

IN THE HIGH COURT OF SINDH AT KARACHI

Suit 2652 of 2017 : Al-Hassan Tech and Eng
Svc (Private) Limited vs.
Federation of Pakistan
& Others

For the Plaintiff : Mr. Balal A. Khawaja
Advocate
Mr. Ghulam Hussain
Advocate

For the Defendant : Mr. Umar Hayat Sandhu
Advocate

Date of Hearing : 12.02.2020

Date of Announcement : 24.02.2020

JUDGMENT

Agha Faisal, J. Pursuant to Section 14(2) of the Arbitration Act, 1940 (“Act”) and Rule 282(1) of the Sindh Chief Court Rules, an award dated 15.11.2017 (“Award”) has been filed by the learned Arbitrator, Mr. Justice (retired) Muhammad Ather Saeed. The defendants filed objections and sought to have the Award set aside, pursuant to Section 30 read with Section 33 of the Act. It is considered illustrative to reproduce the determinant constituent of the Award herein below:

In the light of my above observations, I Award an amount of Rs. 21,956,622/- (Rupees Twenty One Million Nine Hundred Fifty Six Thousand Six Hundred Twenty Two Only) in favour of the Claimant/Contractor, computed in the following manner:

Item No.	Amount Rs.
No.1 – Salaries	6,586,000/-
No.2 – Overheads – Head Office	4,178,148/-
No.3 – Performance Guarantee	341,000/-
No.4 – Retention	5,721,179/-
No.8 – Price Escalation	1,200,000/-
No.9 – Material at Site not paid	1,430,295/-
Proceeding Cost	2,500,000/-
Total Award Amount	21,956,622/-

2. Briefly stated, the parties entered into a construction contract dated 10.07.2008 (“Contract”). The plaintiff was aggrieved on account of non-payment of contractual claims, hence, filed proceedings, being Suit 1505 of 2012, in invocation of the arbitration clause per the Contract, pursuant to Section 20 of the Act. The Court, with the consent of the parties, was pleased to submit the

matter for arbitration, vide its order dated 02.10.2013. The arbitration proceedings were then conducted and subsequently concluded vide the Award.

3. Mr. Umar Hayat Sandhu, advocated the case of the defendants and submitted that the Award is unmerited, void and mala fide. In order to bulwark his contention it was argued that issue no. 2 was decided in cursory manner; the amounts paid by the defendant in good faith have not been taken into account; since the relationship was that of principal and agent, hence, there was no breach whatsoever. In conclusion, it was also argued that since the Award is a void order, therefore, no limitation period is applicable to consider any objections in respect thereof.

4. Mr. Balal A. Khawaja, Advocate appearing on behalf of the plaintiff supported the Award in its entirety. It was contended at the very onset that the objections to the Award were *prima facie* time barred and the same was also manifest from the application seeking condoning of delay, filed by the defendants. Learned counsel submitted that Section 5 of the Limitation Act 1908 has no application to arbitration proceedings, hence, the objections could not be entertained as they were admittedly time barred. It was next contended that while the defendant may have cavil to the findings of the learned Arbitrator based on the evidence led there before, however, he has not raised any grounds which would merit the intervention of this court under Section 30 of the Arbitration Act. In conclusion, it is submitted that the learned Arbitrator has considered the claim and counter claim of the parties and has arrived at the Award after due appreciation of the evidence.

5. This court has heard the arguments of the respective learned counsel and considered the documentation and authority to which its surveillance was solicited. The issue before this court is whether the objections to the Award can be sustained on the anvil of the law, however, such a determination is only merited post determination of the issue of limitation.

Issue of limitation

6. Article 158 of the Limitation Act 1908 states that the limitation period for seeking to set aside an Award or seeking to have an award remitted for consideration, pursuant to the Act, is thirty days from the date of service of filing of the award. The Award was filed on 22.12.2017 and the diary of the Additional Registrar records on 06.03.2018 that the defendants had been served prior to the said date. The objections to the Award were filed on 17.05.2018.

It is an admitted position that the objections were not filed within the statutory period of limitation as an application under Section 5 of the Limitation Act 1908 was filed on behalf of the defendants seeking condoning of the delay occasioned on the following grounds:

“3. That after receipt of notice the working conditions in Karachi became very difficult due to excessive load shedding by K Electric. All the relevant departments faced great hardships in coordinating with each other to reach a final conclusion in the case.

4. That the counsel of the respondents was seriously sick and hospitalized. HE suffered from cervical pain of spine and was incapacitated to do any work.”

7. A Division bench of this court has observed that prescriptions of limitation are not technical and ignoring the same would render entire law of limitation redundant¹. The Supreme Court has maintained that parties are required to keep abreast of proceedings² and remain solely culpable for the consequences of failure in respect thereof³. The august court has consistently maintained that in determination of an application seeking condoning of delay each day of delay had to be explained and justified in the relevant application, failing which the said application was liable to be dismissed⁴.

In the present facts the application seeking condoning of delay is predicated upon two grounds; i.e. load shedding and infirmity of a counsel. It is an absurdity to consider load shedding as a justifiable recurring ground for delay and the Supreme Court has maintained⁵

¹ *United Bank Limited vs. Ghulam Rafiq* reported as 2020 CLD 129; *Mahmood Khan Mahar vs. Qamar Hussain Puri & Others* reported as 2019 MLD 249.

² *Sh. Bashir Ahmed vs. Muddassar Hayat* reported as 2005 SCMR 1120.

³ *Abdul Hamid vs. Abdul Qadir* reported as PLD 2001 Supreme Court 49.

⁴ *Lt. Col. Nasir Malik vs. Additional District Judge Lahore* reported as 2016 SCMR 1821.

⁵ *Altaf Hussain & 2 Others vs. Muhammad Nawaz & 2 Others* reported as 2001 SCMR 405.

on numerous occasions that inaction of a counsel cannot be sustained as grounds for waiver of limitation. It is, thus, the considered view of this court that the grounds invoked do not stand the test set forth by the Supreme Court, hence, no case for condoning of the admitted period of delay is made out.

8. Notwithstanding the finding contained supra, it is imperative to consider whether an application for condoning of delay, occasioned in filing of the objections to an award, was maintainable in the first instance. The Supreme Court has held⁶ that objections to an award filed beyond the thirty day period of time could not be considered. It has also been determined⁷ that Section 5 of the Limitation Act 1908 is not applicable for enlarging the period of limitation prescribed by Article 158 of the Limitation Act 1908 for preferring an application for setting aside of an award. A Division bench of this Court has whittled down the relevance of notice under Section 14 of the Act if the award has been announced in the presence of the parties⁸.

9. The law demonstrably extrapolates that no objections to an award may be entertained if they are not filed within the period of limitation and that an application seeking condoning of delay, per Section 5 of the Limitation Act 1908, may not be entertained to extend the limitation period. It is also maintained⁹ that if the objections, to an award, were time barred then the same may be rejected and the award made rule of court.

It is an admitted fact that the objections under consideration are barred by limitation, which period may not be extended by this court. Even otherwise, it has been observed supra that the grounds pleaded for condoning of the delay did not explain and / or justify the delay occasioned. However, notwithstanding the findings herein this court considers it expedient to discuss the arguments of the learned counsel upon the merits in the interests of justice.

⁶ Per *Saiduzzaman Siddiqui J.* in *Superintending Engineer Communication & Works Highway Circle Kohat vs. Mian Faiz Muhammad & Co Akora Khattak* reported as *PLD 1996 Supreme Court 797*.

⁷ *Thal Development Authority vs. Nisar Ahmed Qureshi* reported as *PLD 1962 (W.P.) 830*; *Valika Woolen Mills Limited vs. DP (Army) Karachi* reported as *1984 CLC 2515*.

⁸ *Matracon Pakistan (Private) Limited vs. Fauji Fertilizer Bin Qasim Limited* reported as *2019 CLC 1732*.

⁹ *Lal Hussain & Another vs. Muhammad Suleman & Another* reported as *2001 MLD 117*.

Objections to the Award

10. The first ground raised before this court, by the learned counsel for the defendants, was that the learned arbitrator decided issue no. 2 in a cursory manner. It is considered illustrative to reproduce the impugned observations herein below:

“65. The second issue which has to be determined reads as under:

“Whether determination of the quantum of amount paid to the Claimant for the work done is essential to establish the conduct of the parties?”

This issue has to be examined in the light of the allegations made by the Claimant/Contractor that bills of Running Account Receipts ("RAR") were paid late which hampered the work and the counter allegations by the Respondent/Employer that the Claimant/Contractor was very weak financially and had not kept aside capital necessary for conducting a project of this magnitude in as much as the Respondent/Employer had to advance the Claimant/Contractor a loan of Rs.3,000,000/-. I am of the opinion that despite the allegations and counter allegations, it is not essential to determine the quantum of the amount paid to the Claimant/Contractor for work done to establish the conduct of the parties, as it will have no effect on the examination and allowance / disallowance of the claim and the counter claims. The second issue is therefore answered in negative.”

Learned counsel for the defendants was unable to demonstrate any infirmity with the aforesaid observations, upon the anvil of Section 30 of the Act or otherwise, and mere allegations / unfounded assertions could not be sustained by this court.

11. The second argument was that the learned arbitrator had not appreciated the amount paid by the defendants in good faith. This averment is *prima facie* dispelled by the record as it is apparent that the learned arbitrator deliberated upon the claim / counterclaim at length and arrived at the Award upon appreciation of all amounts paid and / or due *inter se*. Learned counsel for the defendants failed to point out any constituent of the findings being inconsistent with the evidence, hence, the second argument is also misconceived.

12. The third argument was that the relationship *inter se* was of principal and agent, hence, there was no breach of the Contract. The Contract is an admitted document and it clearly delineates the relationship between the parties. The allegation orally levelled by the learned counsel is at complete variance with the record. It is considered appropriate to observe that the issues, in the arbitration

proceedings, were framed with the consent of the parties and are reproduced herein below:

“1. In this Arbitration, initially, my learned colleague, Mr. Justice Khilji Arif Hussain, was appointed the sole arbitrator and he initiated the proceedings. On the initiation of the proceedings, the learned arbitrator with the consent of the parties had framed the following issues for adjudication.

- i. Who abandoned/repudiated the Contract and its effect?
- ii. Whether determination of the quantum of amount paid to the Claimant for the work done is essential to establish the conduct of the parties?
- iii. Whether the Claimant is entitled to the claim amount mentioned in Para 33 and 37 of the Statement of Claim due to delay in execution of work as per terms of the agreement, if so, for what amount?
- iv. Whether as per terms of the Contract between the parties the Claimant was justified to claim escalation?
- v. Whether the Claimant is entitled for the amount claimed in Para 45 of the claim or any part of it, for what amount?
- vi. Whether the Respondent/Employer are entitled for amount claimed or any part of it, if so, for what amount?
- vii. What should the award be?”

It is apparent from a bare perusal of the consent issues that this novel interpretation of the relationship *inter se* was not pleaded / agitated before the learned arbitrator, hence, appears to be a misconstrued afterthought.

13. The final argument was that the Award was void, however, no substantiation whatsoever was advanced in support of the assertion. It is clear from the record of the proceedings that pursuant to consent of the parties the matter was referred to arbitration¹⁰, wherein pleadings were exchanged and the issues were also framed consensually. It is further demonstrated before us that the parties had exhaustive opportunity to present their case and thereafter the Award was rendered in appreciation of the evidence. It is the considered opinion of this court that no case has been made out to consider the Award void.

Notwithstanding the foregoing, it is pertinent to observe that the present allegation was levelled to obviate the fact that the objections filed by the defendants were barred by limitation. Learned counsel has also failed to demonstrate to the court if the said allegation was even pleaded in the objections filed, albeit belatedly. It is also a matter of record that no such ground was pleaded in the

¹⁰ *Suit 1505 of 2012.*

application filed seeking condoning of the delay in filing of the objections.

It may be pertinent to observe that a Full Court of the honorable Supreme Court has observed¹¹ that limitation may run even against a void order and the time would be computed from the date of knowledge. Knowledge of the Award is admitted by the defendants as is the delay in filing of the objections¹², hence, reliance on this unsubstantiated plea cannot be sustained.

14. Learned counsel for the plaintiff had articulated that none of the objections, argued by the learned counsel for the defendants, qualified within the ambit of Section 30 of the Act. It is, thus, considered apt to consider the parameters of this determination.

The law¹³ requires for an award to be filed in court, pursuant to Section 14(2) of the Act, in order to procure the attendance of the parties concerned so as to provide an opportunity for filing objections, if required. It is settled that while considering the validity of an award, within the parameters of Section 30 of the Act¹⁴, the court does act as a court of appeal and avoids reappraisal of the evidence¹⁵. In principle the award is considered final, in fact and in law, and interference therewith is only merited upon the specific grounds enunciated in the Act¹⁶. It has also been established that an award is exceptionable only in cases where there is a patent error on the face of the record not requiring scrutiny beyond the award for discovering the same and the court is discouraged from interfering in an award if on the basis of the evidence on record the court may have reached a different conclusion¹⁷.

¹¹ Per *Tassaduq Hussain Jilani CJ.* in *Gen (r) Pervez Musharraf vs. Nadeem Ahmed (Advocate) & Another* reported as *PLD 2014 Supreme Court 585*.

¹² Per *CMA 6485 of 2018*.

¹³ Per *Nasir ul Mulk J.* in *Chaudhry Qaiser Mahmood vs. Province of Punjab & Another* reported as *2012 SCMR 1606*.

¹⁴ 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 misconducted 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.

¹⁵ *PLD 2011 Supreme Court 506; PLD 2006 Supreme Court 169; PLD 2003 Supreme Court 301; PLD 1996 Supreme Court 108; 1984 SCMR 597;*

¹⁶ *Section 30 of the Act.*

¹⁷ *2014 SCMR 1268; PLD 1987 Supreme Court 393.*

15. *Mian Saqib Nisar CJ.* has eloquently compiled the law with respect to the grounds upon which an arbitration award may warrant interference, in the *Aeroflot case*¹⁸, and it was illumined as follows:

"8. The principles which emerge from the analysis of above case-law can be summarized as under:-

(1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.

(2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.

(3) 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 that the reasons are not inconsistent and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court.

(4) A dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Such dispute would fall within the arbitration clause.

(5) The test is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction.

(6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.

(7) The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part but it may tantamount to mala fide action and vitiate the award.

(8) If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally.

(9) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award.

(10) The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise.

(11) It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong.

(12) Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation.

(13) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd.

(14) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.

(15) The only exceptions to the above rule are those cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award, which one can say is erroneous.

(16) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(17) It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

(18) The Court does not sit in appeal over the award and should not try to fish or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect.

¹⁸ *Gerry's International (Private) Limited vs. Aeroflot Russian International Airlines* reported as 2018 SCMR 662.

(19) The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record.

(20) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not do so he can be set right by the Court provided the error committed by him appears on the face of the award.

(21) There are two different and distinct grounds; one is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.

(22) An error in law on the face of the award means that one can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous.

(23) A contract is not frustrated merely because the circumstances in which the contract was made are altered.

(24) Even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only.

(25) While making an award rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like a post office but must subject the award to its judicial scrutiny.

(26) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not misconduct on the part of the arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence.

(27) Misconduct is of two types: "legal misconduct" and "moral misconduct". Legal misconduct means misconduct in the judicial sense of the word, for example, some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.

(28) The arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party.

(29) some of the examples of the term "misconduct" are:

(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;

(ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference;

(iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and

(iv) if there has been irregularity in the proceedings.

(30) Misconduct is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator."

It is the considered view of this court that the objections to the Award, articulated by the learned counsel for the defendants, cannot be sustained on the anvil of the law.

16. The matter was referred to arbitration with the consent of the parties and the determinant issues were also framed consensually. There has been no cavil to the proceedings having been conducted

in accordance with the law. The Award is well reasoned and appears to be predicated upon due consideration of the evidence. The objections to the Award are admittedly barred by limitation. Even otherwise, learned counsel for the defendant has been unable to demonstrate any infirmity with respect to the Award, within the ambit of Section 30 of the Act or otherwise. As a consequence hereof the objections to the Award, and CMA nos. 6485 of 2018 and 6486 of 2018, are hereby dismissed.

17. In view of the reasoning and rationale herein contained, this court sees no cause to set aside or remit the Award for reconsideration, hence, the Award is upheld, maintained and hereby made the rule of court. The office is directed to draw up a decree in terms of the Award.

JUDGE