Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

R.F.A. No.43092 of 2022

Employees Old Age Benefit Institution

Versus

M/s Mughals Pakistan (Pvt.) Ltd., etc.

JUDGMENT

Date of hearing:	**11.10.2023**
Appellants by:	M/s Baqir Hussain, Mahmood Ahmad Rehan, Mustansar Ashraf and Shan Saud, Advocate for the Appellant and Respondent No.2 in RFA No.37623/2022. M/s Umar Zia-ud-Din, Raza-ur-Rehman, Talha Asif and Sajid Hussain Qureshi, Advocates for the appellant in RFA No.37623/2022.
Respondents by:	Barrister Hassan Nawaz Sheikh, Mr. Bakhtawar Bilal Soofi, Syed Shahzad Hussain Wattoo, Mr. Shamsha Ali, Muhammad Baqir Hussain and Ali Ashraf Mughal, Advocates for respondent No.1 in instant appeal and RFA No.37623/2022.

[Details of hearings conducted: **9th, 10 and 11th October 2023]**

ASIM HAFEEZ J. This and connected appeal bearing *R.F.A No.37623/2022* are directed against decision of 18.05.2022, whereby Civil Court, exercising powers under sections 14 and 17 of the Arbitration Act 1940 ('**Act, 1940**'), made Award dated 13.07.2021 Rule of the Court ('**Award**'). Aggrieved of the order, two separate appeals are preferred, one

by Employees Old-Age Benefit Institution ('**EOBI**') and other by Pakistan Real Estate Investment and Management Company (Pvt). Ltd. **('PRIMACO**').

2. Facts, essential for the purposes of adjudication of subject matter appeals, are that EOBI [appellant], a statutory corporation, established and functioning in terms of the provisions of Employees Old Age Benefit Act 1976, variously offered diverse opportunities for investments across Pakistan and one of such venture, being relevant for the purposes of present controversy, was the construction of EOBI Hotel and Business Complex Project, Lahore. ('Project'). Respondent No.1 participated in the bidding process and found most competitive. Upon fulfilment of pre-contractual requirements and procedures contract was awarded on 19.04.2011, bearing Contract No.066/01CW/2011 ('hereinafter referred to as the **Contract**'), and contemporaneously multiple other documents / agreements were executed, all forming part of the main contract. Contract was executed between EOBI [identified in the contract as *Employer*] and respondent No.1 [identified in the contract as General Contractor]. Notably, Contract, on behalf of the Employer, was executed through EOBI's wholly owned subsidiary, i.e., Pakistan Real Estate Investment and Management Company (Pvt). Ltd [Appellant in RFA No.37623/2022]. Contractual arrangement proceeded on even keel before encountering obstruction – causes thereof need no reference being irrelevant for the purposes of present controversy. Disputes were papered through reaching a compromise, whereby extension in performance of timelines were allowed – commonly referred as first and second extensions. Pact reached was short lived and soon differences

resurfaced, and this time events led to the calling for the enforcement of bank guarantees. Respondent No.1 approached Civil Court by invoking jurisdiction under section 20 of Act, 1940 – clause 20.6 of Particular conditions of Contract, dealing with Arbitration. Most crucial fact was that petitions under section 20 *ibid,* were directed against concerned Financial Institution(s) and other respondent was PRIMACO [represented to be the wholly owned subsidiary of EOBI] - *EOBI was not the party to said petitions and it never was impleaded as party thereto*. With the concurrence of the parties, recorded in the order of Civil Court of 24.04.2019, matter was referred to the Arbitrators ('Arbitral Tribunal'), in following terms,

> *The arbitrators will settle all outstanding disputes arising out of the agreement between the parties, including the issue of encashment of bank guarantee, and till such time status qua shall be maintained.*

3. Arbitration was conducted between PRIMACO and respondent No.1. Arbitral Tribunal rendered final Award on 13.07.2021. Respondent No.1 sought declaration for making it rule of the Court. PRIMACO filed objections to the Award *inter alia* under sections 16, 17, 30 and 33 of the Arbitration Act, 1940. On 12.11.2021, EOBI filed application under Order 1 Rule 10 of Code of Civil Procedure, 1908 (CPC) and sought permission to be impleaded as party to the proceedings. Application was contested by the respondent No.1 but same was allowed vide order of 06.01.2022.

4. Upon impleading EOBI as party, the Court allowed EOBI to submit objections. Needful was done and thereafter objections of PRIMACO and EOBI were dismissed, and Award was made Rule of the Court on 18.05.2022. Hence instant appeals.

5. Learned counsel appearing for appellant ('PRIMACO') of RFA No.36763/2022, pleads impropriety and invalidity against Award on *inter alia* following grounds:

(a) No notice to the Engineer was issued by the Contractor before seeking extension of time and raising claim of additional payments, which notice was mandatory in terms of clause 20.1 of the Contract. Since no notice was issued within 28 days, hence, no claim for extension of time could be allowed. It is alleged that Judgements relied upon and referred were not properly appreciated and mandatory condition of notice was erroneously reduced as a routine requirement.

(b) Quantum of claim allowed is questioned on the premise that neither requisite evidence was produced, nor exorbitant claim of additional payments was justified. And determination of claim was presumptive and not objective.

(c) Award was deficient in material details and matter was required to be remitted to the Tribunal in terms of section 26-A of Arbitration Act 1940.

6. Learned counsel appearing for respondent No.1 in both appeals, at the outset iterated the significance of settlement agreement of 12.03.2020, wherein extension in time for performance of works was granted, subject to the conditions prescribed. Adds that absence of notice under section 20.1, even if treated as requisite condition for raising claim of extension of time and additional payments, is inconsequential since the lapse, if any, otherwise stood acquiesced in wake of execution of the settlement agreement. Adds that waiver qua the requirements of clause 20.1 was even endorsed by the Board of EOBI. Learned counsel referred to few clauses of the settlement agreement, which, for facility, are reproduced hereunder,

SETTLEMENT AGREEMENT of 12.03.2020

……. The Parties, notwithstanding the claim for extension of time (EOT) pending before the Tribunal, for the purpose of continuing the Project agree on an EOT without financial effect for a period of fifteen months (15) from the date of release of payment as envisaged under clause 4 below. The said extension is a time period to complete remaining works on the Project other than on hotel and independent of Hotel operator.

> This agreement covers only time extension and financial implication arising out of same will be presented to the Tribunal for determination and award.

7. Submits that Arbitral Tribunal was required to determine the quantum of additional claim, which was considered and determined based on the empirical evidence available with the Tribunal and furthermore Tribunal had rightly relied upon evaluation of claim of additional payments by the Engineer with respect to claims raised and allowed at the time of grant of first and second extensions of time. Learned counsel further submits that no case of misconduct of Arbitral Tribunal or invalidity of Award was made out and no illegality or jurisdictional error was committed by the Civil Court while exercising powers under section 17 of the Act, 1940. Adds that supervisory jurisdiction available, to adjudge Award, does not enable court to carry out forensic analysis of quantum of claims awarded. Submits that claims awarded otherwise commensurate with the quantum of additional payments allowed while allowing first and second extensions. Adds that Civil Court extensively dealt with all the objections. Learned counsel placed reliance on following decisions reported as *FEDERATION OF PAKISTAN through D.G. National Training Bureau. Vs. MESSRS. JAMES CONSTRUCTION COMPANY (PVT) Ltd. (**PLD 2018 Islamabad 1**), "Al-Haj Sheikh Abdul Hafeez and Another. Vs. SUHAIL ZAMAN and 6 others." (**2020 CLD 505**), "T.M.A. KOHAT. VS. IFTIKHAR ALI SHAH." (**2020 CLC 1243**), "CHAIRMAN WAPDA and another. Vs. MESSRS SYED BHAIS (PVT.) LTD. and another." (**2011 CLC 841**), "STANDARD INSURANCE COMPANY LTD., MULTAN through Manager. Vs. FAZAL COTTON INDUSTRY and others." (**2000 MLD 1564**), "INJUM AQEEL. VS. LATIF MUHAMMAD CHAUDHRY and others." (**2023 SCMR 1361**) and unreported judgment passed in case titled as "Rifle Factory. Vs. M/s Tal Manufacturing & on 24 February, 2022" Calcutta High Court, "Execution Application No.09 of 2019 (China International Water & Electric Corporation (CWE) P.R. China. Vs. National Highway Authority"*

8. Learned counsel appearing for appellant, EOBI, in RFA No.43092/2022 and for respondent No.2 in connected appeal, submits that contract was executed between respondent No.1 and EOBI, which *inter alia* created rights and obligations for EOBI, but same was not impleaded as party to proceedings under section 20 of the Act, 1940, nor represented before the Arbitral Tribunal. Submits that Award granted, without EOBI, was a nullity. Adds that significance of EOBI was acknowledged by Civil Court while allowing its application under Order 1 Rule (10) CPC and once EOBI was treated as proper and necessary party, it was imperative for the Court to declare the Award invalid, procured without the presence of EOBI. Adds that filing of petition under section 20 of the Act, 1940 without EOBI constitutes gross illegality and Court, in the circumstances, lacked jurisdiction to entertain application and refer the matter to Arbitral Tribunal. Submits that factum of non-fulfilment of requirements under section 20, *ibid*, were not appreciated. On merits, learned counsel opposed the quantum of claim allowed, calling it unrealistically exorbitant Award.

9. While exercising opportunity to rebut, learned counsels for respondent No.1 submit that EOBI – being the principal - had authorized PRIMACO - agent – to act for and on its behalf. Adds that agent was none other than a wholly owned subsidiary of EOBI, which signed Contract on behalf of EOBI, procured bank guarantees in its name and even was allowed to sign settlement agreement, terms and conditions whereof were accepted by the Board of EOBI. Adds that agent otherwise carried out the assignment in accordance with the terms and conditions of Agency Agreement. Adds that principal in fact participated, being represented through the agent, in the

arbitration proceedings and agent had not only contested the claim but also raised counter claim. Submits that principal cannot, at this stage, question the acts and omissions of the agent, when every act and decision of the agent was acknowledged, endorsed and approved by the Board of EOBI. Submits that EOBI entered in Contract through PRIMACO, and latter was fully competent and authorized to contest the claim before the Arbitral Tribunal, and to raise objections to the Award. Reference is made to various judicial decisions, in the context of the relationship of Principal-Agent and repercussions of the acts performed by Agent, which decisions are reported as, *"National Insurance Property Development Company Limited Vs. NH International (Caribbean) Limited"* **[Claim# CV2008-04881]**. "National Highway Authority through Chairman, Islamabad Vs. Messrs Sambu Construction Co Ltd Islamabad and others" **(2023 SCMR 1103)**. "Concentrate Manufacturing Company of Ireland and 3 others Vs. Seven-up-Bottling Company (Private) Limited and 3 others" **(2002 CLD 77)**. *"Abdul Hameed and others Vs. Abdul Baqi and others"* **(2021 CLC 1597)**. *"Defence Housing Authority, Islamabad Vs. Multi-National Venture Development (Pvt) Ltd*" **(2019 CLD 566)**.

DETERMINATION BY THE COURT

10. Heard and record perused.

11. ***Submissions recapitulated***; In essence following objections were raised against the order of the Civil Court and the Award. Firstly, non-compliance of requirement of notice to the Engineer, in terms of clause 20.1 of the Contract was pleaded. Secondly, objections were raised against quantum of the claim awarded in the context of allegation of deficient evidence in support of claim of additional payments. Third and most critical

was the cause and effect of absence of EOBI as party before the Arbitral Tribunal and proceedings initiated under section 20 of the Act of 1940.

12. After hearing the counsels and assessing the merits of the objections raised, broadly summed up in preceding paragraphs, it appears that allegations of default qua contractual discipline, absence of fulfilment of procedural requirements envisaged under clause 20.1 of the Contract and scope of determination of monetary claims, in the context of objections of deficient evidence and absence of convincing documentary evidence to prove claim of additional payments, are material issues but considering the context of scope of jurisdiction available under section 30 of the Act, 1940, we consider that third question is most crucial and determination thereof is fatal to the legality and sustainability of the decree-cum-award. Hence, we are deciding these appeals in the context of third objection – effect of absence of EOBI, notwithstanding being the party to the agreement, before the Arbitral Tribunal and for the purposes of proceedings under section 20 of the Act, 1940. Upon decision of third issue, other two issues would have had academic importance only.

13. Unchallenged facts are that EOBI was the party to the contract with respondent No.1; EOBI was obligated to perform the contractual terms and conditions prescribed, which is otherwise the beneficiary of the project and owns the liability to discharge the obligations embodied therein. There is no dispute that contract was executed through PRIMACO, represented as wholly owned subsidiary of EOBI. Article 7 of the Contract provides an option of assignment of rights and obligations, subject to the conditions prescribed. It is expedient to reproduce Article-7 of the Contract hereunder,

> *Article7: "No party may assign this Agreement or any of its rights and obligations hereunder without the prior consent of the other party".*

14. No assignment in terms of Article 7 took place. Article 6 of the Contract does not permit oral modification – and no written agreement is shown between PRIMOCO and EOBI to shift the rights and obligations of contractual arrangement from EOBI to a wholly owned subsidiary. Respondent No.1 had not pleaded that rights and obligations of EOBI were assigned to PRIMACO, and nor the counsels for PRIMACO had pleaded transfer of rights through alleged assignment. Undisputedly, EOBI was not impleaded as respondent before Civil Court during proceedings under section 20 of the Act, 1940 – only those Financial Institution(s) were impleaded which had furnished bank guarantee and other respondent was PRIMACO.

To address this issue, learned counsel intensely emphasized on the terms of Agency Agreement, executed between EOBI and PRIMACO, who, additionally, emphasized with reference to the factum of acknowledgement of the Board of EOBI regarding pending Arbitration proceedings, appointment and replacement of Arbitrator(s) and approval extended for the execution of settlement agreement. Learned counsel elucidated principles governing the principal-agent relation and respective rights and obligations, especially in the context of the protections available to third parties. Efforts are found unproductive. This case has peculiar features and primarily the context is the scope of section 20 of the Act, 1940 and effect of not impleading one of the parties to the agreement as party to the proceedings under section 20, *ibid*. At the expense of taxing the judgment, it is reiterated, in the context of the case at hand, that the relationship of principal and agent

need to be examined in the context of section 20 of the Act 1940, and to be interpreted in the company of proximate facts, which peculiarity of facts distinguished the ratio of the judgments referred, wherein generic principles with respect to principal-agent relationship were discussed. Post-award events have had bearing to the controversy, which were that EOBI had separately preferred appeal bearing RFA No.43092/2022 and separate appeal was preferred by PRIMACO, against single order. Civil Court allowed application of EOBI, upon being convinced that EOBI was a necessary / proper party for the purposes of proceedings under sections 14 and 17 of the Act, 1940. Findings recorded in paragraph 9 of the order of 06.01.2022 are sufficient to substantiate the significance of the presence of EOBI. It is expedient to reproduce paragraph 9, which read as,

> *"9. Perusal of record reveals that EOBI is related an institution, which was established in the year 1976 under Employees Old-Age Act. It is purely for welfare of workers, Old-Age grant, survivor of pensioners and invalidity pensions. Respondents/PRIMACO is subsidiary of the petitioner/institution and EOBI has certain portfolios of investment to meet the expenses of pensionary benefit and matter incidental to meet the expenses. Petitioner (EOBI) engaged the respondent/PRIMACO in accordance with law. Petitioner/EOBI being an entity having ownership and control of the defendant/respondent is a necessary/proper party. Petitioner/EOBI being having control of the defendant has the valuable rights, which can be effected if the petitioner has not made the party. The petitioner has the right to determine the legality of the alleged said matter of the plaintiff (M/s Mughals Pakistan Pvt. Ltd). Petitioner/EOBI engaged as an agent (M/s Pakistan Real Estate Investment & Management Company Pvt. Ltd) to look after under agency agreement dated 01.01.2013. As per agreement, clause 4 the M/s PRIMACO is liable to implement the projects assigned by the EOBI as per time limit and budget approved by the EOBI. The project name is EOBI Hotel and Mixed-use Development; which is also connected the petitioner in the instant petition/suit being a proper party. The said project is still under construction and EOBI is being deprived of a handsome income opportunity since a lot of years, which is also connect the alleged matter. Main contract shows that the petitioner/EOBI as a employer of PRIMACO vested the right to be a necessary and proper party. The matter of Bank guarantee also relates the petitioner/EOBI as a chairman, EOBI as a beneficiary of said guarantee. Under Article 10(A) of the Constitution of Pakistan, the petitioner/EOBI has the legal entitlement for hearing and provides the record as required by the court to resolve the said controversy. Learned counsel in this regard, reference may be made to the cases law **2004 MLD 1395 and 2007 SCMR 882**, which is relied according to the said propositions. In view of the above discussion,*

> *present petition of EOBI stands accepted. Now, to come up for amended petition u/s 14 r/w 17 of the Arbitration Act, 1940 with impleading the petitioner/EOBI as party for 11.01.2022."*
>
> *[Emphasis supplied]*

15. Whether in view of the findings recorded and reasoning extended to justify the order of impleading EOBI as party to the proceedings under sections 14 and 17 of the Act, 1940, an act of making the Award rule of the court, which award was passed in absence of EOBI, attracts legitimacy. Notably, EOBI was allowed to file objections to the Award and one of the objection was that since EOBI was not impleaded as party before Tribunal therefore matter be remitted to the Arbitrators. Evidently, this conspicuous contradiction could not be reconciled, where EOBI was declared as necessary / proper party for proceedings under sections 14 and 17 of Arbitration Act, 1940 and conversely, while adjudging the validity of the Award, same was treated as unnecessary and improper party, either before the Arbitration Tribunal or for the purposes of proceedings under section 20 of Act, 1940. There is no cavil that upon allowing EOBI as necessary/proper party to the proceedings, upon granting permission to file objections the mutually exclusive status of EOBI and PRIMACO was acknowledged, by dint of the judicial order – which order was later disregarded while dealing with the objections of EOBI. Indubitably, the myth that PRIMACO, being a wholly owned subsidiary of EOBI, was allegedly an *alter ego* of EOBI was dismissed in the wake of impleading of EOBI as party to proceedings under sections 14 and 17 of the Act, 1940. In these circumstances, it is an absurdity to treat PRIMACO as an *alter ego* of EOBI for purposes of one set of proceedings – in the context of proceedings under section 20 of Act, 1940 - and differently for the purposes of proceedings under sections 14 and 17 of

Act, 1940 – where EOBI was declared as necessary/proper party. If PRIMACO was an *alter ego* of EOBI, as alleged, whether both entities can prefer the appeals separately. No objection was raised by counsel for respondent No.1 with respect to filing of two separate appeals, preferred by EOBI and PRIMACO. Now, context of section 20 of the Act, 1940 needs sharper focus, which provision is reproduced hereunder for facility,

> ***Section-20***. ***Application to file in Court arbitration agreement. –***
>
> ***(****1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.*
>
> *(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.*
>
> *(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.*
>
> *(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.*
>
> *(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.*
>
> [Emphasis supplied]

16. In terms of sub-section (1) of section 20 of the Act, 1940, apparently four conditions must be satisfied before the jurisdiction is exercised by the court:-

(i) There must be arbitration agreement between person(s).
(ii) Agreement was entered before the institution of any suit with respect to subject matter of the agreement.
(iii) A difference has arisen to which agreement applies.

(iv) *And they or any of them*, instead of proceeding under Chapter II, may apply to the Court having jurisdiction in the matter to which the agreement relates.

17. In the instant case compliance of aforesaid conditions are found missing. By no stretch of imagination PRIMACO could be construed as party to the agreement – by pulling it within the ambit of the expressions, *'they"* or *'any of them'*. Command of sub-section (3) of section 20 of the Act, 1940 is clear, which directs that *'the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants*. Civil Court, before referring the matter to Arbitral Tribunal, failed in its duty to ensure notice to the party to the agreement – EOBI. Arbitrators otherwise could only be appointed with the consent of the parties to the agreement but here presence of one of the party to the agreement [EOBI] was conspicuous by its absence – [requirement of sub-section 4 of section 20 of the Act, 1940 was not fulfilled]. This crucial aspect escaped attention of the Civil Court while exercising jurisdiction under sections 14 and 17 of the Act, 1940. We have examined the order impugned and find discussion on this issue deficient, conjectural and superficial – reference is made to paragraphs 20 to 25 of the order. Mere knowledge of the Board of EOBI would not satisfy the requirements of section 20 of the Act, 1940 nor condone the legal flaw occasioned upon referring matter to Arbitral Tribunal, without impleading EOBI as party. In the context of the controversy, reference is made to the decision reported as *"Inayatullah Khan Vs. Obaidullah Khan and others"* (1999 SCMR 2702), relevant observations are reproduced hereunder,

> *"Now we come to the crucial and decisive point in the case which is, 'as to whether arbitration agreement or for that matter a consequential award would be valid and binding when it has not*

> *been joined by some of the co-sharers and interested persons?'. The answer would definitely be no, because such an award would be invalid, void and could not be made basis of a decree."*

Some pertinent observations are also found in the case of *"Sh. Muhammad Saleem Vs. Saadat Enterprises"* (2009 CLC 291), relevant portion of the decision is reproduced hereunder as,

> *"The arbitration award has been announced without examining that no written agreement was in existence on behalf of company for referring the matter to arbitration. Khawaja Safdar Ali, had no authority to refer the matter to arbitration. The award, on this score alone, is not sustainable in the eyes of law and rightly held so by learned trial Court. Participation in arbitration proceedings, if any, by Khawaja Safdar Ali, does not validate the proceedings, if his participation is without a valid authority. The findings of learned trial Court that award cannot be made rule of the Court, as the arbitration agreements, which resulted into arbitration proceedings and an award, have not been signed on behalf of company, are devoid of any illegality or legal infirmity. The reasons, which the arbitrators have submitted, are also erroneous conclusions."*

18. Learned counsels for the decree-cum-award holder emphasized that PRIMACO is wholly owned subsidiary of EOBI, otherwise being EOBI's agent and duly authorized, obligated, and competent to represent EOBI, which facts create binding obligations for the principal - EOBI. Besides referring to various clauses of the Contract Act, 1872, much emphasis was laid on the terms of Agency Agreement – in fact two agency agreements are available on record which are dated 29.06.2007 and 01.01.2013, terms of reference qua the scope of services is by and large the same. And it is not the case of the decree-cum-award holder that same was not aware of the terms of Agency Agreement, which, while making submissions, relied upon the contents of the Agency Agreement. Various clauses of the agency agreement of 01.01.2013 are reproduced hereunder for convenience, which read as,

> *Whereas: -*
> *(A) The Principal is a body corporate providing services to the registered establishments and their employees under the Employees Old-Age Benefit Act 1976.*

(B) The Agent is wholly owned subsidiary of the Principal having expertise and experience in Management, Development and Operations of real estate investment and management services
(C) The Principal and the Agent have agreed that the Agent shall, inter alia, carry out obligation in its respective field of expertise on behalf of the Principal in accordance with the term and conditions set out in this Agreement.

1.1 "Scope of Services" means the professional services (herein referred to as "Services") to be performed by the Agent under this agreement and as described in the attached schedule-1; which may constitute as an integral part of this agreement;

OBLIGATIONS OF THE PRINCIPAL
3.5. reimburse to the Agent, penalty claims/consequences resulting from any commitment made by the Agent on behalf of the Principal to any third party and
3.6. ……..

LIABILITIES AND OBLIGTIOINS OF THE AGENT
4.1. The agent shall be liable to implement the projects assigned by the Principal as per time limits and budget approved by the Principal.
4.2. Any deviation from timelines and/or the budget will have to be authorized by the Principal (pre-facto).
4.3. The Principal shall not allow any post-facto approvals of such deviation except in force majeure events. The force majeure events and consequent deviation shall be recommended by the Board of Directors of Agent and may require decision by the Board of Trustees of the Principal.

INDEMNITY AND LIABLITY
14.1. ……..
14.2. ……..
14.3. ……..
14.4. The Principal agrees to indemnify and keep the Agent indemnified from and against all and any losses for all acts of and omissions by the Principal and/or any of its authorized representatives under this Agreement, including, but not limited to, any breach of any provisions of this agreement, any violation by the Principal of the Agent's rights, the Principal's violation of any applicable law, and any third party claim or any loss arising out of or relating to this Agreement.

SCHEDULE 1
……
SPECIFICS.
…..
2.5. The Agent shall be responsible to look after, legal affairs pertaining to the real estate of business; of the Principal only, if approved by the Principal along with express guarantee/commitment by the Principal that the expenses in actual (direct cost), would be reimbursed.

SCHEDULE II
REMUNERATION.
…….
…….

> *1.9. The Agent shall be responsible to look after, legal affairs pertaining to the real estate of business of the Principal, only if approved by the Principal.*

19. Upon examining the terms of Agency Agreement, we are not convinced that PRIMACO, for the purposes of clause 26.6 [Particular conditions of Contract dealing with Arbitration in case of dispute between parties to the agreement] had lawfully substituted EOBI, as party to the Contract, for the purposes of proceedings under section 20 of the Act, 1940. No assignment of rights and obligations of contract could be claimed by the agent, under the Agency Agreement or otherwise by dint of its status as a wholly owned subsidiary of EOBI. Respondent No.1 is unable to show that how, simplicitor, the status of being a wholly owned subsidiary would make PRIMACO as an alternative to EOBI. Simplicitor permission to pursue legal affairs was not enough to meet requisite requirements of section 20 of the Act, 1940. Signing of the Contract at the behest of EOBI, irrespective of being its wholly owned subsidiary, would not make PRIMACO an assignee or an *alter ego* of EOBI. No case for dispensing the necessity of impleading EOBI, for the purposes of section 20 of Act, 1940, is made out. It is not denied that PRIMACO has an independent legal-cum-corporate existence, as iterated in the Agency Agreement. Indubitably, claim of being a wholly owned subsidiary of EOBI is clearly indicative of the distinct statuses enjoyed and claimed, respectively. Hence, PRIMACO cannot be declared or treated as party to the agreement for the purposes of section 20, *ibid*, proceedings, nor same be construed as an entity, which substituted or novated EOBI as party to the agreement. No resolution of the Board of EOBI is shown or relied upon to demonstrate or establish that PRIMACO had the assignment of rights and obligations of EOBI or any novation took

place. No person or an entity, merely being the signatory to the agreement, for and on behalf of one of the party to the agreement, was competent to file petition under section 20 of the Act, 1940, unless its status as party to the agreement is satisfactorily established, by virtue of any law or under any contractually arrangement. PRIMACO fails on both counts to claim any alleged assignment of rights or novation of contractual obligation. In these circumstances, order of referring the matter to Arbitral Tribunal and proceedings conducted subsequent thereto, including arbitration proceedings and issuance of Award without EOBI, are found unlawful and invalid. No validity could otherwise be extended to the Award in wake of an invalid order of reference – guidance is solicited from the decision in the case of *"PAKISTAN through Ministry of Defence v. Ch. FAZAL MUHAMMAD and others* (2005 YLR 2896) and the case of *"Sh. Muhammad Saleem Vs. Saadat Enterprises"* (supra). No plausible explanation is provided that if PRIMACO was to be treated as an *alter ego* of EOBI, why EOBI was impleaded as necessary / proper party to the proceedings under sections 14 and 17 of the Act, 1940. It is nobody's case that Award was exclusively enforceable against PRIMACO, and if EOBI was not party to the Award how Award could be enforced against EOBI. In the context of the controversy reference is also made to the case of *"PAKISTAN through Secretary, Ministry of Religious Affairs, Government of Pakistan, Islamabad v. DALLAH REAL ESTATE AND TOURISM HOUSING HOLDING COMPANY* (2003 CLC 1411). The case of *"Messrs K & N INTERNATIONAL v. Messrs MOTORWAY OPERATIONS AND REHABILITATION ENGINEERING (PRIVATE) LIMITED"* (2019 CLC 1613) is also relevant in the context of scope of section 20 of the Act, 1940. Civil Court misdirected itself while failing to reckon the scope, effect and consequence of order of allowing EOBI to

become party to the proceedings – whereby, on the one hand the Court had acknowledged EOBIs status as necessary / proper party and on the other made Award rule of the court without considering the effect of absence of EOBI, as party before the Arbitral Tribunal. Decree-cum-award holder had not challenged order of impleading EOBI as necessary / proper party to the proceedings – may be because someone advised not to question the legality of order to facilitate enforcement of the Award against EOBI. In these circumstances, Award cannot be clothed with any legitimacy. Principle of *estoppel* is otherwise attracted against respondent No.1 in the context of acquiescence to the order of Civil Court of impleading EOBI as necessary/proper party to the *lis.* We lay hands on a decision handed down by UK Supreme Court in the case of *Kabab-Ji SAIL (Lebanon) v. Kout Food Group (Kuwait)* [2021] UKSC 48, wherein parent company was held not bound by an arbitration clause entered in by its subsidiary in absence of any novation or variation in the terms of contract and when parent company had not acquired any liabilities under the Contract, hence, enforcement of Award was refused. And while handing down the judgment, decision – the case of *'Egiazaryan and another v. OJSC OEK Finance City of Moscow'* [2015] EWHC 3532 (Comm) was distinguished in the context of applicable Russian Law and distinguishable facts. No case of assignment of rights, novation of contract and substitution of EOBI was established.

20. We have examined the order impugned, where Civil Court had brushed aside the objections, raised by EOBI against Award, based on bald, unjustifiable and erroneous reasoning that PRIMACO was wholly owned subsidiary of EOBI, without understanding the concept of a wholly owned

subsidiary company and misconstruing the terms of Agency Agreement, especially where the context being the scope of proceedings under section 20 of the Act, 1940. We have examined the judgments relied upon and referred, which are distinguishable and none of the judgment had discussed the subject matter issue – absence of EOBI before the Court in the proceedings under section 20 of the Act, 1940 and before the Arbitral Tribunal. Generic principles, governing principal-agent relationship are not attracted and relevant for the purposes of instant appeals. In the context of the facts involved, EOBI and PRIMACO need to be construed and treated as mutually exclusive entities for the purposes of proceedings under section 20 of the Act, 1940. Order of upholding of validity of an otherwise invalid Award, in wake of the reasoning given, is found unsustainable in law and liable to be set-aside.

21. In these circumstances, while exercising jurisdiction under clause (c) of section 30 of the Act, 1940, we declare that the Award procured is invalid and the decree, making Award rule of the Court, is also unlawful and of no legal effect, in wake of illegality of the order of reference of matter to the arbitrators, in purported exercise of jurisdiction under section 20 of the Act, 1940.

Hence, appeal of EOBI is allowed and that of PRIMACO is disposed of being rendered infructuous upon allowing the appeal preferred by EOBI. No order as to the costs.

(Muhammad Sajid Mehmood Sethi)
Judge

(Asim Hafeez)
Judge

APPROVED FOR REPORTING.

Judge. Judge.

Judgment signed on …….

M.S.Aleem