

Stereo.HCJDA-38

JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

F.A.O. No.524 of 2013

The Punjab Highway Department and others

v.

Sh. Abdur Razzaq & Company (Pvt) Ltd.

JUDGMENT

Date of hearing	30.05.2024
Appellants by	Mr. Waheed Alam, Asst. Advocate General.
Respondent by	Mr. Riaz Karim Qureshi, Advocate for respondent.

Rasaal Hasan Syed, J. This order will dispose of the instant appeal as well as F.A.O. No.390 of 2013 titled Sh. Abdur Razzaq & Company (Pvt) Limited v. The Punjab Highway Department, etc. as both appeals stem from the same order dated 27.7.2013 of learned Civil Judge, Lahore whereby the objections to the award of arbitrators were disposed of and award was made rule of court.

2. Facts as will be pertinent for decision of the two appeals are that contract for construction of bridge over River Chenab at Shahbazpur, District Gujrat named “Ch. Zahoor Elahi Shaheed Bridge” was awarded to Sh. Abdur Razzaq & Company (Pvt) Limited (the “contractor”) on 01.8.2007. Value of the contract based on work was Rs.1,345,120,000/- obligated to be completed in 24 months. Mobilization advance of Rs.99,843,000.00 with interest deductible in five installments was paid

against furnishing of bank guarantee. A dispute surfaced in respect of the contract qua which a reference was solicited for determination by arbitration through an application under sections 8 and 9 of Arbitration Act, 1940 (the “**Act**”) by the contractor filed in civil court. Appointment of two arbitrators was made on 24.2.2012 and the parties were directed to submit their claims before the arbitrators for final resolution of the dispute. The arbitrators entered upon the reference and made their award on 06.3.2013. Objections to the award were filed by Punjab Highway Department (the “**department**”) which were decided by the learned Civil Judge vide order dated 27.7.2013 in terms whereof the objections were rejected but exercising powers under section 15 of the Act the court modified the award to the extent of adjustment and reimbursement of excess mobilization advance which the respondent had received in terms of the contract. Against the order dated 27.7.2013. The present FAO was filed by the department for setting aside the award while the contractor filed FAO No. 390 of 2013 against the order to the extent of modification of award in respect of adjustment and reimbursement of the mobilization advance.

3. Learned AAG referred to the objections against the award filed in the court below and submitted that the appellant amongst others specifically pleaded that the arbitrators had misconducted themselves and the proceedings; that the award was improperly procured by the

arbitrators with mala fide; that the arbitrators did not give proper opportunity to defend the matter to the appellant; that the arbitrators did not take authorized representative of the objector along with them at the time of site inspection and local inquiry and, thus, condemned it unheard which resulted in miscarriage of justice and that it was misconduct on the part of the arbitrators; that the arbitrators violated the terms and conditions of the contract; that the objections could be decided only after framing issues and allowing opportunity of evidence which course was not adopted by the trial court; and that the impugned order violated due process and the rule of natural, fair and proper justice. It was argued that the learned Civil Judge ignored that the award was not well-reasoned and speaking one and that the conclusions drawn by the arbitrators were not only violative of the contractual provisions but were also legally untenable. As against these arguments, in the perception of contractor's learned counsel the objection was barred by time, therefore, the department had no case and that the mobilization advance was not a matter of dispute nor a subject-matter of reference, therefore, the court below acted illegally while going behind the award and exercising powers under section 15 of the Act. And that the court could not interpret the award by considering matters extraneous to the award nor could act as a court of appeal or go into the merits of the

case; and further that the trial court wrongly interpreted that the mobilization advance was payable by the respondent.

4. Submissions made by learned counsel for both sides have been given due consideration in the light of the available record. The ground amongst others for setting aside the impugned order raised by the learned AAG appearing for the department was that the objection raised against the award could not have been decided without framing of issues and giving opportunity of evidence denial whereof rendered the order violative of due process and rule of natural justice. Before opining on the findings of the court below in the impugned order, it is necessary to consider the scope of jurisdiction of the court and its obligations under the Act in respect of an award before making it a rule of court. In the perception of learned counsel for the contractor, once the objections are observed to be time-barred, the court did not have any jurisdiction to look into the award and shall proceed to pass an order, making it a rule of court in a mechanical manner and that in the instant case learned court while modifying the award exceeded its jurisdiction. The argument does not sound good. Under section 30 of the Act, the award can be set aside on the ground that the arbitrator(s) or umpire had misconducted themselves or the proceedings; that the award was made after the issue of an order by the court superseding the arbitration or after the

arbitration proceedings had become invalid under section 35. Section 17 of the Act mandates that where the court sees no cause to remit the award or any of the matters referred to arbitration for consideration or to set aside the award the court, after the time for making an application to set aside the award has expired or such application having been made, after refusing it, shall proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow. The provision of section 17 ibid. and the scope of jurisdiction thereunder has remained subject-matter of consideration in number of cases by the superior courts and the consistent rule is that the provision of section 17 imposes the duty upon the court to see that there is no cause to remit the award or any other matter referred to arbitration for consideration or to set aside the award and such power can be exercised suo motu by the court and even in the cases where the objections were not filed or were time-barred. Reference in this respect can be made to the case of A. Qutubuddin Khan v. Chec Millwala Dredging Co. (Pvt.) Limited (2014 SCMR 1268) wherein it was observed as below:

10. In view of the above, the obvious question that floats to the surface is that in the eventuality that an Award was filed in the court and objections thereto are either not filed or if filed found to be barred by limitation, whether the Court is to mechanically make such an Award, the Rule of the Court. The powers vested in the Court to make an Award the Rule of the Court are obviously judicial and not

ministerial and it is now settled law that the absence of objections to such an Award does not absolve the Court of its responsibility to examine the same. In the instant case, the learned Single Judge, after concluding that the objections filed by the respondent were time barred, without conducting a judicial exercise of examining the Award qua its validity, made the same the Rule of the Court. Hence its order in this behalf dated 5.8.2000 was not sustainable in law and was rightly set aside by way of the impugned judgment and the case remanded.

Reference can also be made to M/s. Awan Industries Ltd. v. The Executive Engineer, Lined Channel Division and another (1992 SCMR 65)

where it was observed that:

17. But; in his submissions, he ignored the provisions of section 17 of the Arbitration Act, which imposes a duty on Courts to see that there is no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award. This can be done by the court *suo motu*, apart from the application which a party may make for either remission of the award or its reversal. Where, therefore an award is found to be nullity because of the invalidity of the arbitration agreement or, for any other reason or the award is *prima facie* illegal and not fit to be maintained, the court has power under section 17 of the Act to set it aside without waiting for an objection to award being filed or without considering any application for setting it aside, if there be any, and irrespective of the question whether or not any objection to the award was filed or whether the objection, if filed, was not within time...

In Karachi Dock Labour Board v. Messers Quality Builders Ltd. (PLD 2016 SC 121) it was observed as follows:

Therefore, although in the instant case an express objection to jurisdiction of the arbitrator was sought, we are of the view that notwithstanding the absence of objections filed by any party and/or the fact that parties may consent to the making the award a rule of Court, the Court is duty bound to examine the validity and legality of an award and it may *sua sponte* modify or set aside the award if the facts and dictates of justice so demand. The Court, in our opinion, cannot and

certainly should not, remain dormant by merely affixing the judicial stamp on an award. The court is not a part of an assembly line which has to churn out finished products mechanically without applying its judicial mind to the process involved...

It is manifest from the rule in the cases supra that while making an award rule of court, in a case where the parties did not file objections, the court is not supposed to act in a mechanical manner like the proverbial post office and place its seal on it but it is obligated to look into the award and if it finds patent illegality on the face of award it is empowered to set aside, modify or remit the award for reconsideration.

5. It is evident from the impugned order that material portion of objections were disposed of in a casual manner without considering their legal effect. It was a case where the contractor claimed various amounts as compensation for the losses and damages allegedly sustained on the plea of breach of contract by the department which were controverted by the department and raising serious objections against the contractor and maintaining that despite receiving huge amount of mobilization advance, the respondent had failed to perform its part. In the award the arbitrators allowed number of claims which were challenged item-wise in the objections by alleging that there was no basis or evidence for them and that the award was lacking reasons to allow such amount to the contractor. The learned Civil Judge failed to consider these objections in the legal perspective by assuming that the court was not competent to look into the reasoning or

the basis of award. The operative part of the order is as under:

...It is settled principle of law that trial court cannot sit over the award as court of appeal and to go through the merits of the case rather trial court should lean in favour of award instead of setting aside the same. Both the Arbitrators were senior, competent, and experienced Engineers from the respondent's department therefore, the respondent should not raise objection on Arbitrator's award who after hearing the parties have submitted the award on the basis of the reference filed by the applicant...

6. It is thus obvious that the trial court opted not to interfere in the award on the assumption that the court could not look into it even for the purposes of satisfying as to whether the award was based on any evidence or that the reasons recorded by the arbitrators awarding huge amount did have any supporting evidence and as to whether there was any basis for assuming the amount as compensation. It is legal commonplace the court while deciding the objections does not act as a court of appeal nor could substitute the findings of the arbitrators, but it does not mean that it will endorse an award that had no evidentiary basis or if reasons given by the arbitrators were legally untenable.

7. Section 26-A of Act will be relevant in this regard which empowers the court to remit the award which does not record reasons as contemplated by law for consideration of the court to determine the legal questions involved in the matter. Section 26-A as incorporated in the Act itself by the Law Reforms Ordinance (XII) of 1972 reads as follows:

26-A. Award to set out reasons (1) The arbitrators or umpire shall state in the award the reasons for the award in sufficient detail to enable the Court to consider any question of law arising out of the award.

(2) Where the award does not state the reasons in sufficient detail, the Court shall remit the award to the arbitrators or umpire and fix the time within which the arbitrator or umpire shall submit the award together with the reasons in sufficient detail.

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub section (2) shall become void on the failure of the arbitrator or umpire to submit it in accordance with the direction of the Court.

In the case of Karachi Metropolitan Corporation v. Associated Constructors Ltd. (1984 CLC 1077) it was observed that the object of section 26-A of the Act was that if the award is based on irrelevant and extraneous consideration or erroneous view of law or material facts or other relevant matters are not considered those could be made known to the parties so that any of them aggrieved by the award could challenge the same and also enable the court to consider any question of law arising out of such award. It was observed that the court will remit the award to the arbitrators where reasons were not articulated for awarding substantial amount to the party and how the arbitrator had arrived at those figures by mentioning separately various amounts awarded by them under various heads claimed by the contractor. In such cases the award had to be remitted. Excerpt from the above-noted precedent is as under:

14. We have already quoted the material part of the award and from its perusal, it is quite clear that except stating that he has reached the conclusion that the plaintiff (respondent) is entitled to a payment of Rs. 1,60,647/- (Rs.7,23,300 in the award in suit No. 908 of 1981) which include escalation due to losses suffered by the respondent on account of delay caused by the appellant. He has, however, neither stated any reason for awarding such substantial amounts nor has he stated how he has arrived at these figures by mentioning separately the various amounts awarded by him under various heads claimed by the respondent. Indeed, in the absence of the reasons it was not possible for the appellant and for that matter for this Court to know what amount has been awarded by the Arbitrator under each head.

15. We have already stated that the learned Single Judge himself has observed that the awards are non-speaking awards. Indeed, he refused to look into the record for that reason. For all these reasons we find no substance in the first part of the submission.

Reference can also be made to the case of Umer Din through L.Rs. v. Mst.Shakeela Bibi and others (2009 SCMR 29) where it was observed as under:

7. The above noted text of the award clearly depicts that the Arbitrators had failed to give out the reasons for reaching to the conclusions of their decision. On the basis of which document, or evidence they had arrived at that conclusion was not given out in the award so as to enable the court making the award a rule of Court, to examine the correctness of the reasons and conclusions. No sufficient detail has been found by us in the above noted award as envisaged by section 26-A of the Arbitration Act, 1940 to perceive the decision noted in the award. Section 26-A of the Arbitration Act 1940 which was inserted by Arbitration (Amendment) Ordinance XV of 1981, was not interjected into the Act without any aim or purpose behind it by the Legislature. The Civil Court which had to make the award the rule of Court was granted an

opportunity and power to examine the reasons of adjudication of the subject matter in dispute by the Arbitrators. As to how and on what basis, the Arbitrators had decided and made the award, was to be scrutinized critically by the learned Court, to check up as to whether the Award was based on whimsical grounds, without any foundation or reason or it was supported by and rendered on some basis, evidence and document. In other words, arbitrary, non-speaking, sketchy, careless and sleazy award, deciding the fate of the parties to the dispute was not to be blessed with approval to give them authority of Court, by making it a rule of Court. The award which does not contain reasons in sufficient detail has to be rejected and is not to be approved by the civil court so as to make it rule of Court. An arbitration award is enforceable and is to be granted approval of the Court to be transferred into the shape and form of rule of Court when it complies with the essential characteristics and requirements as are contained in section 26-A of the Arbitration Act of 1940. In the instant case no reason has been given by the Arbitrators, for deciding the dispute. Therefore, we fully endorse the view pronounced in 2001 SCMR 750, 2006 SCMR 614 and 2006 SCMR 1657 (*supra*) as referred to by the learned counsel for the appellants...

In the case of Allah Din & Company v. Trading Corporation Of Pakistan and others (2006 SCMR 614) it was observed as under:

5...The learned Division Bench in the impugned judgment had aptly rejected the above claim on the ground that compensation for loss of goodwill or reputation is generally not awarded, particularly in the absence of tangible evidence showing additional loss and further that since the purchaser was already awarded Rs. 1 million by the arbitrator as compensation for the anticipated loss of profit further compensation on account of loss of goodwill and reputation was not justified. We find ourselves in agreement with the reasoning of the learned Division Bench...

6. The contention of the learned counsel for the purchaser that the Court is not entitled to disagree with the findings of the Arbitrator is without force. It is true that the trial court does not sit in appeal from the finding of the arbitrator but at the same

time the court is empowered to reverse the findings of the arbitrator on any issue if it does not find support from the evidence. 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 the soundness of the reasons. As already held the arbitrator in the case before us had granted damages for loss of reputation and goodwill without there being any evidence to that effect. The Courts were, therefore, justified in denying this claim to the purchaser...

Reference can also be made to The Director Industries And Mineral Development v. Dada Bhoyhormusjee & Sons (1990 MLD 301) where it was observed to the effect that the arbitrator having ignored an important piece of evidence on record before him, it was patent that he misconducted the proceedings pending before him and that in view of section 26-A whereby an arbitrator is required to give reasons for the award, a heavier responsibility lay on such domestic forums to deal with all matters going to the root of the dispute and failure to do so would constituted misconduct, for the required, to give reasons, is not a meaningless exercise.

8. In view of the rule supra, if the impugned order is considered, it is obvious that the learned Civil Judge neither considered the reasons for setting aside the award nor considered as to whether the award was liable to be remitted and by simply observing that the award had been delivered by two Arbitrators who are Officers of the Department irrespective of the fact whether the award was invalid, it was violative of the contract or otherwise violative of the rule of due process and that it had no basis. In these circumstances the case needs to be remanded for

decision afresh on the objection to the award by framing proper issues and allowing the parties to produce evidence and in the light of the rule referred supra.

9. For the reasons hereinabove this appeal is accepted, impugned order is set aside, case is remanded to the Civil Judge for decision afresh after framing issues and recording evidence and keeping in view the rule applicable on the subject as observed supra while **F.A.O. No. 390 of 2013** titled Sh. Abdur Razzaq & Company (Pvt) Limited v. The Punjab Highway Department, etc. having become infructuous is disposed of accordingly.

**(RASAAL HASAN SYED)
JUDGE**

ANNOUNCED IN OPEN COURT ON 12.7.2024.

JUDGE

APPROVED FOR REPORTING

JUDGE

*Imran**