IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.24 of 2018

Present:
Mr. Justice Irfan Saadat Khan
Mr. Justice Muhammad Faisal Kamal Alam

J U D G M E N T

Dates of hearing: 24.08.2020, 02.09.2020 & 09.09.2020.

Appellant: Pakistan State Oil Company Limited through Rafiq Ahmed Kalwar, Advocate.

Respondent: M/s. Jawed Pervaiz Enterprises through Mr. Yousuf Moulvi, Advocate.

IRFAN SAADAT KHAN, J. The instant High Court Appeal **(HCA)** has been filed impugning the judgment and decree dated 21.12.2017 and 13.01.2018, respectively, passed by the learned Single Judge in Suit No.355 of 2013.

2. Briefly stated the facts of the case are that the appellant is a company engaged in oil and allied products distribution throughout Pakistan. The respondent was one of the carriage contractors working with the present appellant since the last almost 25 years for the transportation of the appellant's petroleum products from Karachi to upcountry. That an agreement dated 23.1.1995 was also executed

between the parties in this regard. That a consignment of 37.480 Metric Ton **(MT)** of Furnace Oil was loaded on 20.4.2011 from Karachi for delivery to M/s. Kohinoor Energy Limited **(KEL)** at Lahore via vehicle bearing Registration No.LSA-8377. The said vehicle reached its destination on 24.4.2011. While the said vehicle was discharging its load it revealed to KEL that the entire consignment was not decanted into the storage tank. When a representative of KEL inspected the said vehicle, he found a hidden chamber of 22.310 MT capacity; hence as per the KEL they received 15.170 MT of the Furnace Oil only instead of 37.480 MT. A report in respect of the theft of approximately 22.310 MT was then made by the KEL to the appellant-company, which immediately sent their representative at the spot and found the complaint of the KEL to be correct. The driver of the said vehicle somehow or the other absconded from the spot. It is averred by the appellant that when the respondent was confronted about the theft they admitted about the presence of a hidden chamber in the said vehicle.

3. The appellant then raised a claim of Rs.3,29,89,848/- against the respondent for twenty-five (25) trips on account of losses caused by the respondent to the appellant company. It was also the assertion of the appellant that the claim of the loss was based on the terms of the agreement as well as Standard Operating Procedure **(SOP)** of the appellant-company. The appellant then, as per its SOP, deducted a sum of Rs.2,19,93,232/- from the respondent's cartage payments. It has been mentioned in the Agreement of 23.1.1995, executed between

the parties that in case of any dispute, the matter would be referred for arbitration, vide Clause 26 of the said agreement. The respondent then filed an application under Section 20 of the Arbitration Act, 1940 **(the Act)**, which was assigned Suit No.1080 of 2011 by this Court. The matter then proceeded before the learned Arbitrator, who after completing all the legal formalities in this behalf, which included recording of statements of various persons, inspection of the vehicle, etc. filed his award dated 22.3.2013 before this Court, through an application under Section 14 Read with Section 17 of the Arbitration Act, 1940 on 27.3.2013, by reducing the liability from twenty-five (25) trips to ten (10) trips including the trip of 24.04.2011 in which embezzlement was detected by KEL. Both the present appellant and the respondent filed their objections against the said Award before the learned Single Judge. The application of the Arbitration was assigned Suit No.355 of 2013. The matter then proceeded before the learned Single Judge in the said suit, who after hearing the parties at some length made the award rule of the Court with the modification that the respondent (plaintiff in the suit) was held liable for theft committed by the vehicle for its trip to KEL on 20.4.2011 only and not for the past trips. It is against this order of the learned Single Judge that the present appellant has filed the instant HCA.

4. Mr. Rafiq Ahmed Kalwar Advocate has appeared on behalf of the appellant and stated that the order of the learned Single Judge is illegal and not in accordance with the law. He stated that the loss was calculated as per the agreement and the SOPs of the company and that

the respondent was in the knowledge of these SOPs. He stated that the learned Single Judge was justified in accepting that loss has been caused to the company but while making the award rule of the Court, incorrectly modified it by reducing the claim of the appellant quite substantially to the extent of the trip made on 20.4.2011 only. He stated that the calculation made by the appellant was as per the agreement and the SOP and was calculated from the date of last calibration in respect of the trips made by the vehicle, which as per the appellant were twenty-five (25) in number. He stated that there was no justification available with the Arbitrator to reduce the quantum of penalty in respect of misappropriation to ten (10) loads/trips plus the last misappropriated load/trip only, which was further substantially reduced to the extent of the trip made on 20.4.2011 only by the learned Single Judge. He stated that the learned Single Judge has not considered the fact that the respondent's objections to the award were filed after a delay of eight (8) days and since the same were time barred therefore the learned Single Judge should have rejected the same. He stated that as per Article 158 of the Limitation Act the time limit for filing the objections is thirty (30) days, which stood expired on 8.5.2013, whereas the objections in the instant matter were filed on 17.5.2017, i.e. after a delay of eight (8) days by the present respondent. In support of his above contention the learned counsel has placed reliance on the decision given in the case of *WADERO MUHAMMAD TAYYAB VS. AKBAR HUSSAIN AND ANOTHER (1989 MLD 3952)*.

5. The learned counsel next submitted that though Qanoon-e-Shahadat Order, 1984 **(QS)** does not apply to the Arbitration Proceedings but under special circumstances QS do apply. He stated that since in the instant matter the facts have remained unchallenged, hence these may be considered to be an admission on the part of respondent and, therefore, in view of the special and peculiar circumstances of the case, the provisions of QS are applicable. In support thereof the learned counsel has placed reliance on the following decisions:-

1. *MUHAMMAD AKHTAR VS. MST. MANNA AND OTHERS (2001 SCMR 1700)*
2. *SAIBESH CHANDRA SARKAR VS. BIJOYCHAND MOHATOP BAHADUR (AIR 1922 Calcutta 4)*
3. *KHIMJI VS. NATHIBAI (AIR 1925 Sindh 42)*.

6. The learned counsel next submitted that the SOPs issued by the company are to be considered to be the implied terms of the agreement entered between the parties. He stated that the parties have entered into the agreement some 25 years ago whereas SOPs were issued by the company in the years 2002 and 2008 respectively and the respondent was in knowledge of these SOPs. He stated that in the letters addressed by the respondent to the appellant certain clauses of SOPs were duly referred, which clearly denotes that the respondent was in knowledge of these SOPs and the penalty/fine calculated by the appellant was as per the agreement and as per those SOPs, which was incorrectly reduced by the Arbitrator to the extent of ten (10) trips plus the trip in which misappropriation was detected, which, was

further drastically reduced by the learned Single Judge to the extent of theft committed by the respondent in respect of its trip to KEL on 20.4.2011 only and not for the past trips, which according to him is contrary to the terms of the agreement entered between the parties and the SOPs of the company. He stated that the respondent cannot take shelter or refuge that they were not in the knowledge of these SOPs, issued by the company from time to time, as they were liable to abide by those SOPs. The learned counsel next contended that under Clause 3 of the Agreement dated 23.1.1995, it has clearly been mentioned that the contractor, i.e. the respondent will comply with all directions and instructions issued by the company. He stated that SOPs are the directions and instructions issued by the company from time to time and the parties are bound to abide by those SOPs and in case of non-compliance they are liable for imposition of fine and penalty, as done in the instant case. In support of his this submission the learned counsel has placed reliance on the following decisions:-

1. *DEVANI VS. WELLS (2019 SCMR 711)*
2. *CHURCHILL FALLS (LABRADOR) CORPORATION VS. HYDRO QUEBEC (2019 SCMR 454)*
3. *MUHAMMAD SATTAR AND OTHERS VS. TARIQ JAVAID AND OTHERS (2017 SCMR 98)*

7. The learned counsel in the end stated that since the respondent never objected to the SOPs during arbitration proceedings therefore the penalty/fine imposed by the appellant, as per the agreement and the SOPs, may be allowed as per the claim and the order of the learned Single Judge may be set aside.

8. Mr. Yousuf Moulvi Advocate has appeared on behalf of the respondent and supported the order of learned Single Judge. He admitted that the vehicle was loaded by the appellant-company at 37.480 MT of Furnace Oil but delivered only 15.170 MT to KEL. He also admitted that there was a hidden chamber in the vehicle and that the driver of the said vehicle also absconded from the spot but stated that the quantum of the claim raised by the appellant to the extent of Rs.3,29,89,848/- was exorbitant and against the policies of the company itself and, thus, was quite rightly reduced by the learned Single Judge. He stated that as per Clause 26 of the Agreement application for appointment of an Arbitrator was moved, which was duly registered as Suit No.1080 of 2011. He stated that Arbitrator was appointed with the consent of the parties. He stated that the company imposed penalty for twenty-five (25) trips made during 27.7.2010 to 20.4.2011, which was rightly reduced by the learned Single Judge to the trip of 20.4.2011 only, in which the theft, if any, was detected.

9. The learned counsel stated that, no doubt, objections to the award were filed a little late, as there was some confusion with regard to service of notice, however, the Additional Registrar (OS) condoned the delay after considering the matter but on a safe side an application under Section 5 of the Limitation Act was also moved and the delay was rightly condoned by the learned Single Judge. He then submitted that this argument of the appellant may be rejected on this behalf. He next stated that the case laws furnished in this behalf on this issue by the learned counsel for the appellant are distinguishable from the facts

obtaining in the instant matter. In support of his above contention the learned counsel has placed reliance on the following decisions:-

1. *M/S. MECHANISED CONTRACTOS OF PAKISTAN LIMITED VS. AIRPORT DEVELOPMENT AUTHORITY, KARACHI (2000 CLC 1239)*

2. *A. QUTUBUDDIN KHAN S. CHEC MILLWALA DREDGING CO. PVT.) LIMITED (2014 SCMR 1268)*

10. He next stated that the SOPs are the internal instructions of the company, which were never communicated by the appellant to the respondent. He stated that even if there was a hidden chamber in the vehicle that does not mean that arbitrary penalty/fine could be imposed by the appellant-company and the modification done in the Award by the learned Single Judge was quite justified looking to the circumstances of the case. He stated that the quantum of penalty worked out by the company was arbitrary and exorbitant; therefore, according to him the order of the learned Single Judge is in accordance with the law. In support thereof the learned counsel has placed reliance on the case of *ALLAH DIN & COMPANY VS. TRADING CORPORATION OF PAKISTAN AND OTHERS (2006 SCMR 615)*.

11. The learned counsel next contended that the SOPs were made in the year 2002 and revised in 2008, whereas the agreement was made in the year 1995, hence these could not be applied on the agreement between the parties since the agreement was prior in time to the SOPs. In support of his above contention the learned counsel has placed reliance upon the decision given in the case of *HOUSE BUILDING FINANCE CORPORATION VS. SHAHINSHAH HUMAYUN*

COOPERATIVE HOUSE BUILDING SOCIETY AND OTHERS (1992 SCRMR 19).

12. He further stated that the terms of QS are not applicable to the Arbitration proceedings and invited our attention to Article 1(2) of the QS. He stated that whether these are special or ordinary proceedings when it has categorically been mentioned under Article 1(2) of QS that the proceedings of QS are not applicable to Arbitration Proceedings, the insistence of the learned counsel for the appellant with regard to applicability of QS upon such proceedings is incorrect and uncalled for, which needs to be rejected. He next stated that the decisions relied upon by the learned counsel for the appellant in this behalf, thus, are not applicable and are distinguishable. The learned counsel in the end stated that the modified award made rule of the Court by the learned Single, therefore, may be upheld and this appeal being meritless may, accordingly, be dismissed.

13. We have heard both the learned counsel at length and have also perused the record, the relevant law and the decisions relied upon by them.

14. We will first take up the issue with regard to late filing of the objections by the present respondent. There is no denial to the fact that the learned Arbitrator filed his award dated 22.03.2013 before this Court through an application under Section 14 read with Section 17 of the Arbitration Act. As per the present appellant the notice of filing the objections was served upon the present respondent on 09.04.2013

and the respondents were required to file their objections by 08.05.2013 but the same were filed on 17.05.2013. As per the respondent the matter was listed before the Additional Registrar (OS) on 02.05.2013 on which date they got the knowledge about the award and filed their objections on 17.05.2013. It is the claim of the respondents that firstly the objections were filed in a timely manner and secondly if there was a delay, as per the working made by the appellant, they duly moved an application under Section 5 of the Limitation Act for such condonation of delay of eight (8) days, which was duly condoned by the learned Single Judge. The decision relied upon by the learned counsel for the appellant in support of his contention seems to be quite distinguishable as in that case even after allowing time, objections were not filed, whereas in the instant matter it has been pleaded that firstly the objections were filed timely and secondly the delay, if any, was duly condoned by the learned Single Judge. No illegality thus is found in the order of the learned Single Judge in this regard and his order on this aspect is hereby upheld.

15. The learned counsel for the appellant has further stated that under special circumstances the provisions of QS do apply to the Arbitration proceedings, which has vehemently been refuted by the learned counsel for the respondent. Before proceeding any further, we would like to reproduce herein below Article 1(2) of QS, which reads as under:

> *Article-1(2) It extends to the whole of Pakistan and applies to all judicial proceedings in or before any Court, including a Court-martial, a Tribunal or other authority exercising judicial or quasi-judicial powers or jurisdiction, but does not apply to proceedings before an arbitrator.*

16. It is evident from the above reading that the law framers were fully conscious of the fact that under arbitration proceedings the procedure of QS could not be applied, that is why Article 1(2) was specifically provided under the QS. The decisions relied upon by the learned counsel for the appellant are totally distinguishable as in none of these cases it has been stated that under arbitration proceedings, QS would be applicable, as the powers of the Arbitrator under the Arbitration Act are special and exclusive in nature. The decisions relied upon by the learned counsel for the appellant on this aspect specifically talks about the powers of the learned Single Judge and not that of the Arbitrator, hence are distinguishable and not applicable to the case in hand. We, therefore, reject this ground also raised by the learned counsel for the appellant.

17. We will now take up the main issue involving in the instant HCA that whether the penalty /fine imposed upon the present respondent, as held by the learned Single Judge, was in accordance with law or could be considered to be justified in view of the facts and circumstances of the present matter.

18. It is the claim of the appellant company that they have imposed the fine /penalty as per the terms of the agreement and as per their SOPs. Clause (3) of the agreement between the parties states as under:

> *"3) The "CONTRACTOR" shall in the execution of the contract comply with all laws, rules and regulations appurataining to Federal, Provincial Statutory and other authorities including directions and instruction issued by the "COMPANY" in respect thereof."*
>
> *(Underline ours for emphasis)*

19. The relevant SOP bearing No.LM005-PA applied in the instant matter is also reproduced hereunder:

	Pakistan State Oil Company Ltd. ***LOGISTICS MANUAL***		
Location	*Section*	*Activity*	
Logistics : Head Office	*Penalties & Actions*	*Schedule of Penalties and Actions*	
Ref: SOP No: LM-005-PA	*Rev: 00*	*Date: Dec 02, 2008*	*Pg: 2/5*
Nature of Violation	*Attempt*	*Recovery Procedure*	*Suspension/Delist Period*
C. Unauthorized modification or use of unethical practices to tamper with the calibration status of the vehicle	*1st*	*Value of Product embezzled = [(Nos. of Trips made by the T/L from the date of last calibration)* (product pilfered on each trip through fraudulent device or manipulation in calibration parameters) * (actual retail price of the product during each trip at the time of loading/decantation and at the time of last load whichever is higher of the two)] + [Rs. 200,000 or 30% Cost of pilfered Product as penalty whichever is higher] excluding sales loads.*	*Suspension for 30 days from the date of Decision*
	2nd	*Same as above*	*Suspension of T/L for 60 days and Cartage Contractor bill for 15 days from the date of Decision.*
	3rd	*Same as above*	*Suspension for 90 days and blockage of entire Cartridge work for 15 days from the date of Decision.*
	4th	*Same as above*	*The case to be presented in CFL SC for final decision regarding restoration/delisting of take lorry.*

20. The appellant's case being that since the product has been embezzled, hence, in view of the above two procedures, i.e. the rules and the SOP, they initially worked out the penalty /fine to the extent of twenty-five (25) trips made by the above vehicle and worked out a penalty of Rs.3,29,89,848/-, whereas the Arbitrator reduced the same to the extent of last ten (10) trips plus the trip made on 24.04.2011 in which the embezzlement took place, which the learned Single Judge further reduced to the extent of embezzlement found /reported in the

trip dated 24.04.2011 only. The learned Single Judge was of the view that since the SOPs could not be considered to be the rules and regulations, hence penalty could not be imposed on the basis of SOPs and that since in the agreement entered between the appellant and the respondent dated 23.01.1995, there is no mention or reference of any SOPs hence these SOPs may be binding on the appellant company but not upon the respondent and therefore passed the order accordingly by reducing the fine /penalty, as mentioned above, to the extent of embezzlement /short discharge noted by KEL on 24.04.2011 only.

21. Before proceeding any further, we would like to discuss as to what are SOPs. As the name indicates SOPs are Standard Operating Procedures adopted by the companies to set routine procedures that prescribes accepted principles or practices for completing any activity or functions helpful for the better running of the company internally and externally both. There are certain standard procedures being adopted by the companies for their internal and external better functioning. The SOPs are in fact routine procedures developed by certain companies either in written or in verbal form or are their customary procedures and, in our view, carries the same force as that of directives and instructions and violation thereof could result in imposition of fine and penalty or other administrative measures, as the case may be. SOPs though are internal arrangements of a company but these SOPs could be applied to the contractors, clients /customers of the company, who to a certain extent are obliged to abide by these SOPs of the companies, however, subject to the condition that these

SOPs should not be violative of the fundamental principles of law. Now a days almost in every company SOPs are being adopted and are considered to be an integral part for an effective /quality system to be adopted and followed and to facilitate consistency in smooth running of a company which may include instructions /directions /worksheets /derivatives and other methods for adoption and application of these SOPs. However, it is clarified that the above list is inclusive and not exhaustive. The SOPs describe either regular or routine working procedures conducted and followed within an organization and the procedures to be adopted while dealing with persons, institutions etc. to avoid any future eventuality, if any. Some SOPs are designed in such a way to maintain quality control and quality assurance of a company and some SOPs are designed in such a way to ensure compliance with the government regulations etc. The SOPs would fail if not followed. Usually the SOPs are designed in a concise step by step format but this is not a decisive factor to be considered while drafting the SOPs of a company. Having said that we are of the view that SOPs could partake the shape of rules and regulations of a company but, as stated above, the SOPs should cater to the fundamental norms of the law and could be whittled down, in case these are against the basic principles of the law. Hence we do not agree with the findings of the learned Single Judge that while imposing the penalty no reference could be made to the SOPs as, in our view, the Clause (3) of the agreement, reproduced hereinabove, caters within it the SOPs issued by the company, being directions and

instructions and could have a binding effect upon the company as well as upon its contractors, clients /customers.

22. Now reverting back to the issue in hand. From the record it is evident that when the vehicle left the appellant's premises on 20.04.2011, it was duly sealed. It is also an admitted position that when the vehicle reached the KEL, the seal was intact. It is also an admitted position that prior to the present embezzlement no complaint whatsoever has ever been made by the KEL to the appellant company for short discharging /decantation. On examination of the deposition of the witnesses it has come on the record that when the vehicle was loaded it contained 37.480 MT at Karachi and when it reached KEL at Lahore and was weighed it contained same 37.480 MT and it is only after decanting that the Manager Logistic of KEL got suspicious about the vehicle who then inspected it and found a hidden chamber and detected the embezzlement. It has duly been admitted by the company staff, examined by the Arbitrator, that no embezzlement prior to the detected embezzlement was ever found out or reported by the KEL. Hence we agree with the findings of the learned Single Judge that the imposition of fine / penalty either to the extent of twenty-five (25) trips or that of ten (10) trips by the appellant company and the Arbitrator, respectively, appears to be harsh and excessive. In the relevant SOP also it has been mentioned that the recovery would be made to the extent of value of product embezzled, which further has been defined as product pilfered on each trip through fraudulent device or manipulation in calibration. It is an admitted fact that in the

instant matter there is no previous complaint with regard to the product pilfered prior to the trip of 24.04.2011 or detection of any fraudulent or hidden device or manipulation in calibration prior to the trip under question either by the KEL or noted by the appellant company itself. Therefore, in our view, penalty, if any, could be equivalent to the value of the product embezzled, which means that in the instant matter the respondent is liable for penalty to the extent of embezzled quantity found short /pilfered on the trip manipulated or calibrated and not beyond that, as rightly observed by the learned Single Judge.

23. We, therefore, in view of what has been stated above, do not find any illegality or irregularity in the order passed by the learned Single Judge so far as imposition of penalty /fine is concerned. We, therefore, uphold the order with the result that the instant HCA stands disposed of, along with the listed application(s).

JUDGE

JUDGE

Karachi:

Dated:_____.2020.

(Tahseen, PA)