

# IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1602 of 2016

Plaintiff: M/s Sadat Business Group Ltd  
Through Mr.Abdul Qadir Mirza, Advocate

Defendant No.1: Federation of Pakistan  
Through Gul Faraz Khattak, D.A.G

Defendant No.2: M/s Trading Corporation of Pakistan Ltd  
Through Mr.Atir Aqeel Ansari, Advocate

Date of hearing: 29.08.2024

Date of decision: 13.09.2024

## J U D G M E N T

**ARBAB ALI HAKRO, J.** This is a suit pursuant to an Arbitration Award dated 27.6.2016 (“Award”) presented in this Court on 01.7.2016. Through this order, the objections filed by Defendant No.2 (“Objector”) are being decided as to whether the objections are to be sustained or the Award is to be made a Rule of the Court.

2. Brief facts of the case are that the plaintiff (“Claimant”) is a business group based in Dubai and other countries engaged in the supply of commodities. They operate through their legal agent, M/S M.M Ellahi Traders, in Pakistan. The Objector executed a “Contract” with the Claimant to supply 50,000 M.T. white sugar. In accordance with the contract, the Claimant submitted a performance guarantee in the sum of US\$ 598,000/- to the Objector, against which the Objector, as per the terms of the contract, was bound to open a letter of credit within five working days. However, the Objector failed to do so and took two weeks to open the letter of credit, which was contrary to the terms of the contract. The date of shipment was agreed upon as 18.7.2010, but due to heavy rainfall at Santos, Brazil Port, the shipment was delayed. The Objector appointed a pre-shipment inspection agency, NMCI, for lab sampling, vessel inspection, and loading. The agency submitted its report confirming the availability of stock at the port of Brazil. The Objector was informed by the supplier about the shipment, and the only reason for the delay was non-compliance with banking instructions, which was the Objector's responsibility. However, without acknowledging their fault, the Objector cancelled the agreement without invoking Clause-27 of the Contract, which envisages arbitration proceedings. It is further stated that the Claimant

repeatedly approached the Objector to restore the contract but to no avail. The Claimant was willing to supply the consignment to the Objector at the committed price. It was further stated that the Claimant filed a Constitutional Petition in this Court and obtained an interim order. Still, considering the remedy available under Clause-27 of the Contract, the said Petition was withdrawn to initiate arbitration proceedings, resulting in Suit No.1134/2011 being filed before this Court.

3. The Objector filed his written statement in which the execution of the contract was not denied, but it was stated that the entire quantity of 50,000 M.T sugar was to be shipped to Pakistan within six weeks from the date of opening of the letter of credit on 15.6.2010. The Objector also provided the required dates of shipments from 06.7.2010 to 29.6.2010. Regarding the inspection by NMCI Pakistan (TCP's nominated PSI), the said company informed the Objector that the Claimant did not offer any stock of sugar for inspection. It was further stated that the Claimant failed to nominate the name of a particular vessel. The Claimant also failed to fulfill the contractual obligations; therefore, the Objector cancelled the contract vide letter dated 31.7.2010 and forfeited the performance guarantee amount.

4. after hearing both parties' arguments, this Court, by an Order dated 09.5.2013, appointed a Sole Arbitrator, Mr Justice ® Ali Aslam Jafferi, to decide the dispute between the parties. Here, it would be relevant to reproduce the concluding paragraph as follows:

*"18. As a result of above discussion, I feel no hesitation in my mind that despite cancellation/termination of contract the provision of arbitration survives and agreement for arbitration contained in the contract is a separable part of contract, therefore, it would be fair and square to appoint Arbitrator in this case. Consequently, Justice (retired) Mr.Ali Aslam Jafferi is appointed Arbitrator to resolve and arbitrate the dispute between the plaintiff and defendant No.2. The suit is disposed of accordingly."*

5. Before the learned Arbitrator, the Claimant, in his claim, reiterated the same facts as stated above, challenging the act of the Objector in cancelling the contract, forfeiting the amount of the performance bond, and blacklisting the Claimant. The Claimant sought damages amounting to US\$ 1,000,000, plus US\$ 500,000, and US\$ 50,000,000 on various counts, in addition to the costs of the proceedings.

6. Conversely, the Objector filed its objections/written statement, justifying its actions and also filed a counterclaim for an amount to be recovered from the Claimant as damages based on a subsequent tender. The amount of said damages, as claimed by the Objector, is shown as US\$ 86,856,666.30.

7. Learned Counsel for the Objector has contended that the learned Arbitrator has misconducted himself while making the Award and erred in declaring that the Claimants failed to perform the contract due to port congestion and heavy rains. However, it is evident from the record that non-performance was due to the Claimant never having acquired the stock of sugar to be supplied. Hence, the factor of force majeure is irrelevant. He has further contended that the learned Arbitrator arbitrarily held that time was not the essence of the contract, and such findings are not supported by any evidence on record. He has further contended that even if time was not the essence of the contract, the termination of the contract was justified as the Claimant failed to establish any preparation towards the performance of a contract. He has further contended that learned Arbitrator failed to consider that once major terms of contract are breached by any of the party the aggrieved party to the contract has no obligation to issue prior notice and conduct hearings before terminating the contract, which has already been breached by the Claimant. Therefore, the Award is without lawful authority and must be set aside by this Court. He has relied upon the cases reported as **2006 YLR 589 to support his contention.**

8. Conversely, learned counsel for the Claimant has contended that the Award has been passed in accordance with law and that damages were awarded to the Claimant by rule of thumb; therefore, the same may be made as Rule of Court. He relied upon cases reported as **2023 SCMR 169, PLD 2011 SC 506, 2021 CLC 666, 2024 SCMR 1271, PLD 1991 Lahore 400, PLD 1993 SC 773, 1983 SCMR 559, PLD 1959 Dacca 536.**

9. I have heard both the learned counsel and perused the record. The perusal of the Award reveals that the learned Arbitrator framed issues and both the Claimant and Objector were given the fullest opportunity to present their respective cases. The parties presented their versions and evidence, after which the Arbitrator passed an Award. Learned Arbitrator has only awarded/refunded an amount of \$598,000/- being the amount of Performance Guarantee forfeited by the Objector. Here, it would be conducive to reproduce the relevant findings of the learned Arbitrator as under: -

*“After a careful examination of the evidence on record and considering the arguments of the learned counsel for the parties and the case law cited by them, I have reached at a conclusion that time was not essence of the contract and that non-supply of the goods within the specified period was due to fore majeure, which fact is also evidence from the case of M/s Younnan Coal Chemical Industry Group Company Ltd Vs. Trading Corporation of Pakistan, wherein it appears that in the month of July 2010, due to heavy rains, floods and high tides the conditions at the ports in Brazil were such that the ships could not dock and as such the*

*proposed quantity of sugar to be dispatched to the defendant/TCP could not be loaded. I find force in the contention of Mr. Sarfaraz Ali Metro learned counsel for the defendant/TCP that the Award passed by Arbitrator(s) in a case is not binding upon the Arbitrator in other proceedings, however, this fact cannot be ignored that the factum of force majeure causing hindrance in the supply of the sugar at the relevant time on which the said matter was decided is one way or the other accepted by defendant/TCP particularly when the appeal filed against the said Award was not pressed on merits and the Award which was passed while taking into consideration the factum of force majeure at the relevant time and place was not disputed by defendant/TCP and became Rule of the Court. The statement of witness Syed Salman Ahmed that he was forced by TCP authorities in view of some pressure from the Government and Media to give obliging statement in favour of TCP and against the contractor/supplier though vehemently questioned and alleged to be false by the learned counsel for the TCP, cannot be ignored altogether. Even if it is excluded from evidence being the statement of a person alleged to be a liar, the admitted position of the case between parties that cancellation of contract without notice and without providing him a chance of hearing to the plaintiff/Claimant, and it having been awarded to another party on the same day i.e 31.7.2010, despite being holiday in hot haste speaks for itself. As such the defendant/TCP was not entitled to forfeit and encash the Performance Guarantee as being claimed by it in terms of Paragraph No.13 of the Contract. Thus the forfeiture is neither legal nor justified nor equitable. Issues No.1 to are replied accordingly n the above terms.”*

10. I have carefully examined the Award, and in the light of the contention of learned counsel for the Objector, I have focused on the points regarding the essence of time in the contract and the concept of force majeure. The learned Arbitrator concluded that the time for the supply of goods was not a crucial element of the contract, this means that the delay in the supply of goods does not constitute a breach of contract. The learned Arbitrator found that the non-supply of goods within the specified period was due to force majeure. Force majeure refers to unforeseeable circumstances that prevent someone from fulfilling a contract. In this case, heavy rains, floods, and high tides at the ports in Brazil in July, 2010 prevented the ships from docking and loading the sugar.

Section 30<sup>1</sup>, allows an award to be set aside if there is misconduct by the Arbitrator. Misconduct can include legal misconduct, where the Arbitrator makes an error in law, or procedural misconduct, where the Arbitrator fails to follow proper procedures. In this case, the Arbitrator's conclusion that time

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<sup>1</sup> The Arbitration Act 1940

was not the essence of the contract and that the delay was due to force majeure does not appear to constitute misconduct. The learned Arbitrator carefully examined the evidence and considered the arguments and case law before reaching this conclusion.

11. In the context of the contract under consideration, it is imperative to understand that time was not the essence of the contract. This legal principle implies that the stipulated time for performing contractual obligations was not a fundamental term of the contract. The learned Arbitrator, after a meticulous examination of the evidence and documents presented by both parties, concluded that the delay in the supply of goods did not constitute a breach of contract. The Arbitrator's decision was influenced by the fact that the delay was caused by unforeseeable and uncontrollable circumstances, specifically force majeure events such as heavy rains, floods, and high tides at the ports in Brazil, which prevented the docking and loading of the ships. Therefore, the learned Arbitrator determined that the non-supply of goods within the specified period was excusable and did not warrant the forfeiture of the Performance Guarantee by the Objector/TCP. This interpretation aligns with the legal understanding that unless explicitly stated otherwise, time is not considered the essence of a contract, and delays caused by force majeure do not constitute a breach of contractual obligations.

12. The termination of the contract by the Objector, in this case, the Objector, was a significant point of contention. The learned Arbitrator found that the termination was executed without proper notice and without providing the plaintiff/claimant an opportunity to be heard. This lack of due process was highlighted by the fact that the contract was awarded to another party on the same day, July 31, 2010, which was a holiday, indicating a hasty and potentially unjust decision. The learned Arbitrator noted that the Objector's actions were influenced by external pressures from the government and media, as evidenced by the statement of witness Syed Salman Ahmed, who claimed he was coerced into giving a statement favourable to TCP/Objector. Although the Objector vehemently denied these allegations, learned Arbitrator could not entirely disregard the possibility of undue influence. The learned Arbitrator concluded that the termination of the contract and the subsequent forfeiture and encashment of the Performance Guarantee were neither legal, justified, nor equitable. This decision underscores the importance of adhering to contractual obligations and ensuring that any termination is carried out fairly and transparently, respecting the rights of all parties involved.

13. The Performance Guarantee in a contract is a financial assurance that the contractor will fulfill their obligations as stipulated in the Contract/agreement. In this case, the amount of the Performance Guarantee was a critical dispute. The Objector sought to forfeit and encash the

Performance Guarantee, claiming that the Claimant had failed to supply the goods within the specified period. However, the learned Arbitrator found that the delay was due to force majeure events, which were beyond the control of the Claimant. The Arbitrator also noted that the termination of the contract by the Objector was carried out without proper notice and without providing the Claimant an opportunity to be heard. This lack of due process, coupled with the hasty contract awarding to another party on the same day, led the Arbitrator to conclude that the forfeiture of the Performance Guarantee was neither legal, justified, nor equitable.

14. In the above-given facts and circumstances, the controversies have finally been settled through the impugned Award, and there is no illegality or irregularity on the face of the record. Further, the Award is not hit by Section 30. Arbitration is a forum of the parties' own choice and is competent to resolve the issues of law and the facts between them, which opinion/decision should not be lightly interfered with 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<sup>2</sup>. While hearing the objections and examining the Award, the Court cannot sit as a Court of appeal on the Award rendered by the Arbitrator and substitute its own view for one taken by the Arbitrator<sup>3</sup>. In the case of the National Highway Authority<sup>4</sup> While dealing with the grounds for setting aside the Award, the Supreme Court of Pakistan has held that *the Award clearly deals with all the contentions raised by the petitioner and rightly holds that the pre-bid meeting forms part of the Contract document. Besides, we agree with the interpretation of clauses 19.4 and 14.2 as given by the Arbitrators. We are also mindful that there is a limited scope of judicial review of the 'Award' announced by an Arbitrator. An arbitration Award is a final determination of the dispute between the parties. The grounds for challenging an Award are very limited. There are three broad areas on which an arbitration Award is likely to be challenged, i.e. firstly, jurisdictional grounds (non-existence of a valid and binding arbitration agreement); secondly, procedural grounds (failure to observe principles of natural justice); and thirdly, substantive grounds (Arbitrator made a mistake of law).*<sup>1</sup> *The review of an arbitration Award cannot constitute a re-assessment or reappraisal of the evidence by the Court. Courts' over-intrusive approach in examining the arbitral Awards must be avoided.*<sup>2</sup> *The Court is not supposed to sit as a court of appeal and must confine itself to the patent illegalities in the Award, if any.*<sup>3</sup> *The jurisdiction of the Court under the act is supervisory in nature. Where two findings are possible the Court cannot interfere with the*

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<sup>2</sup> Anjum Aqeel VS. Latif Muhammad Chaudhry and Others (2023 S C M R 1361)

<sup>3</sup> A. Qutubuddin Khan vs. Chec Millwala Dredging Co. (Pvt.) Limited (2014 CLD 824)

<sup>4</sup> National Highway Authority through Chairman, Islamabad vs. Messrs Sambu Construction Co. Ltd. Islamabad and others (2023 S C M R 1103)

*Award by adopting its own interpretation. Interference is only possible if any breach of duty or any irregularity of action is inconsistent with the general principles of equity and good conscience.<sup>4</sup> The Arbitrator alone is the judge of the quality as well as the quantity of the evidence. He is the final arbiter of disputes between the parties. He acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight.<sup>5</sup> By applying the afore-noted principles of law on the subject and considering the petitioner's objections within the limited scope of Court's jurisdiction in testing the validity of Award this Court is not supposed to sit as a court of appeal and make a roving inquiry and look for latent errors of law and facts in the Award. The arbitration is a forum of the parties' own choice. Its decision should not be lightly interfered with by the Court until a clear and definite case within the purview of section 30 of the Act is made out. We do not find any jurisdictional, procedural or substantive error patently floating on the record that could justify interference by this Court.”*

15. For the foregoing reasons as discussed above, the objections of the Objector are not sustainable under the law. Therefore, the same are **dismissed**, and the Award is made the rule of the Court. The Office is directed to prepare the decree accordingly.

**JUDGE**