IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.456/2012

Plaintiff : Arabtec Pakistan (Private) Limited,
Through Mr. Zahid F. Ibrahim, advocate.

Defendant : EnshaaNLC Developments (Private) Limited,
Through Mr. Adnan Iqbal Choudhri, advocate.

Date of hearing : 9th March, 2016.

Date of order : 27th April, 2016.

JUDGMENT

SALAHUDDIN PANHWAR, J: It is evident that; the parties themselves, being unable to resolve the disputes amicably, filed an application U/s 20 of the Arbitration Act, 1940 in Suit No.1354 of 2009 Re-Arabetec Pakistan (Pvt.) Ltd. v. EnshaaNLC, which, by consent order dated 20th September, 2010, was entrusted to Sole Arbitrator Mr. Salman Talibuddin Advocate to hear and determine the Parties'disputes. As a result, Award dated 30.04.2012 passed by the Sole Arbitrator is filed to declare the same as Rule of the Court.

2. Against this *award,* the defendant filed CMA No.7311/2012 *i.e*an application U/s 16 and 30 of the Arbitration Act, R/w Rule 284 of Sindh Chief Court Rules (O.S).

3. Concisely, such award was passed in background that, on 18.04.2007 parties viz. Arabtec Pakistan (Private) Limited and EnshaaNLC Developments (Private) Limited, executed a letter of agreement for

construction of Karachi Financial Towers (KFT project) which letter of agreement (LOA) was superseded by letter of agreement dated 17.12.2007, which is relevant for the purpose of instant proceedings; that per clause 13 of the LOA parties agreed to sign an Enabling Contract Agreement however parties executed Enabling Works Agreement dated 17.01.2008 referring it to be Enabling Contract Agreement (ECA). Relevant provisions for the purpose of instant proceedings are clauses 1, 3, 5, 7, 13, 15, 16, 17, 21 and 24 of the LOA; and Form of Agreement dated 17.01.2008 identifying certain documents, clauses 5.1, 6.4, 60.2 and 67.3 of Particular Conditions of Contract.

4. At this juncture, it would be conducive to refer the consent issues for determination that:-

In Arabtec's claims against EnshaaNLC:

a. Are any payments due from EnshaaNLC to Arabtec under the LOA and ECA? if so, in what amount?

b. Was EnshaaNLC's call on the performance guarantee and the Advance Payment Guarantee wrongful? If so, did Arabtec suffer any loss or damage as a result? If so, in what amount?

c. Did EnshaaNLC wrongfully compel Arabtec to extend the validity of the Performance Guarantee? If so, did Arabtec suffer nay loss or damage as a result? If so, in what amount?

d. Was EnshaaNLC obligated to award the main contract for the KFT Project to Arabtec?

e. What were the circumstances that led to the Main Contract for the KFT Project not being awarded to Arabtec? Did Arabtec suffer any damage or loss as a result? If so, in what amount?

f. Did Arabtec suffer any damage or loss to its reputation and standing in constructions and financial circles due to EnshaaNLC's call on the Performance Guarantee and Advance Payment Guarantee? If so, in what amount?

g. Is Arabtec entitled to an award of interest on the amounts, if any, awarded in its favour? If so, at what rate and for what period?

h. Is Arabtec entitled to the cost of these arbitration proceedings? If so, in what amount?

In EnshaaNLC's Claims against Arabtec:

a. Is EnshaaNLC entitled to claim additional cost from Arabtec on account of change of design of main piles from 760mm to 1200mm? If so, in what amount?

b. Is EnshaaNLC entitled to claim additional cost from Arabtec on account of change in design of Index Load Test? If so, in what amount?

c. Is EnshaaNLC entitled to reimbursement from Arabtec on account of over-payment to Arabtec? If so, in what amount?

d. Is EnshaaNLC entitled to claim from Arabtec on account of price escalation on steel? If so, in what amount?

e. Is EnshaaNLC entitled to claim from Arabtec on account of price escalation on cement? If so, in what amount?

f. Is EnshaaNLC entitled to claim from Arabtec on account of price escalation on anchors? If so, in what amount?

g. Is EnshaaNLC entitled to claim from Arabtec on account of execution of main piles from existing level? If so, in what amount?

h. Is EnshaaNLC entitled to claim from Arabtec on account of cost of value engineering? If so, in what amount?

i. Is EnshaaNLC entitled to claim from Arabtec on account of the cost of redesign (Kann Finch)? If so, in what amount?

j. Is EnshaaNLC entitled to claim from Arabtec on account of the cost of redesign (Robert Bird)? If so, in what amount?

k. Is EnshaaNLC entitled to claim from Arabtec on account of payment for dewatering equipment and facilities? If so, in what amount?

l. Is EnshaaNLC entitled to claim from Arabtec on account of additional operational cost of dewatering system? If so, in what amount?

m. Is EnshaaNLC entitled to claim liquidated damages in respect of the enabling works from Arabtec? If so, in what amount?

n. Is EnshaaNLC entitled to claim liquidated damages in respect of the enabling works from Arabtec, is it, in the alternative, entitled to claim administrative cost and overheads from Arabtec? If so, in what amount?

o. Is EnshaaNLC entitled to claim liquidated damages in respect of the enabling works from Arabtec, is it, in the alternative, entitled to claim rent for adjacent land from Arabtec? If so, for what period and in what amount?

p. If EnshaaNLC is not entitled to claim liquidated damages in respect of the enabling works from Arabtec, is it, in the alternative, entitled to claim mark-up on bank financing from Arabtec? If so, at what rate, for what period and in what amount?

q. If EnshaaNLC is not entitled to claim liquidated damages in respect of the enabling works from Arabtec, is it, in the alternative, entitled to claim additional payments made to the Engineer (CPG) from Arabtec? If so, in what amount?

r. If EnshaaNLC is not entitled to claim liquidated damages in respect of the enabling works from Arabtec, is it, in the alternative, entitled to claim Additional payments to the Project Manager (Projacs) from Arabtec? If so, in what amount?

s. Is EnshaaNLC entitled to an award of interest on the amounts, if any, awarded in its favour? If so, at what rate and for what period?

t. Is EnshaaNLC entitled to the cost of these arbitration proceedings? Is so, in what amount?

The evidence before the Arbitrator, *comprised* of the documents annexed by the parties towards their respective statement of *claims* and with respective replies against each other's *claim.* In addition thereto, plaintiff examined its Chief Executive Officer while the defendant examined its Chief Executive Officer and Chief Technical Officer; some additional *documents* were also taken on record during such proceedings.

5. After determination of the disputes of the parties, the learned Arbitrator passed the Award directing the parties as under:-

"*Having found:*

a. In the affirmative in favour of *Arabtec* on the issues noted in paragraph 50(a) and (b);

b. Only partially in favour of *Arabtec* on the issues noted in paragraph 50(d);

c. In the negative against Arabtec on the issues noted in paragraph 50(c) and (e) to (g); and

d. In the negative against EnshaaNLC on the issues noted in paragraph 51(a) to (t);

I (the arbitrator) award and direct as follows:-

e. On the issue noted in paragraph 50(a), Arabtec's Claim Succeeds to the extent of UDS 17,770,440, which shall be paid in Pakistan Rupees at the rate of exchange prevailing on the date of payment, after deducting the sum of Pakistan Rupees 472,792,094 which is the balance advance payment made to Arabtec;

f. On the issue noted in paragraph 50(b), Arabtec's claim succeeds to the extent of AED 374,901.07, which shall be paid in Pakistan Rupees at the rate of exchange prevailing on the date of payment,

g. EnshaaNLC shall pay Arabtec the sums of USD 17,770,440 in Pakistan Rupees at the rate of exchange prevailing on the date of payment, after deducting the sum of Pakistan Rupees 472,792,094 together with the sum of AED 374,901.07 in Pakistan Rupees at the rate of exchange prevailing on the date of payment."

6. Learned counsel for defendant contends that issue pertains to a multy-storey building, plaintiff is a contractor, agreement between the parties was signed, relevant clauses of such agreement are clause No.7, 8, 13, 14, 15 and 21; cost and time of project was very essential; subsequently second agreement was signed; as per agreement plaintiff and defendants were required to sit together and reconcile the work progress on actual site; although a fixed sum was decided but that was subject to progress on actual site. Basic term of agreement was 36 months but through ECA, 8 months

were agreed by the parties; further ECA was not having effect on basics; on 15.10.2008 work was stopped; termination letter was issued by the contractor; defendant also issued notice; clauses 17 and 21 of agreement are required to be read together; pages 21, 28 and 33 of the award shows dispute on preliminaries; learned counsel has given much emphasis on paragraph No.43, 58, 59 and 72 of the award, same are that:-

> Paragraph No.43, 58, 59 and 72 of the Award:
>
> "43. EnshaaNLC's claim for liquidated damages is liable to be rejected. There was no material delay in the execution of Works under the ECA and the total delay caused in the execution of works under the ECA was of 6 days as of 16 October 2008. Even otherwise, the stipulated time for completion under the ECA became irrelevant when EnshaaNLC suspended works as of 15 October 2008. Had the Works been continued, the so called delay would have easily been recovered through catch up measures."
>
> "58. During the course of the evidence and oral submissions on this issue by learned counsel for the parties, the entire controversy boiled down to a determination of whether or not the amount payable to Arabtec towards preliminaries was a filed monthly amount or whether it was subject to reconciliation on the basis of Arabtec's progress of works."
>
> "59. The amounts payable to Arabtec towards preliminaries and on account of other heads, including provisional sum items, are identified in the payment schedule attaché to the LOA. This payment schedule is for a period of 36 months, which the parties expected was the length of time required to complete the whole KFT project."

After referring to the above letters, learned counsel for defendant submitted that:

a. The reference to 'actual executed work' could not conceivably be a reference to preliminaries;

b. The priced BOQ for the ECA is for preliminaries, site works and piling works;

c. The parties had agreed a lump sum amount to be paid on account of preliminaries;

d. The works constituting preliminaries are identified in the first nine pages of the priced BOQ for the ECA and it is no one's case that these works were not carried out by Arabtec; and

e. Preliminaries are not capable of measurement and, to the extent that 'actual executed works' were behind the clause 14 programme attached to the LOA, they were the subject of the LOA Clause 17 quarterly reconciliations as evidenced by Projacs' letter dated 20 May 2008."

He continued that clauses 17 and 21 of the agreement were misunderstood by the Arbitrator; reliance on clause 17 is apparently illegal approach of the Arbitrator; in fact fixed sum was for whole project. He referred para-214 at page 83 of the Award, that is finding on issue No.E; he also referred sections 56, 65 and 73 of the Contract Act; also referred section 30 of the Arbitration Act. Learned counsel for defendant further contended that no evidence was recorded by the Arbitrator and he relied upon 1972 SCMR 19, PLD 1977 Supreme Court 237 @ 267-L, 1970 SCMR 1 (Head notes A, C and F). PLD 1966 Karachi 412, PLD 1978 Karachi 585, PLD 1974 Karachi 155, PLD 1996 SC 108.

7. Conversely, learned counsel for plaintiff has contended that with regard to fixed amount learned Arbitrator splendidly replied at pages 28 to 61 of the Award; page 37 and 38 relate to the preliminaries; consultation of defendant was there; he referred page 23 of the bundle filed by learned counsel for defendant; payment was verified with preliminaries; he also referred page 18 of bundle filed by defendant; 90% amount is of

preliminaries, remaining is with regard to bank guarantees, charges, advance payment guarantee and defendant's call advance bank guarantee; para 171 of the Award is relied upon; at page 151 to 157 and 158 learned Arbitrator has replied with regard to bank guarantee; amount in dollars were payable in rupees that was practice; he relied upon PLD 2003 SC 301 (Pakistan Steel Mills Corporation vs. M/s. Mustafa Sons (Pvt) Ltd), PLD 2011 SC 506 (Federation of Pakistan vs. M/s. Joint Venture Kocks K.G.), PLD 2006 SC 169 (Mian Corporation vs. M/s. Liver Brothers of Pakistan Ltd).

8. I have heard the respective parties and have also gone through the available record.

9. Before going into the detail, it would be just and *fair* enough to first understand the scope and limitation of the *jurisdiction* (S.14(2) of Arbitration Act) while dealing with an, award so passed by the *Arbitrator* or to entertain *objections* for setting aside the award thereon (Section 30 of the Act).

10. A reference to Section 26-A of the Act, *being material to discussion,* is referred hereunder:-

> '***Award to set out reasons.---(1)*** The arbitrator or umpire shall state in the award the reasons for the award in sufficient detail to enable the Court to consider, any question of law arising out of the award.
>
> (2) Where the award <u>does not state the reasons in sufficient detail</u>, the Court **<u>shall remit the award</u>** to the arbitrators or umpire and fix the time within which the

> arbitrator or umpire shall submit the award together with the reasons in sufficient detail.
>
> Provided that….
>
> (3)…..

From above, it is clear that *even* while dealing with an *award*, submitted under Section 14(2) of the Act, the Court shall require *examining* the *award* but only to extent that it (award) must be based on *detail & sufficient reasons* which *otherwise* is the requirement of any decision. This (*absence of detail & sufficient reasons)*, *however,* shall not result into setting aside of the award but require the arbitrator or umpire to *resubmit* the award within *given time* with reasons for conclusion thereof (*award)*.

11. Now, I would step *further* towards scope of Section 16 and 30 of the Act. The *former* vests jurisdiction of the Courts to remit the *award* but only:

> *a) where the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or*
>
> *b) where the award is so indefinite as to be incapable of execution; or*
>
> *c) where an objection to the legality of the award is apparent upon the face of it;*

It shall come into play only where the purpose of referring the matter to *arbitrator* or *umpire* fails but again remitting is insisted so as to get matter

resolved through *trusted* person and remitting *even* under this provision shall not have the affect of *setting aside* the award or *declaration* thereof as void unless there is a failure on part of *arbitrator* or *umpire* in resubmitting same after considering the *points* towards award and its execution which too within time.

The *later* (Section 30) which, *prima facie,* is the *only* provision whereby the Courts have been vested with jurisdiction to *set-aside* an award but language wherein it (Section 30) is couched *prima facie* makes it clear that such *jurisdiction* has been limited because *legally* arbitration is a course, which the parties themselves, choose for the resolution of their present or future disputes by the **'one'** selected / chosen with *consent* (agreeing to honour decision of such chosen person). Before going into *further* details, a direct reference to Section 30 of the Act is made hereunder:

> "30. **Grounds for setting aside award.**- An award ***shall not be set aside*** except **on one or more of the following grounds, namely**
>
> (a) that an arbitrator or umpire has misconduct himself or the proceedings;
>
> (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
>
> (c) that an award has been improperly procured or is otherwise invalid.

The deliberate *opening* of the Section 30 of the Act with the phrase 'An award ***shall not be set aside'*** is sufficient to indicate that *normally* the law insists that decision *(award)* by a chosen person be not disturbed (*set-aside)* else the

purpose and object of *arbitration* by one (*arbitrator or umpire),* trusted & chosen by both the parties, for settlement of their *grievance/dispute* believing in his *'skills; competence; honesty and impartiality'* shall fail. However, *normally* a consent shall not confer a jurisdiction which, if otherwise, not vested by law itself. This principle is not *strictly* applicable in matter of *arbitration* for reason parties *likely* to bear consequences themselves choose the person (*arbitrator)* thereby vesting jurisdiction in him to decide the *unresolved disputed* hence if there is clear acquiescence and waiver on part of the party aggrieved of the jurisdiction, he shall not be legally justified to raise such question *subsequently* even where an arbitrator had no jurisdiction but parties, *entitled* to raise objection to jurisdiction, from his conduct and attitude waived such right rather shows trust in *arbitrator* by making active participation in proceedings. I am supported in such conclusion with thecase of '*Karachi Dock Labour Board v. Quality Builders Ltd.* (PLD 2016 SC 121) wherein it is held that:-

> '..It is proper to mention here that according to the settled rules of law, parties cannot confer jurisdiction upon a Court or other judicial or quasi-judicial forums through consent which otherwise in law would have no jurisdiction and the same is the position regarding waiver and acquiescence qua the Court e.t.c which lack jurisdiction and such being an inherent defect cannot be cured on the rules of consent, waiver, estoppel, acquiescence etc. Though under the arbitration law the parties , as mentioned above, can choose their own forum for the adjudication of their disputes, but that forum has to be constituted strictly in terms of the arbitration agreement and in any case according to the express mandate of law and not in violation thereof. If the constitution is violative of both, the agreement and the law, and the objecting party has also not submitted to the jurisdiction of the arbitrator, the rule of waiver and acquiescence cannot be pressed into service against

> such party. However, in this context there then needs to be express consent to submit to the jurisdiction of an arbitrator having no jurisdiction otherwise, and if there is clear acquiescence and waiver on part of the party aggrieved of the jurisdiction, such as participation in proceedings without any protest or objection , which conduct shall mean that they have accepted by choice the jurisdiction of the arbitrator.

Since, I am equally conscious of the legal position that a *consent* shall not give a license to act *arbitrarily* or *illegally* therefore, Courts have been vested with jurisdiction to set-aside an *award* if examination thereof *prima facie* brings the Courts to conclusion that:

> a) an arbitrator or umpire has *misconduct himself* or the *proceedings*;
>
> (b) an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
>
> (c) an award has been *improperly procured* or is otherwise *invalid*.

The *terms* 'misconduct *himself* or proceedings'; 'procured *improperly*' and *'or* otherwise *invalid'* are *prima facie* indicative to the fact that the Courts are competent to examine manner *'in which arbitrator* conducted proceedings' and *'validity'* thereof.

12. I would part with discussion for a moment only to say that since, the ***Act,*** nowhere, provides any specific procedure or mechanism for conduct of the proceedings by the Arbitrator or Umpire yet the Arbitrator or Umpire shall be required to follow such a procedure whereby the parties have fair chances of proving or disproving their respective stands regarding

the involved controversies / issues else proceedings may hit by ground (a) of Section 30 of the ***Act.*** A reference may well be made to the case of *Managing Director, Karachi Fish Harbour Authority v. Hussain (Pvt.) Ltd.* 2014 CLC 1519 wherein it is held that:

> "11. Insofar as the other objections raised by the learned counsel for the appellant are concerned, we are of the view that the learned Sole Arbitrator has the authority to regulate its own procedure, and is not bound to follow any specific procedure, subject to the condition that the parties are allowed to lead their evidence as well as opportunity to contest the claims."

While resuming again, and to conclude discussion regarding scope of the jurisdiction of the Courts, I would *first* add that terms **'misconduct himself or proceedings'** should be given due meaning as deliberately the word **'or'** has been used in between **'himself and proceedings'** which *always* give equal status to both. A *failure* of Arbitratorto perform his essential duty, resulting in substantial miscarriage of justice between the parties which shall include proper reading and appreciation of material brought onto record in shape of *material* or point (s), raised by respective parties. The term **'misconducted proceedings'** would *however* means such a mishandling of arbitration *proceedings* as is likely to cause some substantial miscarriage of justice which shall conclude a *fair* opportunity to respective parties to prove respective *claims*. A reference to the case of *Brooke Bond (Pakistan) Ltd. v. Govt. of Sindh,* PLD 1977 SC, being relevant is made wherein at page 267 the said terms were defined as:-

> **Brooke Bond (Pakistan) Ltd. v. Govt. of Sindh, PLD 1977 SC 237 relevant at p. 267**

> "The term misconduct used in connection with arbitration does no necessarily imply anything in the nature of fraud or moral turpitude. **In the judicial sense the misconduct of an Arbitrator means his failure to perform his essential duty, resulting in substantial miscarriage of justice between the parties.** According to Atkin, J. in Williams v. Willis 83 L J K B 1296, the words "misconducted the proceedings" means such a mishandling of arbitration as is likely to cause some substantial miscarriage of justice. In the American Jurisprudence Vol. 3 on pages 964-5 it is observed that awards which are valid on their faces may be set aside in equity for misconduct on the part of the arbitrators, and the extrinsic evidence is admissible to prove such misconduct Conduct inconsistent with the duties imposed upon those selected as the arbitrators, **either at the hearing**, or **in reaching their conclusions** will frequently constitute misconduct as will impeach an award."

Now, to make an attempt to summarize *criterion*, I would take the guidance from below listed cases wherein honourable Apex Court held as:

> **Federation of Pakistan vs. M/s. Joint Venture Kocks K.G./RIST, PLD 2011 SC 506**
>
> *3. Heard. While considering the objections under sections 30 and 33 of the Arbitration Act, 1940 the court is not supposed to sit as a court of appeal and fish for the latent errors in the arbitration proceedings or the award. The arbitration is a forum of the parties' own choice and is competent to resolve the issues of law and the fact between them, which* opinion/decision should not be lightly interfered by the court while deciding the objection thereto, **until a clear and definite case within the purview of the section noted above is made out, inasmuch as the error of law or fact in relation to the proceedings or the award is floating on the surface,** *which cannot be ignored and if left outstanding* **shall cause grave , injustice or violate any express provision of law or the law** *laid down by the superior courts, or that the arbitrator has misconducted thereof.* Obviously if there is a blatant and grave error of fact such as **misreading and non-reading** or **clear violation of law**, the interference may be justified by the courts. *But for the appraisal and appreciation of the evidence; the courts should not indulge into rowing probe to dig out an error and interfere in the award on the reasoning that a different conclusion of fact could possibly be drawn. (See Premier Insurance Company and others v. Attock Textile Mills Ltd. PLD 2006 Lahore 534).*

Mian Corporation vs. M/s. Lever Brothers of Pakistan Ltd, PLD 2006 SC 169

"7. …… It is well-settled that the arbitrator acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight, unless the misconduct is not only alleged, but also **proved against** him to the satisfaction of the Court. *The arbitration award may however, be discarded,* **if the findings are contrary to law and the material on record.** *Learned counsel has been unable to pinpoint any inherent* **legal infirmity or defector want of jurisdiction on the part of the arbitrator** *who has elaborately dealt with the claim of the petitioner in minute details with reference to the explanation furnished by the respondent-Company. Suffice it to observe that while examining the award,* the **Court does not sit in appeal over the award** and has to satisfy itself that the award does not run counter to the settled **principles of law and the material available on record**. *Indeed, an arbitrator is final judge on the questions of law and facts and it is not open to a party to challenge the decision,* **if it is otherwise valid**. *If an arbitrator has made an award in terms of the submissions made before him, no adverse inference can be drawn against him.* ***An award cannot be lawfully disturbed on the premise that a different view was possible, if the facts were appreciated from a different angle****. In fact Court while examining the correctness and legality of award* **does not act as a court of appeal and cannot undertake reappraisal of evidence recorded by an arbitrator in order to discover the error or infirmity in the award.** *Learned counsel for the respondent has referred to Pakistan Steel Mills Corporation v. Mustafa Sons (Pvt.) Ltd. PLD 2003 SC 301, which fully supports the impugned judgment as well as the view taken by us in this petition."*

Joint Venture KG/Rist v. Federation of Pakistan. PLD 1996 SC 108

We may mention here that the Court while examining the validity of an award does not act as a Court of appeal. Therefore, a Court hearing the objection to the award **cannot undertake reappraisal of evidence recorded by the arbitrator in order to discover the error or infirmity in the award.** The error or infirmity in the award which rendered the award invalid must appear on the face of the award and should be discoverable by reading the award itself. Where reasons recorded by the arbitrator are challenged as perverse, the perversity in the reasoning has to be established with reference to the material considered by the arbitrator in the award.

Karachi Dock Labour Board v. Quality Builders Ltd. PLD 2016 SC 121

'10. Before proceeding further we find it expedient to mention what is arbitration and also about the empowerment of the arbitrator. In this context it is stated that arbitration is a forum which under the law can be chosen by the parties for the resolution of their present or future disputes. The condition for a valid arbitration agreement is that it should be in writing (*see section 2(a) of the Act)* and as it is a contract between the parties it is essential that it must qualify the test of a valid contract in terms of the law of contract. It may also be stated that there are three modes and approaches to arbitration: (i) without the intervention of the Court; (ii) with the intervention of the Court (*see Section 20 of the Act)* and (iii) again with the intervention of the court but were a suit / lis is pending between the parties and they agree for the resolution of their disputes trough the mechanism of arbitration, keeping the suit pending and that the fate thereof (*suit)* be decided on the basis of the decision recorded by the arbitrator. It may be relevant to state that subject to the terms of reference an arbitrator (s) is the judge on both the points of facts and law; and this shall also include the question to determine his own jurisdiction. However where the arbitrator goes **patently and blatantly wrong on facts**, which wrong is **inconceivable and incomprehensible** in relation to the determination of rights of parties in dispute, such as **assumption of non-existing facts or ignoring the facts duly established on the record**, which in legal parlance is also called the **misreading and non reading**; and especially going wrong on the points of law, the court obviously has the power in its appropriate jurisdiction to correct such a wrong; as under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 it is, inalienable right of every person to be treated and dealt with in accordance with law (See cases reported as *Utility Stores Corporation of Pakistan Limited v. Punjab Labour Appellate Tribunal and others (PLD 1987 SC 447); Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255) and Muhammad Sharif Bhatti and others (PLD 2011 SC 905)*

(Emphasis supplied)

Being enlightened from above, can *safely* conclude that while deciding question of validity of an *'award'* the *jurisdiction* of the Courts is not that of *'appellate'* but is of *'Revisional'* in nature whereby:

i) *jurisdictional defect & patent illegality* with reference to application of the ***Act*** and other settled norms of law;

ii) prima facie *mis-reading or non-reading* prima facie *resulted into* injusticewhich cannot be done without examining the material;

iii) *manner in which proceedings of award conducted* so as to see proper *satisfaction of* **'fair-trial'** and *equal treatment towards both the parties;*

can well be examined but it shall not include:

i) *reopening of whole the case for* trial;

ii) *reappraisal of evidence for* different possible opinion;

Having chalked out the *criterion,* now I would proceed further to discuss the merits of the case, *in hand.* At the very outset, I would say that it is not disputed that the ***LOA*** did contain arbitration clause; further it is also not disputed that appointment of arbitrator was within *consent* of respective parties who, *even,* at no material times, raised any objection towards *credibility* of arbitrator and his conduct in dealing with proceeding thereof hence the *award* in question *prima facie* passes the *first test* of ***'having been passed by a competent person*** **(arbitrator)'.**

13. Now, I would take the *plea* of defendant regarding applicability of the Section 16 of the Act over the *award* in question. It is pertinent to say that an award can either be sought to be *remitted* or *set-aside* because both have *different* criterion, object and scope. The *former* results in remitting the award to same arbitrator or umpire while the *later* results in setting aside the

award. Be as it may, the perusal of the record shows that there has been a *dispute;* agreed by parties for its determination through *arbitration;* such course was resorted through the available legal mode of *intervention* of the Court; consent issues were struck for determination and parties led their evidence without any objection to proceedings *till* passing of the *award* hence, *prima facie,* there appears no *misconduct* on part of the *arbitrator* in conducting the proceedings and *even* there is no such allegation from the side of the *objector* (defendant) *even.* Needless to say that the allegation of *misconduct* on part of the arbitrator *himself* or proceeding should not only be worded but should be referred in *details* because the *lust* of this ground shall not be satisfied by insertion of *mere* words.The position, being so, makes me to say that the *award* in hand passes the *third* test *too.*

14. Now, let's examine the *award* regarding *second* test i.e*misreading and non-reading* on facts and law. While examining this aspect, I would first take the grounds, raised with reference to Section 56, 65 and 73 of the Contract Act. The Section 53 of the Act reads as:-

> "56. **Agreement to do impossible act. –** An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful. – A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

It has never been the case of the respective parties that the *agreement* was for *doing an impossible act* because an agreement to construct multistory building

cannot be said to be *impossible* or *unlawful*. A *failure* of a party to complete his/their *obligations* shall not bring the Section 56 of the Contract Act into play and even *second* portion of the Section 56 i.e:

> **Compensation for loss through non-performance of act known to be impossible or unlawful. -** Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

nor section 65 of the Act i.e:

> "65. **Obligation of person who has received advantage under void agreement or contract, that becomes void.** - When an agreement is discovered to be void, or when a contact becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

can be *legally* pressed because both shall come into play only if the agreement was or became *void* subsequently *even*. However, it would be an *entirely* different situation where a work, *for its completion,* was requiring simultaneous *actions* from both *ends (*parties) which *fails* due to *failure* or *breach* by both ends then both the *ends* (parties) shall have to share responsibility/consequences because one cannot seek an *exception* to his own failure.

Regarding Section 72 of the Contract Act a direct reference thereof shall *itself* make it clear that it has got no application in the circumstances of the matter, which is:

> "72. **Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.** - A person to whom money has been paid or anything delivered by *mistake or under coercion*, must repay or return it."

It has never been the claim or case of the defendant that money was paid under *mistake* or under *coercion* but *legality* of contract / agreement between the parties was never a matter of *dispute.*

15. The above discussion, make me of the clear that there is no *illegality* in findings on issue No.E, *insisted* by the defendant. The same is referred hereunder:-

> Finding on issue No.E at Para 214, page 83 of the Award
>
> "214. Having found as above, I decide this issue by holding that neither party can be held singularly responsible as having created the circumstances that led to the Main contract not being awarded to Arabtec. Both were obviously anxious for the KFT project coming to fruition. While each tried its best, circumstances beyond their control, principally the lack of market appetite for the project and lack of alternative sources of finance, appear to have brought their best laid plans to naught."

The learned counsel for the defendant also attempted to say that *real dispute* between parties was on consent *issue* (a) which the arbitrator eared in awarding *preliminaries* for months of October 2008 to May 2009 in same sum as in the months when work was being performed.

The defendant *legally* cannot show his back to the *consent issues* on basis whereof:

i) parties produced their claims and respective documents;

ii) examined witnesses; and

iii) even*produced additional documents.*

hence*first* part of the argument regarding *real dispute* seems to be having no force. As regard the second portion that findings of the arbitrator regarding *preliminary* as same are not in line with LOA and ECA. At this *juncture* a reference to relevant *findings,* being relevant, are made hereunder:-

> '143. Having considered the Parties' pleadings as well as their evidence and oral submissions on the issue under consideration, I find as follows:-
>
> a) While Clause 17 of the LOA did require a change to the schedule of payment attached to it, if the quarterly reconciliations required by Clause 17 revealed a variation against the Clause 14 programmemilestones and value of work of more than +/- 5%, the Parties' clear intention **at all times** was that any such change **would not affect the amounts for Preliminaries shown** in the schedule of payments;
>
> b) Had the case been otherwise, the period BOQ for the ECA (which was for Preliminaries, Site Works and Piling Works and specifically identified the various items of work falling into Preliminaries), **would not have been agreed in its current form providing a lump sum monthly amount payable to Arabtec on account of Preliminaries;** thus making it virtually incapable of any performance related revision;
>
> **d)** Even before entering into the LOA EnshaaNLC had sought and received advice from Projacshad also advised that a detailed breakdown of this amount may be requested from Arbatec for verification. While there is no evidence on the record as to whether EnshaaNLC heeded Projacs' advice and sought the detailed breakdown of the amount for

Preliminaries, **certainly nothing prevented EnshaaNLC from having insisted on this breakdown and having it incorporated in the priced BOQ for the ECA;**

c) On the basis of the quarterly reconciliations required by Clause 17 of the LOA, **a revised cash flow had indeed been prepared and agreed by the Parties;**

d) The revised cash flow had also been used to change the payment schedule attached to the LOA and Arabtec's invoices had been verified by Projacs on the basis of the said revised cash flow;

e) While the revised payment schedule impacted all other items of works, the verified invoices show that the amounts payable towards Preliminaries remained untouched.**This was consistent with the Parties' intention as embodied in Clause 17 of the LOA; and**

f) Arabtec's having accepted the sum of USD 1,300,000 on account of Preliminaries for work done during the period February 2007 to 01 January 2008 and whether or not this was pursuant to an agreement that can still be enforced is immaterial to the issue at hand, not least because of the fact that the Parties subsequently entered into another agreement, the LOA, **which contained altogether different provisions in respect of Preliminaries.**

(Emphasis supplied)

The above *findings* are result of considerable discussion of all oral and documentary evidence / material, including:

'92. A copy of the statement filed by learned counsel for Arabtec was also provided to learned counsel for EnshaaNLC who did not dispute Arabtec's entitlement to any of the sums set out in the statement except those in Sections B and C of the statement on account of preliminaries which aggregate USD 12,941,250.

93. According to learned counsel for EnshaaNLC, the amount payable to Arabtec towards Preliminaries was not a fixed monthly amount that was to be paid to Arabtec irrespective of Arabtec's progress of works, but was an amount that was subject to change on the basis of a detailed

> *reconciliation of the actual works executed by Arabtec compared to the Clause 14 programme attached to the LOA.*

Thus, it is *prima facie* evident that arbitrator considered and appreciated all what was produced or asserted by *respective* sides. The *findings* prima facie show that arbitrator did consider ECA, LOA and even other *corresponding* material in reaching to such a conclusion. Since, the *correspondence* (documents) were / are not claimed to be *separate* activities hence the defendant *legally* cannot seek an *exception* thereto. Thus, in my view findings and conclusion *drawn* is neither falling within meaning of *misreading or non-reading* nor it can *legally* be amounted to term *'misconducted himself'*. In the case of *Pakistan Steel Mills Corporation, Karachi v. M/s Mustafa Sons (Pvt.) Ltd. Karachi* PLD 2003 SC 301, it is held that:

> *'15. … On the contrary, it is evident that normal procedure was followed and not only this but all pleas raised by learned counsel for the petitioner were considered and answered accordingly. Neither there was any violation of any principle of natural justice nor was any conclusion drawn in haste, nor the conclusion so drawn shocks the consciences. ..'*
>
> *'17. Much stress has been laid by learned counsel for the petitioner on submission (c) of section 30 (ibid) saying that the award is otherwise invalid. It is noted that the Arbitration is the final Judge on the law and facts and it is not open to a party to challenge the decision of the Arbitrator, if it is* **otherwise** *valid. If the Arbitrator has given his decision in terms of the submissions nothing adverse could be attributed to him.* Even if there was **wrong interpretation of a clause in a contract,** in such cases, view has been taken that an Arbitrator is not bound to give specific findings on each and every issue nor he is required to state reasons for his conclusion, if the findings are within the parameters of submissions made before him. **It is also no ground to set aside an award on the plea that the different view was possible if the facts would have been appreciated with different angle.**

Though, a mere *wrong* interpretation is not sufficient for setting an *award* , however, since learned counsel for defendant in (CMA 7311/2012) has *specifically* asserted that arbitrator erred in treating the *term* 'cash-flow' as *'entitlement'* at one hand and *'amount earned'* on the other hand. Since, the term is not *defined* in the contract document hence ordinary meaning thereof, *per settled principles of interpretation,* is to be taken which is:

> BLACK'S LAW (Seventh Edition)
>
> **Cash flow.** 1. The movement of cash through a business, as a measure of profitability or liquidity. 2. The cash *generated* from a business or transaction. Cash receipts *minus cash disbursements* for a given period.

The above *definition (s)* is sufficient to show that the arbitrator committed no *illegality* treating the said term as *'entitlement of money'* or *'amount earned'* because *legally* if one is declared / found to be *entitled* for a right or *money* he can well be said to have *'earned* such a right *or money'* .

16. The defendant has also claimed the *findings* on issue (b) to be an *'error of law'.* To properly appreciate, it would be appropriate to have a *direct* reference to findings on this issue which is:

> *'177. Having considered the Parties' pleadings as well as their evidence and oral submissions on the issue under consideration, I find as follows:*
>
> a) Both the Performance and the Advance Payment Guarantees are conditional in that they require that any claim there under should be in writing, stating that Arabtect has failed to fulfill its contractual obligations under the contract;

b) On the fact of it, the claims submitted on 24 September 2009 and 22 June 2010 are in compliance with the above requirement of the Bank Guarantees;

c) However, *as held in Shipyard K. Damen itself, the enquiry and determination of the correctness of the claims cannot end here.***Fraud and special equities arising out of the particular facts of a case are recognized exceptions to the general rule of non-interference in so far as letters of credit and bank guarantees are concerned.** Indeed, conduct that may be lawful **but is otherwise unethical in the circumstances of a case is also recognized as a ground on which commercial contracts can be avoided; 114**

d) The claim on the Performance Guarantee was made on a date (24 September 2009) more than four months after the Contract stood remained and **over three months after EnshaaNLC has taken-over the site**;

e) No notice of any defect in the performance of its obligations was ever served on Arabtec under the Contract;

f) If Arabtec had indeed been in default of its obligations under the Contract, **nothing prevented EnshaaNLC from lodging a claim under the Performance Guarantee immediately after the Contract termination date or the date on which EnshaaNLC assumed the site;**

g) The fact that EnshaaNLC did not lodge any claim under the Performance Guarantee until Arabtec presented the three cheques for payment strongly suggests that the claim was *retaliatory*;

h) The assertion that EnshaaNLC did not have funds to honour the three cheques was itself false since the cheques were indeed presented and were encashed by Arabtec;

i) The only reason that in March 2009 EnshaaNLC agreed to return the Bank Guarantees to Arabtec, was the realization that there had been no breach by Arabtec of its performance obligations under the Contract and that the advance payment amount that

was recoverable from Arabtecd was far in excess of the amount payable to Arabtec and could be deducted from the payment to be made to arabtec;

j) EnshaaNLC breached its March 2009 agreement with Arabtec by not returning the Bank Guarantees to Arabtec;

k) EnshaaNLC was also in breach of its GCC 10.3 obligations to notify Arabtec before making a claim on the Performance Guarantee. There was no GCC 10.3 breach in respect of the claim on the Advance Payment Guarantee since that was made with Arabtec's consent; and

l) The circumstances of this case give rise to ***special equities in favour of Arabtec***, which make EnshaaNLC's claim on the Performance guarantee as well as its effort to recover the balance advance payment through the Advance Payment Guarantee wrongful;

The above findings of the arbitrator *prima facie* are not result of without any discussion or considering all the *available* pleas of the defendant therefore, the same cannot be said to be *illegal* or *perverse* that another view/ conclusion is possible nor evidence and material *can* be examined in the manner as is done in *appellate* jurisdiction, therefore, I am not inclined to agree with the counsel for defendant that findings on this *issue* are **'error of law'**.

17. The above discussion brought me to the *firm* view that the award, *in hand,* also qualifies *second* test as defendant failed to point any assumption of non-existing facts orignoring the facts duly established on the record, which in legal parlance is called the misreading and non-reading, hence no case for *setting aside* the award within meaning of Section 30 of the ***Act*** is made out, *which* is the *bone* for exercise of such *jurisdiction,* as

discussed *above.* Besides, a careful perusal of the *award* itself reflects that learned Arbitrator considered all the arguments and material brought by respective parties on record hence even a possibility of *another* opinion is not sufficient to disturb the award. Accordingly, the award, in hand, is hereby made the Rule of the Court. The office shall draw decree in terms of the Award.

Imran/PA

J U D G E