IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE ANWAR ZAHEER JAMALI, HCJ.
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE UMAR ATA BANDIAL

CIVIL PETITION NO.130 & 131 OF 2015

(On appeal against the judgment dated 2.12.2014 passed by the Lahore High Court, Lahore, in Civil Revision No.2577/2014 and FAO No.442/14 respectively)

Pakistan Railways, thr. AGM(Traffic) Pakistan Railways, Lahore … … Petitioner (in both cases)

VERSUS

M/s Four Brothers International (Pvt) Ltd and others (in both cases) … … Respondents

For the Petitioner (in both cases)	**:**	**Sardar Muhammad Aslam, ASC**
For Respondent No.1 (in both cases)	**:**	**Mr. Aitzaz Ahsan, Sr. ASC** **Mr. M. S. Khattak, AOR**
Date of hearing	**:**	**28-10-2015**

JUDGMENT

AMIR HANI MUSLIM, J.- These Petitions are directed against the judgment dated 2.12.2014, passed by the Lahore High Court, Lahore, whereby Civil Revision and FAO filed by the Petitioner were dismissed.

2. Facts necessary for the purpose of deciding these proceedings are that the Petitioner invited Expression of Interest from qualified parties by floating tender in the National Press, for plying Train between Lahore-Karachi-Lahore on public-private partnership basis. The Respondent being the highest bidder was declared successful and awarded the contract. The

agreement between the Petitioner and Respondent No.1 was executed on 18.8.2011, which was subsequently amended on 26.12.2011. The term of the agreement was initially fixed for a period of five years, on the terms and conditions enumerated in the agreement, extendable for another term of five years with mutual consent of the parties. As per the terms of agreement the train started its operation by 4.2.2012. Under Article 6.1 of the agreement the Business Train was scheduled to run between Lahore and Karachi Cantt. as agreed upon, and the Respondent No.1 was obliged to pay to the Petitioner a sum of Rs.1.573 million per single train journey calculated at 88% capacity of luggage and passenger, normal business class fares for passengers and luggage. The journey fare was required to be deposited by the Respondent No.1 before commencement of the train journey. It was further stipulated that any delay in payment of the agreed fare would entail additional penalty of 5% of the amount in case no amount is deposited till the 6th day, the Petitioner would be entitled to suspend the operation of the Train without any notice.

3. It was further stipulated in the said article that the Respondent No.1 would invest a sum of Rs.225.786 million for value added services, which would be treated as performance guarantee/security and additional expenses incurred for value addition or uplifting in respect of the business train would be the sole responsibility and liability of the Respondent No.1 which would, under no circumstances, be transferred to the Petitioner. Under Article 6.2 of the agreement, in case one or more passenger coaches are not available by the Petitioner, the Petitioner will not recover any amount equal to 88% of carrying capacity of the coaches and if additional coaches are

provided then the Respondent No.1 shall pay to the Appellant equal to 88% of the amount of carrying capacity of coaches.

4. However, the Respondent No.1 inspite of depositing of Rs.225.736 million as performance guarantee, paid a sum of Rs.3.19 million before the commencement of the business, without justifiable reasons. The Respondent Company failed to own its commencement as per Article 6.1 of the agreement and on 10.2.2012, exactly after six days of commencement of business, approached the Ministry of Railways with the request to suspend operation of Article 6.1 of the agreement, undertaking to pay the outstanding amount within a period of six months. The Ministry of Railways through a summary dated 16.5.2012 referred the matter for change in the composition of business express to the Economic Coordination Committee [hereinafter referred to as "ECC"] in order to safeguard the interest of the Railways, which was stranger to the agreement. The ECC decided to determine the basis of award of contract and validity of personal agreement for sharing of revenue, by evaluation through a third party. The ECC appointed M/s Deloitte Pakistan as a consultant to make its recommendations, which submitted its following recommendations and the E.C.C in its meeting dated 1.1.2013 approved them : -

i. "Minimum occupancy to be achieved at 65%

ii. Share ratio of gross revenue can be set as 80.20 between Pakistan Railways and Joint Venture Partners up to occupancy of 75% and,

iii. For occupancy achieved above 75% the sharing ratio between PR and JV Partner can be set at 75.25."

5. In the light of the recommendations of M/s Deloitte Pakistan on 3.7.2012 the ECC took the following decision : -

> "The Economic Coordination Committee of the Cabinet considered the Summary dated 16th May, 2012, submitted by Ministry of Railways on "Changes in the Composition of Business Express" and decided to constitute a Committee, comprising Minister for Information & Broadcasting (Convener), Chairman Board of Investment, Deputy Chairman, Planning Commission and Secretary Ministry of Railways for further examining the matter and suggesting a viable course of action for Pakistan Railways.
>
> Ministry of Railways will also act as secretariat of the Committee."

6. On 17.12.2012, the Ministry of Railways floated another summary, proposing that the Respondent No.1 had defaulted to the extent of Rs.289.8 million and any dispensation granted to Respondent No.1 must be accompanied by a caveat with the understanding that the outstanding amount must be cleared within one year. This proposal contained in the summary was an interim arrangement, which was approved by the ECC and on 15.3.2013 was endorsed by the Federal Cabinet.

7. The Respondent No.1 failed to clear its outstanding dues in terms of the Cabinet decision. On 23.2.2013 the Respondent No.1 undertook to clear the outstanding amount of Rs.236,247,808/- in equal installments starting from July 1st, 2013 and concluding the entire amount within the stipulated period. On 28.2.2013, the Ministry of Railways floated another summary to the ECC on which following decision was made, which was approved by the Government on 4.6.2013 : -

> "The Economic Coordination Committee of the Cabinet considered the Summary dated 28th February 2013, submitted by the Ministry of Railways on "Charges in the Composition of Business Express" and decided that the additional services provided to the passengers by the JV partner should not be part of ticket/fare and revenue be shared accordingly, with the condition that there is no downward revision in the actual fare."

8. On 17.9.2015, The Ministry of Railways moved yet another summary, stating that summary to review the earlier decisions, came under

discussion of the ECC on 17.6.2015, in which it was stated that matter needs reconsideration of ECC to the Cabinet and that the decision of ECC to the Cabinet dated 1.1.2013 may be re-visited and re-called abinitio, and save Pakistan Railways from recurring losses. After consideration of the summary, the ECC took the following decision:-

> *"The Economic Coordination Committee of the Cabinet considered the summary dated 11th September, 2015, submitted by the Ministry of Railways regarding "Change in the Composition of Business Express Train", endorsed the opinion of Ministry of Law, Justice and Human Rights contained in para-9 of the summary and approved the proposal contained in para 11 of the summary."*

9. On 29.11.2013, the Petitioner required the Respondent No.1 to resolve the issue but the Respondent No.1 approached the Civil Court under Section 20 of the Arbitration Act for appointment of an independent Arbitrator and to refer the dispute to him with the following prayer alongwith an Application for interim relief : -

> a. The agreement dated 18.08.2011 along with the Addendum dated 26.12.2011 be filed in this learned Court.
>
> b. This application may kindly be allowed and the matter be referred for Arbitration under the terms of the Agreement for adjudication on merits.
>
> c. Adjudication be completed within a period of four months and award be filed in this learned Court.
>
> Any other relief as deemed appropriate in the circumstances of the case may also be granted in favour of the Plaintiff and against the Defendants."

10. By order dated 24.4.2014, the Civil Judge, Ist Class Lahore, allowed the Application and directed the parties to provide names of their respective Arbitrators. The Civil Judge also allowed the Application of the Respondent No.1 under Section 41(b) of the Arbitration Act, granting injunction from recovery of the amounts from them.

11. Feeling aggrieved, the Petitioner filed Civil Revision against the order of allowing the Application of the Respondent No.1 under Section 20 of the Arbitration Act and F.A.O against the grant of interim injunction. which were dismissed, by the Lahore High Court, Lahore, vide impugned judgment dated 02.12.2014. Hence these Petitions for leave to Appeal.

12. The learned Counsel for the Petitioner has contended that he will not be pressing his Petition against the appointment of the Arbitrators, as he has been instructed to contest the Petition against the grant of interim injunction, allowing the Application of the Respondent No.1 under Section 41(b) of the Arbitration Act. The learned Counsel next contended that the Respondent No.1 has neither paid the amounts in terms of the contract nor invested the agreed amount contained in the contract. He contended that the Respondent No.1 was put to notice for payment of the agreed amount under the terms of the contract besides the investment they had to make and the matter was referred to the E.C.C, for decision which allowed the interim arrangement under which the contract amount was reduced from 88% capacity of luggage and passengers to 65%. The Respondent No.1 had defaulted in payment of such amounts and inspite of the undertaking given by them that they would clear the outstanding amount within one year. In the intervening period, the Respondent No.1 approached the Civil Court which had directed the parties to take up the dispute to the Arbitrators appointed by each one of them. Additionally, the Civil Court restrained the Petitioner from recovery of the amounts and presently the Respondent No.1 has to pay a huge sum of Rs.1,11,55,00,000/-, outstanding against them while they are playing the train and availing all the benefits under the contract.

13. The learned Counsel submits that on one hand, the Petitioner has been restrained from recovery of the outstanding amount and on the other hand the dispute has been referred to Arbitration. He contended that neither the Civil Court nor the High Court has applied their minds to the facts of the case while granting injunction against the Petitioner. The principles for grant of injunction have been completely overlooked by the learned High Court and the Court below while passing the impugned order. The reasons for grant of injunction were neither assigned nor discussed either by the learned High Court or by the Civil Court. He next contended that grant of injunction is causing recurring financial losses to the Petitioner – a National Asset.

14. As against this, the learned Counsel for the Respondent No.1 has contended that the contract was assumption based and under Article 6.1 of the contract the Respondent No.1 had to pay 88% of carrying capacity of the train whereas the actual occupancy was 60 to 65%, therefore, the Respondent No.1 was not obliged to make payment in excess of the said 60-65% of the carrying capacity of the passengers and luggage. He next contended that it has been pointed out in the report of M/s Deloittee Pakistan that contractual payment to Pakistan Railways at the rate of 88% of the full capacity revenue of the train was a major contributor to the deficit. The learned Counsel further submits that the High Court as well as the Civil Court had rightly allowed the Application of the Respondent No.1 while taking into account the language of clause 5(vi) addendums to the agreement, which restricts the parties from suspending the operation of the Business Train.

15. He next contended that the Respondent No.1 has paid excess amount to the Petitioner on the basis of report of M/s Deloittee Pakistan, as the amount agreed upon by the Respondent No.1 was assumption based. He submitted that the Respondent No.1 has also made huge investments for operating the Business Train and their investment should also be saved.

16. We have heard the learned Counsel for the parties and have perused the record. In the first place, we are not persuaded by the contention of the learned Counsel for the Respondent No.1 that the contract between the parties was assumption based and the Respondent No.1 was not obliged to pay the amounts agreed by them in terms of the contract. If the Respondent No.1 had made financial commitments, they are bound to own them and could not switch over their burden, *inter alia*, on the ground that 88% capacity of passenger and luggage, normal business class fares for passenger and luggage and compensation as per Article 6.4 were assumption based and absolved them from payment of the agreed amounts in view of the report of Deloittee. The dispute raised by the Respondent No.1 in regard to the quantum of payment based on the report of M/s Deloittee Pakistan has no binding effect, as financial commitments made by the parties to the contract would not be defused by the aforesaid report. The plea of misrepresentation in such like contracts is hardly a ground to allow a party to withdraw itself from its financial commitments. In law, before entering into contracts of the nature, the parties do their home work.

15. The clause pertaining to continuous of operation of the Business Train, as has been incorporated in the Addendum to the agreement,

was introduced for public welfare and has to be read alongwith immediate succeeding clauses of the agreement. The mode for termination of the contract has been provided under independent clauses and Addendum to the agreement has no nexus with it. The clauses of the contract, in no way, can be construed to absolve the Respondent No.1 from discharging its obligation by not paying the agreed amounts on the ground that financial commitments were assumption based, therefore, they were not obliged to pay, as has been contended by the Respondent No.1.

16. It has been shown from the record that the Respondent No.1 has invoked the arbitration clause, therefore, the dispute will be determined through Arbitration, but at the same time, a restraining order against recovery of the amounts by the High Court and the Civil Court in terms of Section 41 (b) of the Arbitration Act without examining the three ingredients for grant of injunction i.e *prima facie* case, balance of convenience and irreparable loss, is not sustainable at law. Unrestricted permission to the Respondent No.1 for plying the Business Train without discharging their obligation of payment of amounts agreed in the agreement cannot be termed as justifiable grounds for grant of injunction. In the case in hand, *prima facie*, the Respondent No.1 has defaulted in paying the agreed amounts towards fares besides the investment, as is evident from the record, therefore, grant of injunction of the nature to the disadvantage of the Petitioner was not justified.

17. We are informed that the Respondent No.1 has appointed his Arbitrator, and accordingly direct the Petitioner to appoint their Arbitrator within the stipulated time incorporated in the short order. We, for the

aforesaid reasons, have converted these petitions into Appeals and allow the same, by our short order of even date, which is reproduced here-under:-

“

Chief Justice

Judge

Judge

Islamabad,
27-10-2015
Sohail**