

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No. 718 of 2009****Khairpur Sugar Mills Limited ----- Plaintiff****Versus****Trading Corporation of Pakistan ----- Defendant****Date of hearing: 01.11.2017****Date of judgment: 10.11.2017****Plaintiff: Through Mr. Emadul Hassan Advocate.****Defendant: Through Mr. S. Ashfaq Ahmed Rizvi Advocate.****J U D G M E N T**

Muhammad Junaid Ghaffar, J. This is a Suit in respect of an Award passed jointly by two Arbitrators, one nominated each by the parties and through this Judgment the objections raised on behalf of the Defendant under Sections 30 and 33 of the Arbitration Act, 1940 against the validity of the Award dated 6.11.2009 are being decided.

2. Very precisely the facts as stated appear to be that a Contract was entered into by the Plaintiff with the Defendant for supply of 5000 metric tons of Sugar for the Season 2007-2008 at a price of Rs. 20,880/- per metric ton excluding Sales Tax as per terms and conditions of tender dated 16.02.2008. It appears that the dispute occurred due to objections by the Defendant on the quality and specifications of the Sugar and the Performance Money which was deposited was forfeited in terms of Clause 13 of the tender documents. The matter was referred for Arbitration and both the parties nominated one Arbitrator each and a joint Award has been

passed in favor of Plaintiff directing refund of the performance money on which objections have been raised.

3. Learned Counsel for Defendant submits that the Award was filed belatedly after 42 days of delay by the Arbitrators and therefore, it cannot be made Rule of the Court; that the same has been passed without recording and or leading any evidence by the parties; that it is not based on any cogent reasons but only on examination of the documents; that it is without any reasons and only the conclusion / decision has been communicated; that no issues were settled; that the Arbitrators have not taken into consideration the objections of Defendant; that the Sugar was not according to the required specifications prescribed by the Pakistan Standard and Quality Certification. In support of his contentions he has relied upon ***Pakistan, Ministry of Commerce, Karachi V. Messrs Rizvi & Co., Karachi (PLD 1979 Karachi 250), Pakistan through Secretary, Ministry of Industries V. Messrs Asian Associated Agencies (PLD 1974 Karachi 155), Pakistan through Secretary, Ministry of Industries, Karachi V. Messrs Rizvi & Co., Karachi (1971 SCMR 566), State of Rajasthan V. M/s. Nav Bharat Construction Co. (AIR 2005 SC 4433).***

4. On the other hand, learned Counsel for Plaintiff has contended that it is a joint Award by two Arbitrators and one Arbitrator which was nominated by the Defendant is their Director Commercial and therefore, the Defendant cannot object to such Award; that proper reasons have been given and documentary material has been appreciated, therefore, no evidence was required as the documents are admitted; that this Court is not a Court of Appeal against the Award, whereas, the objections do not fulfill the requirements of Sections 15, 16 and 30 of the Arbitration Act, and therefore, they are to be dismissed. In support he has relied upon ***A. Qutubuddin Khan V. Chec Millwala Dredging Co. (Pvt.) Limited (2014 CLD 824), Al-Abdullah Constructors (Pvt.) Ltd. V. Pakistan Water and Power***

Development Authority through Chief Engineer (2008 CLC 798), Securities & Exchange Commission of Pakistan through Commissioner V. First Capital Securities Corporation Limited and another (2011 CLD 907).

5. I have heard both the learned Counsel and perused the record. It appears that due to a dispute regarding quality and the specification of the Sugar in question pursuant to Clause 13 of the terms and conditions of the tender, the dispute between the parties was referred for Arbitration and both the parties appointed one Arbitrator. The Claimant / Plaintiff filed its claim and the Defendant filed their response. It would be advantageous to reproduce the relevant portion of the Arbitrators joint Award which reads as under:-

“We have perused the reference as well as the reply filed by the Respondents and counter reply filed by the Claimant with respective documents carefully. After perusing the documents and hearing the parties, we have decided to pass joint award without reasons as follows:-

It is an admitted position that Claimant has deposited the Performance Money of Rs. 5,220,000/-, which is not denied by the Respondents.

We are of the considered opinion that the Respondents action of forfeiting Performance Money is harsh and not fair due to the following reasons:-

- “a) Respondents (TCP) make inordinate delay in getting the samples of sugar tested from the Laboratories and getting final reports.
- b) The Sugar purchased by the Respondents was due to Government’s Policy to facilitate Sugar Cane Growers.
- c) The reason shown by Claimant with documentary evidences that there was an immense pressure from Government for clearing dues of Sugar Cane Growers by the Claimant appears to be proper and reasonable.
- d) The final test report shows that the Sugar offered by the Claimant was as per the specifications.
- e) For the above reasons, the Respondents (TCP) cannot forfeit the Performance Money.

We are therefore hold and award that Respondents be directed to refund the Performance Money to the Claimant, within a fortnight of this Award.

Announced on this 6th January 2009 under respective hands of Arbitrators, above named, at Karachi.”

6. Perusal of the aforesaid portion of the award reflects that the same has been passed merely on perusal of the documents relied upon by the respective parties. Admittedly, no evidence was called for, whereas, the case of the Defendant is that since the Sugar was not up to the required specification(s) therefore, evidence should have been led. The Award does not reflect that any consent was obtained from the parties for not leading the evidence and for passing of the Award on the basis of documents. The Defendant appears to have disputed the test reports relied upon by the Plaintiff and therefore, the learned Arbitrators ought to have allowed the aggrieved party to lead proper evidence after settlement of issues / points for determination. This apparently has not been done. Notwithstanding this, it further appears that there are no reasons assigned by the learned Arbitrators for reaching the conclusion so stated in the Award. In fact there is nothing in the Award except the conclusions drawn by them. Neither there is any discussion about the case of the parties nor the documents being relied upon by them and it is only on the examination of the documents which even have not been referred, the Award has been passed. In such circumstances, the Award does not seem to be an Award which could be made Rule of the Court.

7. Coming to the objection of learned Counsel for Plaintiff that this Court has no jurisdiction to set aside an Award on the ground that a different conclusion can be drawn is concerned, there appears to be no cavil to this proposition and it is settled law that while hearing objections to the Award under Section 30 and 33 of the Arbitration Act, 1940 this Court does not sit as a Court of appeal nor it is required to undertake reappraisal of evidence recorded by the Arbitrator in order to discover the error or

infirmity in the award. However, there is an exception to this rule as well, according to which if the error or infirmity in the award is apparent on the face of the award and is discoverable by reading the award itself then it renders the award invalid. (Reference may be made to the case reported as ***Joint Venture KG/Rist v. Federation of Pakistan-PLD 1996 SC 108***, ***Ghee Corporation of Pakistan (Pvt.) Limited v. Broken Hill Proprietary Company Limited-PLD 1999 Karachi 112***) and ***J.F.C. Gollaher v. Samad Khan (1993 MLD 726)***). Here in this matter as discussed there is nothing in the award except the conclusion and finding, which is not supported by any material whatsoever. There is no evidence recorded, therefore, even no appreciation is required which may be a point to consider the objection of the Plaintiffs' Counsel. In my view there is in fact no award in field.

8. Reference may also be made to the case of ***Allah Din & Company v. Trading Corporation of Pakistan (2006 SCMR 614)*** wherein the Hon'ble Supreme Court has been pleased to observe as under;

....The learned Division Bench in the impugned judgment had aptly rejected the above claim on the ground that compensation for loss of goodwill or reputation is generally not awarded, particularly in the absence of tangible evidence showing additional loss and further that since the purchaser was already awarded Rs. 1 million by the arbitrator as compensation for the anticipated loss of profit further compensation on account of loss of goodwill and reputation was not justified. We find ourselves in agreement with the reasoning of the learned Division Bench. The learned counsel appearing for the purchaser was unable to show any discussion by the arbitrator in the award regarding the loss suffered by the purchaser on account of reputation or goodwill. Apart from a bare claim of the purchaser, the learned counsel could not even refer to any evidence produced by the purchaser before the arbitrator on this issue. The finding of the arbitrator on the issue reproduced above indicates the absence of such evidence as he had awarded compensation on the item simply on the ground that the purchaser was not questioned on behalf of the Food Department on the issue. Such failure by the department does not go to prove the loss caused to the purchaser. It was the burden to the purchaser to have produced independent evidence of the damage caused to his reputation and goodwill on account of non-performance of the contract by the Food Department. Bald statement of the petitioner, without more, that he had suffered loss on this account was not sufficient to establish the claim. In this view of the matter the purchaser was rightly denied damages for loss of goodwill and reputation.

6. The contention of the learned counsel for the purchaser that the Court is not entitled to disagree with the findings of the arbitrator is without force. It is true that the trial Court does not sit in appeal from the finding of the arbitrator but at the same time the Court is empowered to reverse the finding

of the arbitrator on any issue if it does not find support from the evidence. The very incorporation of section 26-A of the Arbitration Act requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine the soundness of the reasons. As already held the arbitrator in the case before us had granted damages for loss of reputation and goodwill without there being any evidence to that effect. The Court were, therefore, justified in denying this claim to the purchaser.

Similarly in the case of ***IBAD & Co v. Government of Pakistan (PLD 1981 Karachi 236)*** a learned Single Judge of this Court has been pleased to hold as under:-

9. The third challenge of learned counsel for the defendant was that it was a case of no evidence. As observed earlier, the contention was that admittedly this was a case of damages but no evidence was adduced by the plaintiffs for proving any damage suffered by them. Counsel, in the circumstances, urged that the record be perused by the Court to determine whether there was evidence before the arbitrator that the plaintiff had suffered the damages which had been awarded by the Arbitrator. To the extent that where there is an allegation that the award is based on no evidence, the Court can, even in a case of non-speaking award, peruse the record including the evidence while considering the objections/application under sections 30 and 33 of the Arbitration Act, 1940 the contention of learned counsel is correct. And if the Court on such perusal finds the award is based on no evidence, will be lawfully exercising jurisdiction in setting aside the award However, it is also settled law that insufficiency of evidence or that on the evidence adduced before the arbitration the Court would have reach a different conclusion is not a ground for setting aside or interfering with the award. Keeping these principles of mind, I have perused the record of the arbitration proceedings in this case.

9. In this matter I am of the opinion the error and infirmity is appearing on the face of the award as this is a case of no evidence as reflected from a bare reading of the award, whereas, at the same time this Court has all the authority and jurisdiction to see that the Award has been passed on the basis of the evidence led by the parties and the same is not exaggerated and or defective. As discussed hereinabove, the Arbitrators while passing the award have not based their findings on any evidence led by the parties.

10. In view of hereinabove facts and circumstances of this case, I am of the view that the Arbitrators have not only misconducted themselves but so also the award is invalid and is without any reasons whatsoever. Therefore this Court is fully competent to exercise powers under Section 16, 26-A and

30 of the Arbitration Act, 1940, and the objections of the Defendant are to be sustained and the Award is hereby set aside and is remitted to the learned Arbitrators for deciding the controversy after permitting the parties to lead their evidence and give their findings in passing the Award with reasons thereof. Such exercise be completed preferably within 120 days from the date of passing this judgment.

11. Award is hereby set aside and remitted, as above.

Dated: 10.11.2017

J U D G E

ARSHAD/