IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.146 of 1997

Present:
Mr. Justice Irfan Saadat Khan
Mr. Justice Zafar Ahmed Rajput

Dates of hearing: 04.03.2016, 11.03.2016 and 18.03.2016.

Appellants: Trading Corporation of Pakistan Pvt. Ltd. through Syed Ashfaq Hussain Rizvi, Advocate.

Respondent: Amanullah Khan, Muslim Corporation, Cotton Ginning Factory, Oakara, through Mr. Javed Farooqui, Advocate.

J U D G M E N T

IRFAN SAADAT KHAN, J. This High Court Appeal under Section 3 of the Law Reforms Ordinance, 1972, read with Section 39(1) of the Arbitration Act, 1940 **("the Act")** has been filed against the order dated 12.05.1997 and the decree drawn thereunder on 10.6.1997, passed in Suit No.231 of 1993, whereby the learned Single Judge of this Court, while rejecting the application filed under Section 30 of the Act by the appellants/defendants, made the Award the rule of the Court.

2. Briefly stated, the facts of the case are that the respondent submitted a complaint to the Wafaqi Mohtasib **(Mohtasib)** on 12.09.1987 against the appellants for not paying appropriate rates or the market price for the Cotton supplied by his Cotton Ginning Factory during the period October 1986 to June 1987. In the said

complaint it was stated by the respondent that certain assurances were given by the Finance Minister but those assurances were not complied with and the appellants had paid very low rates of the Cotton purchased by them, which prompted him to file the complaint before the Mohtasib. The Mohtasib then, after hearing the complaint, recommended to the appellants and the respondent to resolve their dispute amicably by referring their matter to an Arbitrator, as provided in the purchase contract entered between the appellants and the respondent. The respondent then nominated Haji Saeed-ur-Rehman, Ex-Member Majlis-e-Shoora as his Arbitrator, while the appellants appointed Syed Ashfaq Ali, Director (R&D), as their Arbitrator. Both these Arbitrators held various meetings but failed to resolve the matter amicably between the parties. Finally, Mr. Nusrat Hussain was mutually appointed as Umpire, who after hearing the parties made an Award on 09.02.1993, which was filed by the Arbitrators in the Court on 12.04.1993 to make the same the rule of the Court. The appellants/defendants filed the objections under Section 30 of the Act, which were dismissed by the learned Single Judge and made the Award rule of the Court vide order dated 12.05.1997. It is against this order, that the instant High Court Appeal has been preferred by the appellants/defendants.

3. Syed Ashfaq Hussain Rizvi Advocate has appeared on behalf of the appellants and submitted that the Award passed by the Umpire is not in accordance with law and is against the equity and justice. He has stated that the Award has been passed with a preconceived notion and the arguments advanced by the appellants before the learned Single Judge were not considered. The learned counsel

submitted that the respondent had entered into ten (10) contracts for different quantities and rates which were binding upon them, which aspect has totally been ignored by the Umpire. He has further submitted that the learned Umpire was required to determine the real contract price, which was not considered and the learned Umpire has fixed the price of the Cotton without any justification. The learned counsel has also submitted that the learned Single Judge has failed to appreciate that the respondent has confirmed in writing that they received the amount in full and final settlement against 9993 bales from the appellants, which aspect has totally been ignored by the learned Single Judge, as well as the learned Umpire. He further submitted that the learned Single Judge should not have accepted the payment price @ Rs.555 per maund. He has maintained that the statement made by the Federal Finance Minister could not be considered as a law and hence assurance of the Finance Minister, on which reliance was placed by the respondent, is uncalled for. He has further maintained that it is always the fair market price which is to be considered and not any arbitrary and whimsical price and since the respondent was given a fair and reasonable price by the appellants, the non-acceptance of the price was not justified. He, in the end, submitted that the order passed by the learned Single Judge whereby the Award was made rule of the Court may be set aside since the same has been made by ignoring the provision of section 30 of the Act. In support of his above contentions, the learned counsel has placed reliance on the following decisions:

1. *The Textile Trading Co. v. Habib and others* ***(PLD 1956 Sind 17)***
2. *Qasim Ali Rajab Ali v. Municipal Corporation of Karachi* ***(PLD 1964 (W.P.) Karachi 108)***

3. *Neelum Flour Mills through Kafayat Hussain Naqvi, Managing Director, Asgharabad, Muzaffarabad, A.K v. Government of the State of Azad Jammu and Kashmir through Chief Secretary and 2 others* ***(PLD 1991 Azad J & K 26)***

4. *Punjab National Bank Ltd. and another v. S.B. Chaudhry* ***(AIR (30) 1943 Oudh 392)***

5. *Ali Mohammad and 2 others v. Bashir Ahmad through Legal Heirs* ***(1989 CLC 2194)***

6. *Muhammad Amin Khan v. General Public, etc.* ***(NLR 1991 AC 498)***

7. *State of Rajasthan v. M/s. Nav Bharat Construction Co.* ***(AIR 2005 Supreme Court 4430)***

8. *Pakistan through Secretary, Ministry of Industries v. Massrs Asian Associated Agencies* ***(1974 PLD Karachi 155)***

9. *Dev Kinandas and Co. v. Union of India* ***(AIR 1961 Punjab 136)***

10. *Somar Puri, v. Shyam Narain Gir and others* ***(AIR 1954 Patna 586)***

4. Mr. Javed Farooqui Advocate has appeared on behalf of the respondent and has vehemently refuted the arguments advanced by the learned counsel for the appellants and submitted that the price was fixed by the Umpire after giving ample opportunity of hearing to the appellants and after considering all the factors which include market conditions also. The learned counsel then read out different portions of the Award and stated that all the issues now raised by the learned counsel for the appellants have already been considered by the learned Umpire while making the Award, which has rightly been made the rule of the Court by the learned Single Judge. He has stated that the learned Umpire through an exhaustive and erudite Award, after considering the monthly average, spot rates and other factors has rightly fixed the rate at Rs.555 per maund and

has rightly directed that the amount should be paid to the respondent within stipulated time otherwise a penalty at the current market rate per month would also be payable to the respondent. He stated that the appellants have duly participated in the said Award and their objections to the said Award and to the impugned order are uncalled for. The learned counsel has further submitted that the appellants have failed to point out any misconduct or partiality on the part of the learned Umpire, hence, the order passed by the learned Single Judge may be upheld and this High Court Appeal may be dismissed with cost. He has also submitted that the decisions relied upon by the learned counsel for the appellants are distinguishable from the facts of the case as in all these decisions the Awards passed by the Arbitrators were either found to be tainted with malic, arbitrary or have been passed without fulfilling the legal requirements, whereas in the instant case no such objection is available to the appellants, therefore, this High Court Appeal being bereft of any may be dismissed.

5. We have heard both the learned counsel at considerable length and have perused the record and the decisions relied upon by the learned counsel for the appellants.

6. Before proceeding any further we would like to reproduce hereinbelow some portions of the Award made by the Umpire:

> *"31. In the light of above analysis of facts and Govt. policy implemented by CEC it is not difficult to conclude that both prior to 86-87 as well as in subsequent years the only fair and equitable formula for purchase of lint by the CEC was on the basis of market rates if they were higher than the minimum support prices fixed by Govt. 1986-87 is however, not an isolated or exceptional year, and the same market rate policy should therefore be made applicable to it as requested by the*

complainant supported by his Arbitrator in his Award, and assured by the then Federal Finance Minister."

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41. .. ..
i) .. ..
ii) .. ..
iii) .. ..
iv) After considering all the facts of the case and the arguments in favour and against the contentions of the complainant the most fair and feasible appropriate and reasonable alternative therefore appears to be to take the market rate at the monthly average of KCA spot rates from Oct 86 to June 87. Apart from the fact that this will meet the demand of the complainant only partially, it is equally fair to the CEC as it will be in line with their past practice of making final payments towards the end of May or June since 83-84 to 1986-87. The seller must and should in all fairness be compensated for delayed payment by the CEC, and this alternative meets that objective also. Monthly average KCA spot rates from Oct 1986 to June 1987 as furnished by CEC are as under:-

Oct. 86	*Rs.430*
Nov. 86	*Rs.526.08*
Dec. 86	*Rs.539.58*
Jan. 87	*Rs.547.76*
Feb. 87	*Rs.531.17*
Mar. 87	*Rs.537.39*
Apr. 87	*Rs.563.08*
May.87	*Rs.606.36*
Jun. 87	*Rs.717.31*

Average spot rates for month therefore comes to 555.0 per md. And it will meet the ends of justice if the total cotton bales of 9993 of the complainant are paid for at that rate plus the F.A.O. premium already paid to him.

42. CEC pointed out to the Umpire that Rs.15 per md should be deducted from the average DCA spot rate because that is the practice the CEC is followed as per Govt. policy. This however, is not a correct stand because such policy was introduced since 1987-88 and not earlier. This policy also includes payment of Rs.5/- per md. or special packing expenses. This amount was although very justified and legitimate was also not given to the ginners prior to 1987-88 who sold their cotton to CEC with special export packing. Moreover prior to 87-88 CEC "purchase contract" was ex-Karachi and only from that year onwards it was "Ex-Factory Delivery". There is therefore no justification to deduct Rs.15/- per md as transportation charges for Karachi from the rate.

43. As the Umpire is not in a position to determine the quality of cotton supplied by the complainant to the CEC as that cotton is no longer available for inspection, he cannot

order any relief on that account. His observations in the foregoing paragraphs about Appeal and Arbitration of Evaluation may however, be taken note of by the CEC so that such complaints don't soil its image or mar its national and international reputation.

44. To sum up, I have come to the conclusion that the complainant deserves to be compensated and his demand for getting paid on the basis of market rates is reasonable to the extent mentioned above.

45. AWARD : In view of my above findings I make the following Award:

1. On the basis of monthly average of KCA spot rates from Oct 1986 to June 1987 which comes to Rs.555.0 per md, the complainant should be paid Rs.2,48,46,084 (as basic gross value in respect of 9993 bales of cotton equivalent to 44767.72 maunds) less Rs.2,2647334 already received, by him on that account excluding FAO Premium. This amount comes to Rs.21,98750.00.

2. Because the complainant has already suffered delay of many years in getting justice and CEC alone sought three adjournments. I also order that the payment of the Award amount be made on or before 31st March 1993 by the CEC failing which a penalty at the current mark-up rate per month will also be payable to the complainant.

7. We also would like to reproduce hereinbelow the provisions of section 30 of the Act upon which much emphasis has been laid by the learned counsel for the appellants:

> ***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.*

The above provision of the law provides setting aside of the Award if any of the grounds mentioned in the said section are found

available. In our view the Award passed by the Umpire could not, by any stretch of imagination, be considered to be an award falling under any of the above categories. Perusal of the Award shows that the same comprises of as many as 22 pages, wherein each and every aspect raised either by the appellants and the respondent No.1 were discussed in detail. In the said award it has been mentioned that since the two Arbitrators had failed to reach to an amicable settlement thereafter Mr. Nusrat Hussain was appointed, with the consent of the parties, to act as an Umpire in the matter. Clause 7 of the agreements entered between the parties enumerates as under:

> *7. ARBITRATION*
> *Any dispute/difference touching terms and conditions contained in this contract, failing mutual amicable settlement, shall be referred to arbitrators, one to be nominated by each party (Buyer and Seller) should the so nominated Arbitrators fail to arrive at an agreement, they (the Arbitrators) will nominate an Umpire <u>whose findings shall be final and binding on both the parties</u>;* (Underline ours)

8. Mr. Rizvi has also taken an objection that since the Award has been made beyond four months; hence, the same is liable to be set aside. Perusal of the record reveals that no such plea was raised by the appellants when the matter was proceeding before the Umpire, hence, this ground now raised by Mr. Rizvi with regard to limitation that the Award has been made after four months in our view is not available to him, as the appellants participated in the proceedings before the Umpire and have even furnished various details and documents required by the Umpire from time to time. It is a settled principle of law that if the parties to the arbitration continued to participate in the arbitration proceedings and no objection is raised during the course of the proceedings before the Arbitrator they are precluded from raising the said objection

afterwards as the same amounts to a waiver and the parties are precluded from objecting to an Award on the basis of four months rule. Reference in this regard may be made to the decision given in the case of WAPDA and another v. Messrs Khanzada Muhammad Abdul Haque Khan Khattak and Company **(PLD 1990 Supreme Court 359)** wherein it has been held as under:

> *12. It is now well settled that where the party had all along submitted to the proceedings of the arbitrator without any protest, he cannot turn round and object or insist that the award was made out of statutory period.*

Reference may also be made to the decision given in the case of Sh. Saleem Ali v. Sh. Akhtar Ali and 7 others **(PLD 2004 Lahore 404)** wherein a Division Bench of the Lahore High Court observed as under:

> *The principle of estoppel and acquiescence will be aptly attracted where a party having consented to arbitration by a person and participated in the proceedings before him subsequently attempted to challenge the jurisdiction of the arbitrator. The principle is based on the oft-quoted expression that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. We are, therefore, clearly of the view that since Sh. Murtaza Ali, having full knowledge of the facts, stood by and took his chance of an award in his favour and when it has gone against him, cannot be permitted, in law, to have it set aside on an objection which he never took before the learned Arbitrators. The position would have been different if he had participated in the proceedings under protest which is not the case here.*

9. Mr. Rizvi, during the course of the arguments, has further raised an objection that the respondent No.1 have agreed to the amount paid by the appellants in full and final settlement against 9993 bales sold by them to the appellants and have also given a ‘no claim’ Certificate to the appellants in this behalf. It is seen from the record that this aspect also has been discussed by the Arbitrator on

page-10 at point No.xi of para-20 of the Award in the following manner:

> *xi) There is no force in the CEC argument of 'no claim' Certificate because the clerk was neither so authorized nor understood what he was required to sign the form being in English which he did not know.*

Hence this objection raised by the learned counsel for the appellants is also repelled.

10. The Award clearly shows that the Umpire has firstly discussed the facts of the case in an erudite manner and thereafter has categorically stated in paragraph 14 that it was the CEC (Cotton Export Corporation) [the appellants] who after consulting the other parties have informed the Umpire, vide their letter dated 13.05.1992, that the name of the Umpire is acceptable to the Arbitrator of the respondent also and only thereafter the learned Umpire proceeded to decide the matter between the parties. It has been mentioned in the said Award that due to the unprecedented flood in the country there was a delay in finalizing the matter. It is also mentioned in the said Award that the contentions of both the two sides were thoroughly examined and only thereafter the Award was passed. The Umpire has not only discussed the current market position of the cotton but has also considered the previous market condition and previous market rates. The Umpire has mentioned that CEC (the appellants) have themselves admitted that in the preceding year they had revised the cotton rates because of certain contingencies.

11. It is also a matter of record that on the very first day of the meeting, held on 12.10.1992, the same was attended by duly authorized representatives of the appellants. It is also evident from

the record that the Umpire gave a number of opportunities to the appellants to clarify certain points raised during the discussion of the issues and has also given the appellants ample opportunities to furnish necessary documents in respect of their contentions. It is also seen from the Award that certain legal objections were raised by the appellants but the same were duly replied by the Umpire. It is also seen from the Award that the Umpire had made an in-depth scrutiny of the matter with regard to the price of the seed, cotton and lint fixed by the Government from year to year. The learned Umpire has also noted that there were some gray areas in the policy making and price fixing by the CEC (appellants). The Umpire also obtained a video cassette of the speech of the Finance Minister. The Umpire has also observed that beneficial policy decision and commitment of the CEC (appellants) could not be deviated, as the same would be unfair and unreasonable. The Umpire, after analysis of those facts, observed that the only fair formula for purchase of lint by the CEC (appellants) could be on the basis of market rates and it was in this background that the Umpire fixed the value of cotton supplied by the respondent No.1 to the appellants at Rs.555/- per maund.

12. It is a settled proposition of law that while examining the validity of an Award the Court does not act as a Court of appeal and a Court hearing objections to an Award cannot reappraise the evidences recorded by the Arbitrator, which otherwise are legally sound. From the Award, which has been made the rule of the Court, it is seen that no error or legal infirmity is apparent, which could warrant interference by this Court. All the relevant pieces of evidences and documents were thoroughly examined and discussed

in the Award by the Umpire, which in our view has rightly been made the rule of the Court, and therefore no illegality has been found in the order of the learned Single Judge. It has further been observed that the learned counsel for the appellants has failed to demonstrate that the Umpire has mis-conducted himself or the proceedings of the Award have been conducted in an illegal manner or the Award made by the Umpire is unreasonable or has improperly been procured or invalid. It is evident that the Umpire has discussed each and every aspect of the case by giving detailed reasons and after providing ample opportunity of hearing to the appellants, which in our view does not require any interference.

13. It has further been observed that in the clause 7 of the agreement, as reproduced above, it has categorically been mentioned that the findings of the Umpire shall be final and binding on both the parties, hence, on this aspect also, in our view, the appellants are estopped from raising objection on the Award made by the Umpire. Therefore, in our view, a sanctity is attached to the Award which could not be brushed aside until and unless it is shown that the Award has been improperly procured, invalid or the Umpire has mis-conducted himself in terms of Section 30 of the Act. The Court, in our view, could not sit as a Court of appeal in respect of the factual findings recorded by an Arbitrator until and unless the same are proved to be perverse and based on misreading or non-reading of the evidences, leading to miscarriage of justice. It is also a settled principle of law that while making an Award the rule of the Court, the Court has to examine the validity of the Award in a limited scope without deeply examining the same and if from the surface any error

or infirmity is apparent only then the Award is to be interfered with. The decisions relied upon by the learned counsel are found to be distinguishable from the facts obtaining in the instant appeal.

14. In view of what has been stated above, we do not find any legal infirmity in the order passed by the learned Single Judge whereby the Award has rightly been made the rule of the Court and no interference in this regard is warranted. We, therefore, uphold the order passed by the learned Single Judge and dismiss this appeal, being devoid of any merit, alongwith the listed application.

JUDGE

JUDGE