IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain,

Chief Justice

Mr. Justice Hasan Foez Siddique

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

CIVIL APPEAL NO.173 OF 2011.

(From the judgment and order dated 15.01.2009 passed by the High Court Division in Arbitration Case No.02 of 2006)

Saudi Arabian Airlines Corporation represented by its Country Manager, Dhaka Office :	Appellant.
=Versus=	
M/S Saudi Bangladesh Services Company, Ltd. Orchard Plaza, 71 Nayapaltan (VIP Road), Dhaka and represented by its Managing Director :	Respondent.

For the Appellant :	Mr. A. J. Mohammad Ali, Senior Advocate (with Mr. Mohammad Salahuddin, Advocate) instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
For the Respondents :	Mr. Ajmalul Hussain, Q.C. (with Mr. Mohammad Saifullah Mamun, Advocate) instructed by Mvi. Md. Wahidullah, Advocate-on-Record.

Dates of hearing : 08.12.2020 and 09.12.2020.

Date of judgment : 15.12.2020.

J U D G M E N T

Hasan Foez Siddique, J: This appeal is directed against the judgment and order dated 15.01.2009 passed by the High Court Division in Arbitration Case No.02 of 2006 setting aside the award dated 08.04.2006 passed by the Arbitral Tribunal in an arbitration proceeding held between Saudi Arabian Airlines Corporation (SAAC) and M/S Saudi Bangladesh Service Company Limited (SBSC).

The relevant facts, for the disposal of this appeal, are that the arbitration was related to the dispute arose between the parties in the matter of the failure of the respondent to deposit the sale proceeds for tickets sold from July till the 2nd of September 2002. It also dealt with the counter claim of the respondent, Saudi Bangladesh Services Company Limited. Under Article V(B) of the agreement, the respondent was under an obligation to transfer each month's sale proceeds of tickets to the appellant by the end of the next calendar month. The sale proceeds of tickets for July 2002 became payable by August 31st 2002. The respondent, violating the terms and conditions of the agreement, defaulted in paying the said sale proceeds and such default caused the appellant to lose substantial amount of money. The instant appellant, then formally requested in writing to the respondent to pay the amount of tk.32,21,50,666.51/-. The respondent denied the claim of the appellant. The respondent, M/s. Saudi Bangladesh Service Company Limited had entered into the General Sales Agency Agreement, in short, (the GSA agreement) on 01.03.1995 for selling tickets initially for the areas of Sylhet and Chittagong. The parties subsequently extended the area of operation to the area of Dhaka by effecting an amended agreement dated 27.01.2001. The said amended agreement contained specific terms, conditions and obligations which created the relationship of principal and agent whereby the respondent as general sales agent would sell the tickets of the principal/claimant against which the agent/respondent would receive commission at the agreed rate as per international practice. It was agreed between the parties that the rate of commission that the agent would be allowed to receive 9% as normal commission and that the overriding commission would be 3% over the normal commission i.e. the agent would

receive 12% commission on the tickets' sale proceeds. It was further agreed between the parties that before the expiry of each month, the respondent would have to remit all the sale proceeds of the transportation of the previous month to the instant appellant. Before remitting the entire sale proceeds, the respondent and its sub agents, if any, will deduct, at source, their commission at the agreed rate. In the instant case, the sale proceeds for July, 2002 fell due towards the end of August 2002, i.e. by the 31st day of August 2002, which was the ultimate day for the remittance of sale proceeds of July, 2002 to the appellant. But, the respondents defaulted in fulfilling its commitment and did not remit the sale proceeds to the appellant. The claimant appellant then issued a letter on 03.09.2002 demanding payment of the outstanding amount accrued during the month of July, 2002 totalling BDT 20,4,096,135.50 (Taka twenty crore four lac ninety six thousand one hundred thirty five and paisa fifty) only tentatively by 5th of September, 2002. Till the 7th of September, 2002 as no payment was effected. It forwarded to the respondent on 07.09.2002, three debit memos containing the total sale proceeds of tickets during the month of July, 2002. The said amount became due in three districts, namely, Dhaka, Sylhet and Chittagong respectively. In response, the respondent wrote a letter dated 16.09.2002 stating, inter-alia, that they have invested a huge amount of money in order to expand the claimant's business which they have estimated to be BDT 750 million. They admitted that there is a dispute with regard to the agreement and again proposed for amicable settlement by mutual discussion. It is to be noted that nowhere in the letter the respondent denied the claim of the claimant. They also did not deny the appellant's claim of the outstanding sale proceeds for the months of July

and August, 2002 at the meeting held in the chambers of the appellant in the presence of both parties' lawyers on 21.09.2002. Instead, in the meeting and thereafter, the respondent proposed various modes for settling the outstanding amount for the months of July and August, 2002, especially by instalments. Even at that stage, the respondent did not claim his alleged 750 million taka. On 26.09.2002, the claimant again demanded payment of the entire outstanding amount i.e. the total sale proceeds for the whole months of July, August, 2002 and two days of the month of September, 2002. The respondent failed to pay the sale proceeds amounting to tk.20,4,096,135.50 only for the month of July, 2002 and tk.20,71,2091.40 only for the month of August 2002 and tk.1,43,73,795.92 only for two days for the month of September,2002. The total sum thus due from the respondent stood at BDT 41,91,82,022.61 (Taka forty one crore ninety one lacs eighty two thousand twenty two and paisa sixty one) only. The claimant, after adjusting the performance guarantee furnished by the respondent to the amount of USD 1.50 million and the sale proceeds received from two sub-agents (which step the claimant had to undertake to mitigate further loss as per section 73 of the Contract Act), terminated the GSA Agreement on the ground of default under Article XI of the agreement by claiming the balance outstanding sum of Tk.32,27,50,566.51 (Taka thirty two crore twenty seven lacs fifty thousand five hundred sixty six a.nd paisa fifty one).

The appellant having failed to settle the matter amicably in respect of its lawful claim referred the matter to the arbitration by invoking arbitration clause as provided in the GSA Agreement. The Arbitral tribunal was initially constituted with late Justice B.B. Roy Chowdhury, Mr. Justice Sultan Hossain Khan and Mr. M. Amir-Ul Islam, Barrister-at-Law. With

the death of Mr. Justice B.B. Roy Chowdhury and the appointment of Mr. Justice Sultan Hossain Khan as the Chairman, Anti Corruption Commission, the tribunal was re-constituted with Mr. Justice M. H. Rahman (Chairman), Dr. M. Zahir and M. Amir-Ul Islam. The arbitral tribunal after being reconstituted decided to hear the matter afresh as two of its members, being subsequently appointed, were not aware of the contents of the earlier proceedings and felt that the entire matter be heard afresh to do justice.

The Arbitral tribunal framed as many as 18 issues to decide the claim and the counter claim made by both the parties. The Tribunal, on 08.04.2006, after considering the evidence on record, the relevant exhibits filed by both the parties and upon hearing the submissions of both the parties, awarded in favour of this appellant (claimant), by their majority decision, the claimed amount of BDT 31,27,50,566.00/- and dismissed the counter claim of the respondent. A dissenting opinion was given by Mr. M. Amir-Ul Islam who allowed the claim of the claimant for an amount of Tk.4,88,72,217.43/- and also allowed the counter claim of Tk.57,26,92,897.67/- against the appellant.

The present respondent, challenged the legality and propriety of the award given by the majority of the arbitrators and filed Arbitration Case No.02 of 2006 in the High Court Division under Section 42 read with Section 43 of the Arbitration Act, 2001. The appellant appeared and filed an affidavit-in-opposition denying all the material allegations made in the said petition and sought for dismissal of the case.

Hearing the learned Counsel of both the parties, the High Court Division set aside the award dated 08.06.2006 made by the majority

decision of the Arbitration Tribunal, predominantly on the ground that the final deliberation took place to the total exclusion of the third Arbitrator which is against the spirit and intendment of the Act, as such the award is opposed to public policy.

Against the judgment and order of the High Court Division, the appellant preferred Civil Petition for Leave to Appeal No.1839 of 2009 in this Division which was dismissed by a judgment and order dated 01.03.2010. Then the appellant filed the Civil Review Petition No.83 of 2010. Thus, the Division ultimately allowed the said Civil Review Petition upon setting aside the judgment and order dated 01.03.2010 passed in Civil Petition.

Mr. A.J. Mohammad Ali, learned Senior Counsel appearing for the appellants, submits that the High Court Division has set aside the award on the ground of public policy which is not at all consistent with the facts and circumstances of the instant case. He further submits that the point of public policy has wrongly been used in the instant case. He further submits that the allegations brought by the respondent is not the ground for setting aside arbitral award in view of the provision of section 43 of the Arbitration Act, 2001. He, lastly, submits that the High Court Division committed an error of law in holding that there was total absence of consultation by the Chairman and second arbitrator of the Arbitral Tribunal with the third arbitrator though from the order-sheet of the Arbitral Tribunal it appears that the Chairman and second arbitrator consulted with the third arbitrator at every stage of the Arbitration proceeding, the High

Court Division erred in law in assuming that the Chairman and second arbitrator have not consulted with the third arbitrator, thereby, erroneously submitted the award.

Mr. Ajmalul Hussain, Q.C. learned Senior Counsel appearing for the respondent drawing our attention to the orders dated 16.08.2005, 06.09.2005, 02.04.2006, 04.04.2006, 05.04.2006, 06.04.2006 and 08.04.2006, submits that the orders of the aforesaid dates reflected that the Chairman and second arbitrator had not consulted the third arbitrator before passing award, thereby, they have committed illegality in passing arbitral award, the High Court Division upon proper appreciation of the materials on record rightly set aside the arbitral award. He further submits that the arbitrators failed to act according to the arbitration agreement between the parties and the arbitrators. He further submits that the Arbitral tribunal is duty bound to deal with the dispute submitted to it fairly and impartially. But in the instant case that was not done and, thereby, the High Court Division rightly dismissed the award.

The claim of the appellant was that the respondent failed to deposit the sale proceeds for the month of July, August and up to 2nd September 2002. The majority members of the Arbitral tribunal, upon deducting the commission of the respondent to a sum of tk. 1 crore for those period, awarded tk.31,27,50,566/- in favour of the appellant. On the other hand, the third arbitrator allowed counter claim of the respondent a sum of tk.57,26,92,857.67/- and allowed the appellant's claim of tk.4,88,72,217.43/-.

On perusal of the judgment and order of the High Court Division, it appears that it did not state anything regarding the merit of the award made

by the majority members of the Arbitral tribunal. The High Court Division dismissed the Arbitral award of the majority on the simple ground that the third arbitrator has not been consulted on 08.04.2006, that is, on the date of making award and sign. It appears that on 08.04.2006, the third arbitrator observed that he had not read the opinion and he would give reasoning later on. Thereafter, he submitted his descending decision allowing the counter claim as stated above.

As per provision of Section 43 of the Arbitration Act an award may be set aside for the following reasons:

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.

Arbitration has been widely recognized as an efficient and effective mode of dispute settlement by the international community. 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. Mr. Ajmalul Hossain relied on the case Ssanyoung Engineering & Construction Co. Ltd. Vs. National High Ways Authority (C.A. No.4779 of 2019). In the cited case, R.F. Nariman, J. stated that, "however, when it comes to the public policy of India argument based upon most basic notions of justice, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice."

Arbitration laws in countries like UK, USA and France provide limited scope of judicial intervention and also, the grounds to challenge arbitral award are restricted. The instant arbitration proceeding was started in 2003. Except inadequacy of consultation with the third Arbitrator by the majority members, the respondent had no objection in respect of procedure followed by the Arbitrators. On perusal of the order-sheet of the Arbitration proceeding it appears that on 17.01.2006 the respondent submitted amended defence and counter claim and the learned Advocate for the respondent cross examined P.W.1. The matter was fixed on 18.01.2006 at 9.30 am. Order dated 18.01.2006 shows that claimant appellant submitted some documents which were kept with the record. The respondent did not raise any objection. The respondent's learned Advocate cross-examined P.Ws.1 and 2. The tribunal adjourned the matter till 9.30 A.M. on 19.01.2006. On 19.01.2006, the learned Advocate for the respondent cross-examined P.Ws.2,3 and 4. Thereafter, the matter was adjourned till 6.30 P.M. on 22.01.2006. On 22.01.2006, the Advocate for the respondent

cross-examined P.W.5. The matter was again adjourned till 6.30 P.M. on 26.01.2006. Thereafter, following orders were recorded:

26.01.2006: Three witnesses have been examined and cross-examined today. By agreement of the parties the rest of the claimant's witnesses need not be produced and their statements will be recorded in the light of the cross-examination on previous statements. Claimant will produce only another witness and his statement will be given to the respondent lawyer's in advance.

To 31.01.2006 at 6.30 A.M. for further hearing.

Signature/Illegible	Signature/Illegible	Signature/Illegible
Mr. Justice M.H.Rahman (Chairman)	Barrister Amir-ul Islam (Arbitrator)	Dr. M. Zahir (Arbitrator)

31.01.2006: The examination and cross-examination of the claimant's witnesses is closed.

To 01.02.06 at 6.30 P.M. for further hearing.

Signature/Illegible	Signature/Illegible	Signature/Illegible
Mr. Justice M.H.Rahman (Chairman)	Barrister Amir-ul Islam (Arbitrator)	Dr. M. Zahir (Arbitrator)

01.02.2006: The respondent examined 3 witnesses (D.W. Nos.3, 4 and 5). The learned lawyer of the claimant has started cross-examination of D.Ws and prayed for adjournment.

To 06.02.06 at 6.30 P.M. for further hearing.

Signature/Illegible	Signature/Illegible	Signature/Illegible
Mr. Justice M.H.Rahman (Chairman)	Barrister Amir-ul Islam (Arbitrator)	Dr. M. Zahir (Arbitrator)

26.02.2006: Parties are present with their learned Advocates. D.W.6,7,8,9 are examined by the Respondents lawyers. 27.02.2006 is fixed for further hearing.

Signature/Illegible

27.02.2006: Respondent has submitted witness statement's of D.W.10, D.W.10 was examination-in-chief by the respondents. Respondents have filed some documents which are marked as Ext.X 17 to X-22 and Ext.R1 to R 3 series. 06.03.2006 fixed for further hearing.

Signature/Illegible

06.03.2006: Claimant has filed same receipts which were earlier marked as Ext.D series. D.W.10 was examined and cross-examined by the Claimant. D.W.1 was recalled by the Respondent's lawyer, Mr. Azmalul Hossain. D.W.10 has submitted a supplementary witness statement.

Fixed 07.03.2006 for further hearing.

Signature/Illegible

07.03.2006: Parties are present. Mrs. Sigma Huda has concluded her cross-examination of all the D.Ws. Both the parties will conclude their argument on 02.04.2006 and they will also file their written argument by 21.03.2006. The case is closed. All expenditure will be paid before 02.04.2006.

Signature/Illegible

02.04.2006: Claimant has submitted their written argument. The claimant's lawyers are not present. Respondent's Lawyer Mr. Azmalul Hossain has submitted his argument and also filed his written argument. Both the parties concluded their argument. 07.04.2006 is fixed for signing the Award. Parties are directed to pay the Court fees and filing cost for execution of the Award in Court.

Signature/Illegible

05.04.2006: Parties are present respondent has filed an application for further submission. The Tribunal having allowed the prayer, the learned Counsel, Mr. Azmalul Hossain QC, has made his submission and it is concluded. The Award will be made and signed on 08.04.2006 at 10.30 at the same venue.

Signature/Illegible

08.04.2006: Parties are present. The Award is made and signed today. Let the copies of the Award is given to the parties. Since I did not have the opportunity to read the opinion and only seen the award at 10.20 a.m. this morning. I will give my reasoning (illegible) opinion later.

On 6th April, 2006 Co-Arbitrator wrote letter addressing the Chairman of the Arbitral Tribunal as well as Co-Arbitrator. Contents of the said letter were as follows:

April 6, 2006

Dear Hon'ble Chairman
Mr. Justice Habibur Rahman and
Co-Arbitrator, Dr. M. Zahir

Ref: Saudia Arabian Airlines Corporation
-Versus-
Saudia Bangladesh Services Company Ltd.

I refer to our discussions yesterday after the close of the hearing. I thought this was not adequate to discuss the proposed award, not allowing any opportunity to discuss the issues and the underlying legal principles involved both on question of fact and law. While we accepted the obligation to hear and determine the dispute between the parties it will not be proper to rush for an award without discussing each of the issues. You proposed Saturday, 08.04.2006 I hope you will not close your mind and take a view before we have had opportunity to share our thoughts and reasoning. I invite you to arrange a mutually convenient time when we can discuss the issues between the parties and deliberate our reasoning for resolution of those issues. You suggested Saturday but before signing the award there has to be enough time, opportunity and willingness to share the reasoning before taking a view and finalizing the Award.

Since this matter is of the greatest importance to the parties, I feel that it is incumbent upon us to properly and judicially approach the issues with a view to revolving them and the material and legal principles have to be considered before the Award is finalized.

Kindly inform me of a convenient date and time for proper deliberations with adequate opportunity to deal with each of the issues before the award is made. If there is such an opportunity prior to finalizing the Award, then, I shall certainly make myself available to deliberate upon these issues and consider the proper Award to be made in this case.

Yours sincerely.
S/d-
M.Amir-Ul Islam
Co-Arbitrator

The matter was heard for days. The parties have given their written submissions exclusively. I shall be at the Bilia at 10.10 A.M. on next Saturday.

Sd/-Mr. Justice Habibur Rahman

06.30

April 6, 2006

Dear Hon'ble Chairman
Mr. Justice Habibur Rahman and
Co-Arbitrator, Dr. M. Zahir

Ref: Saudia Arabian Airlines Corporation
-Versus-
Saudia Bangladesh Services Company Ltd.

I refer to our discussions yesterday after the close of the hearing. I thought this was not adequate to discuss the proposed award, not allowing any opportunity to discuss the issues and the underlying legal principles involved both on question of fact and law. While we accepted the obligation to hear and determine the dispute between the parties it will not be proper to rush for an award without discussing each of the issues. You proposed Saturday, 08.04.2006 I hope you will not close your mind and take a view before we have had opportunity to share our thoughts and reasoning. I invite you to arrange a mutually convenient time when we can discuss the issues between the parties and deliberate our reasoning for resolution of those issues. You suggested Saturday but before signing the award there has to be enough time, opportunity and willingness to share the reasoning before taking a view and finalizing the Award.

Since this matter is of the greatest importance to the parties, I feel that it is incumbent upon us to properly and judicially approach the issues with a view to revolving them and the material and legal principles have to be considered before the Award is finalized.

Kindly inform me of a convenient date and time for proper deliberations with adequate opportunity to deal with each of the issues before the award is made. If there is such an opportunity prior to finalizing the Award, then, I shall certainly make myself available to deliberate upon these issues and consider the proper Award to be made in this case.

Yours sincerely.
S/d-
M.Amir-Ul Islam
Co-Arbitrator

We have already exchanged opinion. Pl. contact Chairman. Friday 7th April 06 we can meet alternatively you can give your opinion later, but whatever Mr. Chairman says is ok with me.
Sd/ Dr. M. Zahir
6th April 2006

Copy of the same letter was submitted to the Chairman and member of the Arbitral tribunal who made their respective endorsements quoted above.

From the above quoted letters dated 6th April, 2006 third Arbitrator admitted that on 05.04.2006, the Arbitrators discussed on the matter but, according to him, such discussions were not adequate to submit the award. So, it is difficult to say that the arbitrators did not at all discuss over the "issues and submissions of the arbitration" together. He sought a convenient date and time for proper deliberations with adequate opportunity to deal with each of the issues before the award is made. Thereafter, on 08.04.2006 award was made and signed. Two of three Arbitrators put their signatures and third Arbitrator opined that he would give reasoning later on since he did not have the opportunity to read the opinion. Later on, third Arbitration gave his dissenting opinion. It appears that the respondent got ample opportunity at every stage of the proceedings to place its case before the Arbitrators and there was no breach of procedure. The respondent had no objection regarding the procedure followed. Its only allegation was that before making and signing the award the discussions made amongst the Arbitrators were not adequate.

Now only question is, in view of the circumstances stated above the arbitral award was liable to be set aside or not.

Mr. Hossain submits that the arbitral award given by majority members is in conflict with the public policy of Bangladesh. Public policy of a country is one such grounds upon which challenge to the validity of arbitral award and its enforcement, can be made. Therefore, interpretation and conceptualization of the term 'public policy' is vital to understand the extent and scope of its applicability as a ground to challenge arbitral award. The words "public policy" used in section 43(b) (iii) connotes some matters, which concern public good and the public interest. "Public policy" is to be understood in the context of each and every case. The term "Public policy" is not defined in the Arbitration Act and it is difficult to derive a straight jacket formula to define and determine the scope of public policy. Black's Law Dictionary defined Public policy as community common sense and common conscience extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like; it is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation. It is a dwindling concept and given its flexibility and adaptability, can be interpreted to stall the enforcement process. Public policy can be generally defined as a system of laws, regulatory measures and course of action enacted by the government in response to public. Public policy manifests the common sense and common conscience of the citizens as a whole that extends throughout the state. It is a decision to either act or not act in order to resolve a problem. It can be stated that the concept of public policy connotes some matter which

concerns public good and the public interest. What is for public good or in public interest or that would be injurious or harmful to the public good or public interest has varied from time to time. In the current era of globalization, liberalization, and growing international trade, the term ‘public’ covers an expanding range of issues. An award would be contrary to public policy if it were ‘patent illegal’. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void. Here, in this case the respondent did not raise any objection against the other steps taken in the continuation of proceeding. The High Court Division did not make any comment regarding award awarded by the majority numbers. The third Arbitrator also did not raise any objection as to process adopted. He admitted that they exchanged their views but his simple allegation is that the views exchanged, according to him, was not sufficient, he needed more consultation which was not held. Thereafter, he gave separate verdict. In view of such facts, it is difficult to hold that such decisions were given against public policy or the same was unfair which shocks judicial conscience of the Court. The juristic principle of a judicial approach demands that a decision be fair, reasonable and objective. We do not find any violation of fundamental juristic principles or fundamental policy of Bangladeshi laws. It must clearly be understood that when a court is applying the public policy test to an arbitration award, it does not act as a court of appeal for reassessing or reappreciating the evidence and consequently errors of fact cannot be corrected. No less important in the

principle now recognized as a salutary juristic fundamental in the administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury [Associated Provincial Picture Houses Ltd. V. Wednesbury Corpn., (1948) IKB 223] principles of reasonableness. In Kuldeep Singh V. Commissioner of Police [(1992)2 SCC 10 it was held by the Supreme Court of India that: “A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, however compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.” We do not find any perversity or irrationality in the instant award. Even the respondent did not bring any such allegation and the High Court Division did not find so. It was not the case of the respondent that the findings recorded by the majority arbitration are based on surmises and conjectures and not on any legally permissible materials/evidence.

In the case of Swan Gold Mening Limited V. Hindustan Copper Ltd. [(2005) 5SCC 739 Supreme Court of India has held, “The Arbitrator’s decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the face of it erroneous or patently illegal or in contravention of the provisions of the

Act.” It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. In M/S Navadaya Mass Entertainment V. M/S J.M. Combines(2015) 5SCC 698 it was observed that where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Even if two views are possible, in view taken by the Arbitrator would prevail.” The Supreme Court of India in Patel Engineering Ltd. V. North Eastern Power Cor. Ltd (2020 SCC online SC 466) has once again exposited the ‘patent illegality’ reaffirming the test of patent illegality as set out in Associate Builders V. Delhi Development Authority (2015)3SCC 49 which was reiterated in Ssangyong Engineering (supra). An arbitral tribunal must decide in accordance with the terms of contract, but if an Arbitrator construes a term of the contract in such a way that it could be said to be something that no fair minded or reasonal person could do, the same will render the award “patent illegal”. Here in the dispute the third Arbitrator in his letter dated 06.04.2006 stated that, “I refer to our discussions yesterday after the close of the hearing, I thought this was not adequate to discuss the proposed award, ----------.” which clearly shows that there was discussion but according to him same was not adequate and thus, he gave dissenting award which can not be termed that the award of the majority Arbitrators was “patently illegal” or the award of majority suffer from the vices of irrationality and perversity. A Court can set aside an award only on the grounds provided in Arbitration Act. Arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the

root of the matter, without there being a possibility of alternative interpretation, which may sustain the arbitral award. (Dyna Technologies Pvt. Ltd V. Coromption Graves Ltd. 2019 SCC online SC 1656)"

From the judgment of the High Court Division, it appears that there is no finding of the High Court Division that the requirements of setting aside the award as stipulated in section 43 Arbitration Act have been established by the respondent in the instant case. Mr. Hossain mainly made his submission that the award, in question, was in conflict with the public policy. We do not find anything that the award was managed through deception or dishonestly or the same was in contravention to fundamental policy of Bangladesh or in disagreement with ethics or integrity.

We have gone through the arbitral award, order sheet of the arbitration proceeding and the judgment of the High Court Division. We do not find any element as provided in section 43 of the Arbitration Act, 2001 for setting aside the arbitral award in the pleadings and other materials produced by the respondent. We also did not find any allegation and proof of fraud or corruption or the arbitration award has been made in contravention of law or the arbitrator have failed to give reasons in the arbitration award.

In such view of the matter, the High Court Division has committed error of law in setting aside the arbitral award of the majority arbitrators. Accordingly, we find substances in this appeal.

Thus, the appeal is allowed. The judgment and order of the High Court Division passed in Arbitration Miscellaneous Case No.02 of 2016 is hereby set aside.

C. J.

J.

J.

J.

The 15th December, 2020.
M.N.S./words-5693 /