IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE IJAZ AHMED CHAUDHRY
MR. JUSTICE QAZI FAEZ ISA

CIVIL APPEAL NO.305 OF 2008
(Against the judgment dated 19.4.2006 of the High Court of Sindh, Karachi passed in HCA No.18/2005)

Karachi Dock Labour Board

...Appellant(s)

VERSUS

M/s Quality Builders Ltd.

...Respondent(s)

For the appellant(s): Mr. Zahid Ibrahim, ASC
Mr. M. S. Khattak, AOR

For the respondent(s): Dr. Muhammad Farogh Naseem, ASC
Mr. Mehr Khan Malik, AOR

Date of hearing: 02.10.2015

...

JUDGMENT

MIAN SAQIB NISAR, J.- This appeal involves the key question, in that, whether the award made, announced and signed by the sole arbitrator appointed by the respondent was with jurisdiction or not and thus should not have been made rule of the Court. The ancillary questions to the above are, whether the appellant had waived etc. its objection about the jurisdiction; whether lack of jurisdiction can be compromised; whether the court, considering the matter qua making the award rule of the Court, should itself consider the jurisdictional aspect and decline to make an award, made without jurisdiction, rule of the Court. In this context, leave was granted vide order dated 27.02.2008 reproduced below to consider certain points highlighted therein:-

"After hearing learned counsel for the parties, leave to appeal is granted, inter alia, to consider:-

1. *Whether in the instant case sections 8 & 9 of the Arbitration Act, 1953 would apply; and*
2. *Whether the award given by the Arbitrator was according to the terms of the agreements entered into by the parties.*

2. Since a short point is involved, as such office is directed to fix the case during 1st week of May 2008. Meanwhile interim order dated 06.2.2008 shall hold the field."

2. The relevant facts of the case are:- The appellant *(employer)* entered into a contract dated 08.10.1989 with the respondent *(contractor)* for the construction of a hospital at Kemari, Karachi. The contract contained an arbitration clause *(clause 131)*. The parties subsequently entered into multiple supplementary agreements dated 17.06.1991, 12.11.1992, and 31.05.1993 which amended various clauses of the original contract including *inter alia* the time for completion of the contract. The fourth and final supplementary contract dated 01.03.1995 not only extended the time for completion of the contract but also, according to the appellant, settled finally certain claims of the respondent. Subsequently the respondent, claiming that certain dues/claims remained unpaid, invoked the arbitration clause by referring to the consultants certain disputes vide letter dated 05.06.1996. Due to non-determination by the consultant of the disputes alleged by the respondent, the latter proceeded to approach the appellant vide letter dated 19.01.1997 for the appointment of arbitrator and also suggested some names therein. Since the appellant did not appoint an arbitrator in response thereof, the respondent vide letter dated 02.07.1997 informed the appellant that they had appointed one Mr. S. A. Nizami and requested them to appoint an arbitrator for resolution of their disputes, in the absence of which Mr. Nizami would become the sole

arbitrator. In response the appellant stated in its letter dated 12.07.1997 that since the final supplementary agreement satisfied the respondent's claim fully therefore the arbitration clause cannot be invoked and that the arbitrator cannot be appointed in the terms as suggested by the respondent. The respondent then sent a letter dated 20.08.1997 to the arbitrator stating therein that since the appellant had failed to appoint an arbitrator, Mr. Nizami should act as a sole arbitrator in terms of Section 9 of the Arbitration Act, 1940 *(Act)*, after which the arbitrator issued notices to the parties dated 22.08.1997 and entered upon the reference. However, the appellant took the plea before the arbitrator which is envisaged by the letter dated 19.09.1997 to the effect that because the original contract was in effect superseded by the final supplementary agreement, therefore the arbitration cannot be invoked and, hence the arbitrator had no jurisdiction. Notwithstanding this the arbitrator conducted ex-parte proceedings as the appellant refused to appear and rendered the award dated 20.12.1997 in favour of the respondent which was filed in court on 19.01.1998 for making it the rule of the Court. Notice of the same was sent to the appellant on 27.01.1998 pursuant to which they filed objections under the provisions of Section 30 of the Act on 24.02.1998 on various grounds including *inter alia* that the arbitrator had no jurisdiction in the matter and therefore the award was a nullity in the eyes of the law. However the learned Single Judge vide judgment and decree dated 24.11.2004 overruled the objections and made the award a rule of the court pursuant to Section 17 of the Act. The appellant filed an appeal against the said judgment which was dismissed vide impugned judgment dated 19.04.2006, against which they have filed the instant appeal before this Court.

3. Learned counsel for the appellant, while relying upon **Textile Machinery Corporation Ltd v Nalinbhai B. Munshaw (AIR**

1969 Calcutta 146), submits that in order to invoke the provisions of Section 9 of the Act as the respondent necessarily did, certain pre-conditions need to be met, in that, the agreement should provide a reference to two arbitrators, one to be appointed by each party. He then referred to the arbitration clause, i.e. clause 131 of the contract and pointed out that since it did not specifically provide for two arbitrators, one to be appointed by each party, therefore the application of Section 9 was ousted. Reliance in this regard was placed on **Port Qasim Authority, Karachi v Messrs Nadeem Brothers and another (1982 CLC 1506)**. Instead, recourse should have been made to Section 8 read with Section 20 of the Act according to which the Court, and not the respondent, was empowered to appoint an arbitrator. He relied on **Muhammad Azam Muhammad Fazil & Co., Karachi v Messrs N. A. Industries, Karachi (PLD 1977 Karachi 21)**. He further submitted that where the number of arbitrators is not specified in the arbitration agreement, as was so in the instant case, recourse has to be made to Section 3 which when read with clause 1 of the First Schedule of the Act implies a condition that unless otherwise expressly provided, the reference shall be to a sole arbitrator. Reference was also made to the respondent's letter dated 02.07.1997 requesting the appellant to appoint their arbitrator, and the appellant's response dated 12.07.1997 wherein it was specifically pointed out to the arbitrator that lacking jurisdiction, he should abstain from entering upon the reference and proceeding with the matter. He stated that whenever the appellant was sent a notice by the arbitrator, they raised an objection regarding the latter's jurisdiction. The propositions which have been framed by the learned counsel for the appellant's counsel is as follows:-

i. The arbitrator rendered the award having no jurisdiction as his appointment was not in terms of the arbitration agreement, therefore the award is a nullity;

ii. The pre-conditions of reference to the consultant to invoke the arbitration clause was not met as the respondent did not apply to the consultant before asking for the appointment of the arbitrator and making a reference thereto;

4. When confronted as to why the appellant did not invoke the provisions of Section 5 of the Act, learned counsel for the appellant responded by stating that in order for the said section to be applicable there has to be a validly appointed arbitrator, which he contends was not in the present case. Further, that Section 5 assumes valid conferment of authority, hence that said section is about revocation of authority and does not deal with challenge to jurisdiction of the arbitrator. While elaborating on his first proposition, in support of the contention that the Court as opposed to the arbitral tribunal will examine the power of the latter, learned counsel for the appellant relied upon **Abdul Hamid v H. M. Qureshi (PLD 1957 SC (Pak) 145)**. He also submitted that the Courts have the power under Section 17 to set aside the award on its own where the award is patently invalid and not enforceable under the law and in this regard placed reliance upon **M/s Awan Industries Ltd v The Executive Engineer, Lined Channel Division and another (1992 SCMR 65)** and **A. Qutubuddin Khan v Chec Millwala Dredging Co. (Pvt.) Limited (2014 SCMR 1268)**.

5. Learned counsel for the respondent has controverted the arguments of the learned counsel for the appellant by stating that the appellant did not challenge the jurisdiction of the arbitrator on the basis of non-applicability of Section 9 before the arbitrator himself, thus such objection is deemed to have been waived and the same cannot be raised

subsequently. Rather the appellant's objection was based on the fourth supplementary agreement rendering the arbitration agreement non-existent allegedly being a full and final settlement of the respondent's claims. He also stated that despite repeated notices to the appellant, they stayed quiet. He built his defence on the premise of the arbitration principles prevalent today, which according to him are:

(i) The role of the court is supportive;
(ii) Doctrine of least intervention;
(iii) Sections 8 and 9 are machinery provisions;
(iv) The arbitration clause is to be interpreted in a workable manner – liberal construction;
(v) Principle of *Kompetenz-Kompetenz* - arbitral tribunal shall determine its own jurisdiction; and
(vi) If a particular objection, even if it pertains to the jurisdiction of the arbitrator, was not raised earlier it cannot be raised subsequently; if the particular ground was not taken earlier it will be deemed to have been waived off.

6. The primary contention of the learned counsel for the respondent was that since the appellant did not raise their objection to jurisdiction specifically vis-à-vis Sections 8 and 9 before the arbitrator nor the learned Single Judge, hence they are estopped from doing so now. He also attempted to draw a parallel of arbitral tribunals with tax tribunals in that with respect to the latter, if a question of law is not raised before the tribunal it cannot be raised subsequently and this concept should apply to the former alike. Further while relying upon **Federation of Pakistan, through Secretary, Ministry of Food, Islamabad and others vs Messrs Joint Venture Kocks K.G./Rist (PLD 2011 SC 506)** he stated that objections must be taken with sufficient clarity, and that this was not the case with the appellant. He also placed

reliance on **Messrs Vaseem Construction Co. vs Province of Sindh through Secretary to Government of Sindh, Communication and Works Department, Karachi and 4 others** (**1991 CLC 1081)** in furtherance of his argument that objections to an award cannot be subsequently raised. He also relied upon **Muhammad Saghir Bhatti & Sons vs The Federation of Pakistan and another (PLD 1958 SC (Pak.) 221)** that a subsequent challenge to appointment of arbitrator is not sustainable when it was not raised before.

7. According to learned counsel for the respondent the concept of inherent defect in jurisdiction applies differently in the world of arbitration, in that it would only arise if the arbitration agreement was in dispute which was not, it is argued, the case at hand, and while relying on several cases of foreign jurisdictions he further contended that there has been a development in arbitration, that even inherent defects are now to be raised before and decided by the arbitral tribunal itself.

8. When confronted as to why the respondent did not file the arbitration agreement in court under the provisions of Section 20, learned counsel for the respondent stated that as per the scheme of the Act, the respondent had three options available to them under Chapters 2, 3 and 4 and they chose Chapter 2, which they could not forgo for Chapter 4 without exhausting it in its entirety. Reliance in this regard was placed upon **Messrs Commodities Trading International Corporation vs Trading Corporation of Pakistan Ltd and another (1987 CLC 2063)**.

9. Heard. The issues in this case mainly revolve around the construction of the arbitration clause and the scope, interpretation and application of the provisions of Sections 3, 5, 8, 9, 11 and 20 and Paragraph 1 of the First Schedule of the Act, hence we find it expedient to reproduce the same in the order so stated:

"131. <u>SETTLEMENT OF DIPUTES/ARBITRATION</u>

If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor or the consultants and the Contractor in connection with, or arising out of the contract, or the execution of the works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment, or breach of the contract, it shall in the first place, be referred to and settled by the Consultants who shall within a period of ninety (90) days after being requested by either party to do so give written notice of his decision to the employer and the Contractor. Such decision in respect of every matter so referred shall be binding upon the Employer and the Contractor who shall proceed with the execution of the works with all due diligence whether he or the Employer requires arbitration. If the Consultant has given written notice of his decision to the Employer and the Contractor and no claim to arbitration has been communicated to him by either the Employer or the Contractor within a period of thirty (30) days from receipt of such notice, the said decision shall remain final and binding upon the Employer and the Contractor.

If the Consultant shall fail to give notice of his decision, as aforesaid, within a period of ninety (90) days after being requested as aforesaid or if either the Employer or the Contractor be dissatisfied with any such decision, then in any such case either the Employer or the Contractor within ninety (90) days after receiving notice of such decision, or within ninety (90) days after the expiration of the first named period of thirty (30) days, as the case may be, require that the matter or matters in dispute be referred for pre-consideration then only in that case ***<u>the matter shall be referred to the Arbitrator(s) and/or Umpire as the case may be within the meaning of Arbitration Act, 1953, whose decision shall be final and binding upon the parties</u>****.*

[Emphasis added]

Arbitration Act, 1940

3. Provisions implied in arbitration agreement. *An arbitration agreement, unless a different intention is expressed therein, shall*

be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

5. Authority of appointed arbitrator or umpire irrevocable except by leave of Court. *The authority of an appointed arbitrator or umpire shall not a revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.*

8. Power of Court to appoint arbitrator or umpire. *(1) In any of the following cases:--*

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after difference have arisen, concur, in the appointment or appointments; or

(b) If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied; and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) Where the parties or the arbitrators are required to appoint an umpire and do not appoint him, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to made an award as if he or they had been appointed by consent of all parties.

9. Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator. *Where an arbitrations agreement provides that a reference shall be to two arbitrators, one to be appointed each*

party, then, unless a different intention is expressed in the agreement.

(a) If either of the appointed arbitrator, neglects or refuses to act, or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place.

(b) If one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days, after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

Provided that the Court may set aside any appointment as sole arbitrators made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pas such other order as it thinks fit.

Explanation. The fact that an arbitrator or umpire, after request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of Section 8 and this section.

11. Power of Court to remove arbitrators or umpire in certain circumstances. *(1) The Court may, on the application of any party to reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.*

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under the section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire become necessary, giving notice of that fact to the parties and to the umpire.

20. Application to file in Court arbitration agreement. *(1) Where any person 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 the 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.

First Schedule

Implied Conditions of Arbitration Agreement

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator."

10. Before proceeding further we find it expedient to mention what is arbitration and also about the empowerment of the arbitrator. In this context it is stated that arbitration is a forum which under the law can be chosen by the parties for the resolution of their present or future disputes. The condition for a valid arbitration agreement is that it should be in writing *(see Section 2(a) of the Act)* and as it is a contract between the parties it is essential that it must qualify the test of a valid contract in terms of the law of contract. It may also be stated that there are three modes and approaches to arbitration: (i) without the intervention of the court; (ii) with the intervention of the court *(see Section 20 of the Act)*; and (iii) again with the intervention of the court but where a suit/*lis* is pending between the parties and they agree for the resolution of their disputes through the mechanism of arbitration, keeping the suit pending and that the fate thereof *(suit)* be decided on the basis of the decision rendered by the arbitrator. It may be relevant to state that subject to the terms of reference an arbitrator(s) is the judge on both the points of fact and law; and this shall also include the question to determine his own jurisdiction. However where the arbitrator goes patently and blatantly wrong on facts, which wrong is inconceivable and incomprehensible in relation to the determination of rights of parties in dispute, such as assumption of non-existing facts or ignoring the facts duly established on the record, which in legal parlance is also called the misreading and non-reading; and especially going wrong on the points of law, the court obviously has the power in its appropriate jurisdiction to correct such a wrong; as under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 it is inalienable right of every person to be treated and dealt with in accordance with law [*See cases reported as* **Utility Stores Corporation of Pakistan Limited v Punjab Labour Appellate Tribunal and others (PLD 1987 SC 447)**; **Muhammad Anwar and others v Mst.**

Ilyas Begum and others (PLD 2013 SC 255) and **Muhammad Ashraf Butt and others v Muhammad Asif Bhatti and others (PLD 2011 SC 905)**].

11. Coming to the present case, having regard to the fact that the agreement in which the arbitration clause is contained is not denied, it is not disputed that there was a valid arbitration agreement between the parties. The first issue is which out of the two Sections 8 or 9 of the Act is attracted to the arbitration clause *(reproduced above)*. In order to resolve this, an exercise of interpretation of the arbitration clause needs to be undertaken. Ordinarily, parties have a right to agree upon the number of arbitrators and the manner in which the arbitrators will be appointed. However, a perusal of the arbitration clause shows that it is silent on both these aspects. The arbitration clause talks of referral of disputes to "arbitrator(s)". Had the arbitration clause spoken of the appointment of an "arbitrator", there will be no scope for the application of Para 1 of the First Schedule, because a single arbitrator would be indicated by the agreement itself. Also, had the arbitration clause provided for the appointment of "arbitrators", then the application of Para 1 of the First Schedule would have been excluded because the word "arbitrators" certainly refers to more than one arbitrator. Thus we find much force in the contentions of the learned counsel for the appellant that the instant case will be governed by Section 3 and the reference shall be presumed to have been intended to be made to a single arbitrator by virtue of Para 1 of the First Schedule, necessarily to be appointed by the consent of both parties. [*See cases reported as* **Mujtaba Hussain Siddiqui v Sultan Ahmed (2005 YLR 2709)**, **In the matter of Arbitration between Ghufran Ahmed and others (PLD 1959 (W.P.) Karachi 43)**, **Muhammad Jamil v Iqbal Ahmed (PLD 1977 Karachi 886)**, **Government of Sindh and others v Tausif Ali Khan (2003 CLC**

180), **M/s National Small Industries Corpn Ltd v M/s National Metal Craft, Delhi and others (AIR 1981 Delhi 189)**, **India Hosiery Works v Bharat Woollen Mills Ltd (AIR 1953 Cal 488)**]

12. The second aspect of this issue is whether in the facts and circumstances it was in the power of the respondent to appoint the arbitrator in terms of Section 9 or whether an application should have been made to the Court under Section 8 for appointment of the arbitrator. This would depend on the construction of Sections 8 and 9 of the Act. As a plain reading of the sections would suggest, the question of whether Section 8 or 9 applies ultimately boils down to whether an arbitration agreement provides for reference to a sole arbitrator to be appointed by the consent of both parties, or to two arbitrators each to be appointed by each party separately, respectively. From the clear wording and the mandate of the Section 9(b) we also find the Respondent could have appointed their arbitrator to act as a sole arbitrator in terms of the said section only if the following essential conditions were met:-

(1) The agreement itself provides that a reference shall be to two arbitrators;

(2) The agreement further provides that, of the two arbitrators, one has to be appointed by each: one by the appellant and the other by the respondent;

(3) One arbitrator has in fact been appointed by one of the parties, and the other party has failed to appoint an arbitrator;

(4) The party who has appointed their arbitrator has served a notice in writing *(after the appointment of their arbitrator)* to the party who has failed to appoint their arbitrator; and

(5) 15 days have passed since a notice in writing to make the appointment was served to the party who has failed to appoint their arbitrator.

This was also the view of the Calcutta High Court in the **Textile Machinery Corporation Ltd** case *(supra),* albeit with respect to Section 9(a) of the Act. In the case before us, as has been established above, the arbitration clause speaks of reference to a sole arbitrator to be appointed by the consensus of both parties. It does not provide for a reference to two arbitrators, and neither does it provide *(as it cannot)* that one of the two arbitrators is to be appointed by each party. Hence we find that the first two ingredients, which necessarily form the basis of the last three ingredients, and are *sine qua non* for attracting this section and having resort thereto, are conspicuously missing from the arbitration clause at hand. Therefore Section 9(b) could not have been pressed into service by the respondent and resultantly, the appointment of the arbitrator pursuant thereto was absolutely invalid, being in contravention of the Act. It is a settled principle that where the law requires an act to be done in a particular manner it has to be done in that manner and not otherwise and this rule shall be stringently applicable when it comes to the question of appointment of arbitrators; as the conferment of jurisdiction upon the arbitrator should be strictly in line with the letter and spirit of the agreement between the parties and the express provisions of law. Obviously, any award passed by such an arbitrator who is not appointed in the above manner shall also be invalid, having been passed by an arbitrator without jurisdiction. In fact it was the provisions of Section 8 that were squarely applicable to this case and should have been made recourse to. A bare reading of Section 8 makes it sufficiently clear that it is meant to be applied to a case where the

reference provides for a sole arbitrator *(as also more than one arbitrator as the case may be)* to be appointed by the consent of the parties. As mentioned above, the arbitration clause in this case provides, albeit impliedly, for the appointment of a sole arbitrator with the consent of both the parties. According to Section 8(2) an application has to be made to the Court to appoint an arbitrator after hearing the parties, in the event of non-appointment within 15 clear days of the service of notice to concur in appointment. Therefore the respondent did not have the power to appoint the arbitrator unilaterally after the appellant even failed to concur to appointment of the arbitrator; rather it was the exclusive jurisdiction of the Court to make such appointment if approached by the respondent [*See cases reported as* **Muhammad Azam Muhammad Fazil & Co., Karachi** *(supra)* **Hariram Khiaram, a firm v Gobindram Rattan Chand, a firm (PLD 1949 Sind 30)**, **Mujtaba Hussain Siddiqui**, **S. L. Balmokand v Uttamchand Brijlal (AIR 1927 Sind 177)**, **M/s National Small Industries Corpn Ltd** *(supra)*, **Anjuman–i-Ahmadiya Ashait-i-Islam, Lahore through Secretary, Jamaat Ahmadiya, Lahore, and another v Hafiz Ghulam Ahmad and others (PLD 1955 Lahore 23)**]. It is an admitted position in this case that no such application was ever made to the Court, and consequently, as the mandate of law prescribed by Section 8, was not followed by the respondent, the award passed by the arbitrator cannot be deemed to be valid as the arbitrator, having not been appointed in terms of the arbitration agreement and the law, lacked the requisite jurisdiction, and it is settled law that a determination made and decision given by a Court or other forum performing judicial functions *(or even quasi-judicial functions)* having no jurisdiction is a nullity in the eyes of law. Apart from applying to the Court for appointment of an arbitrator under Section 8, the respondent also had the option of doing so under the provisions of Section 20 of the Act. As mentioned above

Section 20 is an alternative procedure whereby the arbitration proceedings would have been conducted with the intervention of the Court, which the respondent certainly had the choice of opting for instead of further proceeding under Chapter II of the Act.

13. The second issue, as put forward by the learned counsel for the respondent, is that of the failure of the appellant to raise the objection to the jurisdiction of the arbitrator due to defective appointment which is deemed to have been waived by them. The learned counsel for the respondent has primarily relied upon the case of **Chief Engineer, Building Department v Pakistan National Construction (1988 SCMR 723)** and **Saghir Bhatti**'s case *(supra)* to support this contention. However it is pertinent to mention that the principles laid down in the **Chief Engineer** case is in relation to non-compliance with the **machinery aspect** for the arbitrator's appointment contained in the arbitration agreement, and not non-compliance with essential mechanism of appointment prescribed in the Act. It is clearly stipulated in this dictum that *"An inherent want of jurisdiction results in vitiating the proceedings taken by the Tribunal and is incurable notwithstanding waiver by conduct or otherwise, whereas irregular assumption of jurisdiction is always subject to waiver"*. In the case of **Saghir Bhatti** the appointment of an arbitrator was cancelled and a new arbitrator was appointed without the leave of the Court and the parties participated in the said proceedings without objection, however subsequent objection to such arbitrator's jurisdiction was disallowed ostensibly on the principle of waiver, whereas as established from the facts given in the preceding paragraphs, the instant case is such where there has been sheer failure to comply with the express and the mandatory provisions of the Act *(referred to above)*, which in view of the unambiguous wording of the arbitration agreement between the parties was the only remedy available to the respondent, as opposed to

unilateral appointment by either of the parties. It is proper to mention here that according to the settled rules of law, parties cannot confer jurisdiction upon a Court or other judicial or quasi-judicial forum through consent which otherwise in law would have no jurisdiction and the same is the position regarding waiver and acquiescence qua the Courts etc. which lack jurisdiction and such being an inherent defect cannot be cured on the rules of consent, waiver, estoppel, acquiesce etc. Though under the arbitration law the parties, as mentioned above, can choose their own forum for the adjudication of their disputes, but that forum has to be constituted strictly in terms of the arbitration agreement and in any case according to the express mandate of law and not in violation thereof. If the constitution is violative of both, the agreement and the law, and the objecting party has also not submitted to the jurisdiction of the arbitrator, the rule of waiver and acquiescence cannot be pressed into service against such party. However in this context there then needs to be express consent to submit to the jurisdiction of an arbitrator having no jurisdiction otherwise, and if there is clear acquiescence and waiver on part of the party aggrieved of the jurisdiction, such as participation in proceedings without any protest or objection, which conduct shall mean that they have accepted by choice the jurisdiction of the arbitrator. However in the instant case we do not find any material on the record to hold that the appellant either waived their objection or acquiesced to the arbitration of Mr. Nizami, rather to the contrary the record clearly suggests that the appellant had persistently objected to the arbitrator's lack of jurisdiction even before the arbitrator himself. Letters dated 12.07.1997, 28.07.1997 and 27.09.1997 from the appellant to the respondent all contain the former's objection to the arbitrator's lack of jurisdiction. With respect to the objection taken before the arbitrator himself, reference may be made to

the letters dated 13.09.1997, 27.07.1997 and 13.12.1997. For the sake of clarity and brevity, the relevant extract from the letter to the arbitrator dated 13.12.1997 is reproduced herein below:

> *"It may be specifically stated here that KDLB has never accepted you as a sole arbitrator. In fact all the proceeding before you are without jurisdiction with no legal effect."*

We do not see how an objection phrased in these very terms could amount to the appellant's consent to Mr. Nizami acting as a lawfully appointed sole arbitrator or a waiver of their objection to his lack of jurisdiction. The Kerala High Court in **Cochin Refineries Ltd v C. S. Company, Engineering Contractors & Another [(1988) 2 Ker LJ 452]** has held that when the sole arbitrator has been appointed irregularly, participation in the proceedings under protest does not amount to consent on part of such a party and it can approach the court to set aside such appointment. We do not feel hesitant in subscribing to such a rule. In fact in the instant case, the record reveals that the appellant never appeared before the arbitrator even under protest. They have been denying the arbitrator's jurisdiction from the very outset and boycotted the arbitrator's proceedings throughout as has been established hereinabove. We thus opine that the appellant had not, by its conduct, waived its right to object to the jurisdiction of the arbitrator.

14. Attending to the argument of the learned counsel for the respondent regarding the principle of *Kompetenz-Kompetenz (German), Competence de la Competence (French)* or *Competence Competence (English)*, that an arbitral tribunal has the competence to determine its competence. This principle has its roots in Germany, which is now employed in the European Union and other international arbitral tribunals as also India. Learned counsel for the respondent has relied

upon several judgments of the United Kingdom and India wherein broadly it has been held that where a party has not raised an objection with regard to the competence or jurisdiction *(or lack thereof)* of the arbitrator before the arbitrator himself, it would be deemed to have been waived. Our courts have acknowledged the principle that an arbitral tribunal is a judge of both fact and law, the latter of which includes the question of its own jurisdiction. However the law in our country has developed somewhat differently. With respect to the English judgments relied upon by the learned counsel for the respondent, they have held that the parties were deemed to have waived their right to object and precluded from raising such objections if not raised before the arbitrator himself. This however was based on a provision in the English Arbitration Act, 1996 unique to it, which specifically provides for loss of right to raise objections when not raised before the arbitrator. We have no such corresponding provision in our Act hence do not feel that the law laid down in the English judgments can hardly be of any help to our jurisdiction. The Indian judgments on the other hand revolve around the Indian Arbitration Act, 1996 which contain a particular provision vis-à-vis waiver with respect to non-compliance with the arbitration agreement. However it is pertinent to mention that the said provision does not pertain to non-compliance with the Act. Thus, although our international counterparts have, as have we, retained the concept that an arbitral tribunal's decision on its jurisdiction is open to review by the courts, the course that the law has taken in our country with respect to applicability of the concept of waiver is slightly different, particularly due to variance in our respective arbitration statutes. We have not adopted wholesale the concept that if the question of proper constitution of an arbitral tribunal is not raised before the tribunal itself, this would constitute a waiver of the right to object which objection cannot be

subsequently raised for setting aside the award. Indeed this principle may hold true where the appointment of the arbitrator has not been made in compliance with the terms of the arbitration agreement, as the parties may by way of waiver amend the terms of their arbitration agreement. However where such appointment was made in contravention of the provisions of the Act, then this principle has no application. In this respect, guidance may be sought from a five member bench judgment of this Court in **Abdul Hamid** *(supra)*, while considering the question as to whether the appointment of an arbitrator made in terms of Section 9 where it was claimed to be not applicable thus rendering the appointment of arbitrator and the subsequent award invalid, held that:

> *"In the present case, only one arbitrator, who may be described as the arbitrator for H. M. Qureshi, was appointed and his award which was based upon an inquiry in which Abdul Hamid took no part, has been made the basis of a decree for a large sum in favour of H. M. Qureshi. It cannot be denied that the aspect of one-sidedness appears most prominently. It is sought to be justified by reference to clause (b) of section 9 of the Arbitration Act, 1940.* ***The question goes to the competency of the arbitrator nominated by one of the parties, to give an award which shall be binding upon both parties. In order that the award should qualify, within the context of law for being made a rule of Court, it should be the act of a tribunal validly invested with authority to investigate and pronounce upon the rights of the parties to the submission. The Court will, of necessity, examine the power which such person or persons appear to exercise, with the care necessary for the purpose of ensuring that the decree which it proposes to make in relation to the rights of the parties, does not rest upon a conclusion reached by a private tribunal which was itself not competent in law to deal with the matter in the light of the agreement between the parties, and the relevant law.***
>
> ***The question of the competency of Mr. G. H. Lodhi's appointment was not raised in the terms indicated above at any earlier stage of this case, but that is not a circumstance which need stand in the way of this Court undertaking the duty of examining the point.***
>
> *[Emphasis added]*

The case of **Abdul Hamid** *(supra)* seems to satisfactorily resolve the issue of objection to the arbitrator's jurisdiction in favour of the appellant. In relation to the argument of learned counsel for the respondent of the principle of least intervention, we are of the view that it is a valid principle, but we will not apply it where there has been sheer non-compliance with the provisions of the Act, as it is not fathomable as to how the court can abstain from intervening in such a situation.

15. With respect to the reliance placed on **Joint Venture Kocks** *(supra)* by the learned counsel for the respondent in that objections must be made with sufficient clarity, it is stated that such reliance is misplaced, as in that case, the objections could not even have been implied, whereas in the instant case, the objection vis-à-vis jurisdiction of the arbitrator was without fail taken up by the appellant at every stage of the proceedings as highlighted above. Furthermore, an objection regarding inherent jurisdiction of an arbitrator is a point of law, which goes without saying, can be raised at any stage and it is an incurable defect per the law laid down in **Chief Engineer**'s case *supra.*

16. Another important and related aspect of this matter is that of the Court's role vis-à-vis making an award the rule of the Court. The appellant raised an objection regarding lack of jurisdiction of the arbitrator before the learned Single Judge in their application under Section 30 of the Act in the following terms:

> *"10. As already stated above, there was/is no provision in the contract for a reference to the Board of Arbitrators or to a sole arbitrator. There is an Arbitration was to be invoked, it had to be done through an intervention of the court. This having not been done, the entering of the Arbitrator in the present case upon the reference as a sole arbitrator amounts to legal misconduct."*

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 [*See case reported as* **Rashida Begum v Ch. Muhammad Anwar and others (PLD 2003 Lahore 522)**]. Thus Mr Nizami, the supposed arbitrator, who for the reasons mentioned above was incompetent to act as an arbitrator and pronounce the award, could not possibly have passed an award that would be valid in law. This error was floating and apparent on the face of the award, rendering it invalid, thus it could not have been made the rule of the Court.

17. With respect to the contention of the learned counsel for the respondent that the appellant should have made an application under Sections 5 or 11 of the Act, we find force in the learned counsel for the appellant's argument that Section 5 speaks of the authority of an "*appointed arbitrator"* hence making valid conferment of authority a pre-requisite for the application of Section 5. Therefore an application under Section 5 would not have been sustainable in law. The same reasoning applies to Section 11, which although does not use the words "appointed arbitrator", talks about the removal of arbitrators and we are of the opinion that only those arbitrators can be removed, who have been in fact appointed, and a defective appointment made in contravention of the provisions of the Act is no appointment, hence removal can certainly and

logically not follow. In any case, non-filing of an application under the said sections would not, in our view amount to waiver on part of a party and it would not preclude a party from challenging the jurisdiction of an arbitrator subsequently.

18. Learned counsel for the appellant has also argued that the pre-condition of reference to the consultant to invoke the arbitration clause was not met as the respondent did not apply to the consultant before asking for the appointment of the arbitrator and making a reference thereto. We are of the opinion that this contention is unfounded, as a perusal of the record reveals that the respondent vide letter dated 05.06.1996 had forwarded their claims to the consultant, who had failed to render a decision within the period stipulated in the contract, after which they proceeded with arbitration.

19. Now we come to the contention of the learned counsel for the appellant that the respondent's claim was already settled by payment made under the fourth and final supplemental agreement. A perusal of all four supplementary agreements does not suggest that the arbitration clause was amended or removed in any way thus it was valid for all intents and purposes. Furthermore, clause 5 of the fourth supplemental agreement provides:

> *"Claims by both parties if unresolved shall be adjudicated as per terms of Contract after handing-over the entire project to the employer according to this Agreement."*

This clause clearly suggests that the parties were not precluded from utilising the method of adjudication provided for in the contract, which was reference of the dispute to the consultant and then the arbitrator. Furthermore, the factum of a final settlement may be subsequently disputed by the parties. Adjudication in this regard would be required to

be undertaken by the process stipulated by the parties in the contract. Therefore, we are not convinced by the argument of the learned counsel for the appellant in this respect. In any case this point has been rendered irrelevant due to the jurisdictional point.

20. In view of the foregoing, we find that the appellant has a case for setting aside of the award passed by the arbitrator whose appointment was not in consonance with the arbitration agreement and the law contained in the Act. The learned Single Judge and the learned Division Bench of the High Court had erroneously made and upheld the award as a rule of the court respectively by incorrectly observing that arbitral tribunal was properly constituted and that the award was not invalid in law.

21. The above are the detailed reasons for the short order of even date whereby the appellant's appeal was accepted, which reads as:-

> *"Upon hearing learned counsel for the parties, for reasons to be recorded later, we allow this appeal and set aside the judgment and decree of the learned Single Judge dated 24.11.2004 making the award rule of the court, and the judgment dated 19.4.2006 regarding dismissal of appellant's appeal. However, while the short order was being dictated in Court, the learned counsel for the respondent has made a request to the Court for appointment of a new Arbitrator in terms of Section 20 of the Arbitration Act, 1940 for resolution of the dispute between the parties as this has been the argument of the appellant in attacking the award and the two decisions of the learned High Court that the respondent should have resorted to the provisions ibid (Section 20). When confronted, learned counsel for the appellant has no objection if learned retired judge of this Court is appointed as an Arbitrator in the matter to resolve the dispute emanating out of the reference filed by the respondent before former Arbitrator (whose award has been set aside in these proceedings). Thus, with the consent of learned counsel for the parties, Mr. Justice (R) Khilji Arif Hussain is appointed as a sole Arbitrator and the reference which the respondent filed before*

the former Arbitrator, namely Mr. S. A. Nizami, shall be considered and deemed to be the reference in this case before the learned Arbitrator. The appellant shall file a reply to the said reference which shall be proceeded upon by the Arbitrator in accordance with law. The parties are directed to appear before the Arbitrator on 03.11.2015. The learned Arbitrator shall determine his own fee which shall be paid by the parties in equal share. The award shall be made and signed within the time provided in law, however, in case any reasonable extension of time is required for making the Award, the Arbitrator can extend such further period with the consent of the parties."

JUDGE

JUDGE

JUDGE

Islamabad, the
2nd October, 2015
Approved For Reporting
Waqas Naseer/*