IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, CJ
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEAL NO. 539 OF 2003 AND
CIVIL APPEAL NO. 1773 OF 2016
(on appeal against the judgments dated 19.03.2003 and 08.04.2016 of the High Court Of Sindh, Karachi passed in J.M.A.22-A/99 and H.C.A.239/1999)

Gerry's International (Pvt.) Ltd

...Appellant(s)

VERSUS

Aeroflot Russian International Airlines

...Respondent(s)

For the Appellant(s): Khawaja Muhammad Farooq, Sr. ASC
Mr. Mehr Khan Malik, AOR

For the Respondent(s): Mr. Khalid A. Rehman, ASC

Date of Hearing: 01.01.2018

ORDER

MIAN SAQIB NISAR, CJ.— The facts of these appeals are intertwined and the questions of law arising therefrom are also intrinsically connected, thus the same are being disposed of together.

2. The facts of Civil Appeal No. 1773/2016 shall enable us, for the most part, to decide the other appeal as well. In this context the brief facts of the case are that the respondent is an international airline incorporated in Russia, conducting its business with its office in Karachi. *Vide* a General Sales Agreement *(GSA)* dated 22.02.1993 entered into between the parties, the respondent conferred upon the appellant rights as a sales agent, for sale of its tickets, which GSA was subsequently cancelled by it *(the respondent)* on 19.10.1994. The aggrieved appellant filed a suit

bearing No.252/1995 before the learned High Court of Sindh, Karachi, challenging such termination and seeking enforcement of the GSA. In this suit the respondent moved an application under Section 34 of the Arbitration Act, 1940 *(the Arbitration Act)* which was allowed *vide* order dated 17.12.1995. The other suit bearing No.569/1995 was initiated by the respondent against the appellant for recovery of Rs.97,585,085/60 on account of amounts outstanding against the appellant under the GSA, wherein an application for stay of the proceedings under Section 34 of the Arbitration Act was moved, which was allowed *vide* order dated 11.1.1996 and the proceedings in the said suit were also stayed. The respondent appointed Mr. Justice (R) Abdur Rehim Kazi, as an arbitrator on 12.2.1996, but the appellant refused to agree to his appointment as the sole arbitrator. Since the appellant failed to appoint an arbitrator, on 11.3.1996, pursuant to Clause 14.4 of the GSA, the respondent requested the International Air Transport Association *(IATA)* to appoint the same. IATA initially required the appellant to appoint an arbitrator itself, but on its failure to do so, appointed Dr. Parvez Hasan, Senior Advocate as an arbitrator on behalf of the appellant. Subsequently, the arbitrators unanimously appointed Mr. Justice (R) Shafi-ur-Rehman as the Umpire. The appellant participated in the arbitration proceedings. As the arbitration proceedings could not be concluded within the stipulated period, the respondent filed an application for extension of time period for making the award by two months, which *(application)* was allowed *vide* order dated 8.5.1997. Ultimately a unanimous award *(award)* was made on 25.08.1997, which was filed in Court on 17.3.1998, wherein the respondent was awarded

Rs.35,356,171.60. The appellant filed objections thereto, which were rejected and the award was made the rule of Court *vide* order/decree dated 17.11.1998. The detailed judgment in this regard was released on 19.4.1999. The appellant challenged the said judgment and decree before the learned High Court through H.C.A. No.239/1999, which was dismissed *vide* judgment dated 8.4.2016 *(impugned in CA No.1773/2016)*.

3. After having obtained the decree, the respondent applied for the winding up of appellant company *(J.M. No.22-A/1999)* under the provisions of Section 306 of the Companies Ordinance, 1984 *(the Companies Ordinance)*. The appellant resisted the winding up petition on various grounds. However, the learned Judge in Chambers dismissed the petition of the respondent *vide* order dated 2.5.2000. On appeal filed by the respondent, *vide* judgment dated 6.8.2002, the matter was remanded back to the learned single Judge for deciding the case afresh. After the remand, the application for winding up was allowed *vide* judgment dated 19.03.2003 *(impugned in CA No.539/2003)*.

4. For brevity, the respective arguments of the parties are not separately set out, but shall find mention later in our opinion. The questions which emerged from the record and require consideration are: what is the true scope, import and application of Sections 30 & 33 of the Arbitration Act; what is the jurisdiction of the Court while making an award rule of the Court; whether the Court can sit in appeal over the decision of the arbitrators; whether the Court can make a roving inquiry and look for latent or patent errors of law and facts in the award; which flaws and shortcomings, if allowed to remain shall cause failure of justice

and vitiate the proceedings before the arbitrator and the award; what are the questions for determination of arbitration agreement; and what are the grounds/basis on which an arbitrator should be held to have misconducted himself?

5. In order to ascertain the answers to the above questions, it is imperative to consider the relevant provisions of the Arbitration Act as well as the case-law concerning the powers and authority of the arbitrators in arbitration proceedings *viz*. the jurisdiction of the Court while determining the validity of the award. The relevant provisions of the Arbitration Act read as under: -

> *2.(a) "**arbitration agreement**" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".*
>
> *13. **Powers of arbitrator**. The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to:*
>
> *(a) administer oath to the parties and witnesses appearing;*
>
> *(b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court;*
>
> *(c) make the award conditional or in the alternative;*
>
> *(d) correct in an award any clerical mistake or error arising from any accidental slip or omission;*
>
> *(e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.*
>
> *15. **Power of Court to modify award**. The Court may by order modify or correct an award:*
>
> *(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated*

from the other part and does not affect the decision on the matter referred; or

(b) Where the award is imperfect in form, or contains any obvious error which can be amended without effecting such decision; or

(c) Where the award contains clerical mistake or an error arising from an accidental slip or omission.

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 arbitrators or umpire to submit it in accordance with the direction of the Court.

30. ***Grounds for setting aside award****. An award shall not be set aside except on one or more of the following grounds, namely:*

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid.

36. ***Power of Court, to order that a provision making an award a condition precedent to an action shall not apply to a particular difference****. Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any*

> *particular difference, may further order that the said provision shall also cease to have effect as regards that difference.*

6. In order to ascertain the principles set out by the Courts on the questions cited above, firstly we shall consider the case-law from the foreign jurisdictions. In the case of **Hodgkinson v. Fernie [(1857) 3 C.B. (N.S.) 189] = (140 Er 712)** Williams, J. held that where a cause or matters in difference are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact. However, the only exceptions to that rule are cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. In **Anchor Marine Ins. Co. *v.* Corbett. [(1882) 9 SCR 73]** the Supreme Court of Canada held as under: **-**

> "The award of the arbitrators is conclusive, and the appellants cannot go behind it. *Russell on Arbitration (P. 476)*; *Hodgkinson v. Fernie et al. (3 C. B. N. S. 189)*; *Cummings v. Heard (L. R. 4 Q. B. 668)*.
>
> In order to entitle the appellants to impeach the award, they should have made the submission a rule of court and moved to set aside the award, and not having done so, the court cannot in this suit review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise. *Delver v. Barnes (1 Taunt. 48)*."

In **Champsey Bhara Company v. The Jivraj Ballo Spinning and Weaving Co. Ltd. (AIR 1923 PC 66)**, it was held that an error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, some legal proposition which is the basis of the award and which you can then say is erroneous. In the cases of **Government of Kelantan v. Duff Development Company Ltd. (1923 A.C. 395)** and **F. R.**

Absalom Ltd. v. Great Western (London) Garden Village Society Ltd. (1933 A.C. 592) it was held that if it is evident that the parties desire to have a decision from the arbitrator rather than from the Court on a question of law, then the Courts will not interfere. However, in cases where the question of law is incidentally material in order to decide the question actually referred to the arbitrators it is open to the Court to set aside the award if an error of law is found patent on the face of the record. In **Heyman v. Darwins Ltd. [(1942) A.C. 356]**, it was held that if a party has to have recourse to the contract in a dispute, that dispute is a dispute under the contract. In **Durga Prasad Chamria v. Sewkishendas Bhattar (AIR 1949 PC 334)** the Privy Council applied the above English view to Indian cases and upheld the award on the ground that the error of law was committed on points of law which were specifically referred to the arbitrator. In **A.M. Mair & Co v. Gordhandass Sagarmull (AIR 1951 SC 9)** it was held that a dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Here, the respondents must have recourse to the contract to establish their case and therefore it is a dispute falling within the arbitration clause. In **Ruby General Insurance Co. Ltd Vs. Pearey Lal Kumar and another (AIR 1952 SC 119)** the Court observed that the test is whether recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. In **M/s. Alopi Parshad v. Union of India (AIR 1960 SC 588)** it was

observed that a contract is not frustrated merely because the circumstances in which the contract was made are altered. In **Jivarajbhai ah 41 Ujamshi Sheth and others Vs. Chintamanrao Balaji and others [(1964) 5 S.C.R. 481]** it was held as under:

> "The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in S.30. It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award. ... The primary duty of the arbitrator under the deed of reference in which was incorporated the partnership agreement, was to value the net assets of the firm and to award to the retiring partners a share therein. In making the "valuation of the firm" his jurisdiction was restricted in the manner provided by paragraph 13 of the partnership agreement." (Emphasis supplied)

In **Tarapore & Company vs Cochin Shipyard Ltd. Cochin & anr (AIR 1984 SC 1072) = [1984 SCR (3) 118]** while considering the question whether the claim made by the contractor and disputed by the respondent would be covered by the arbitration clause, it was held that if it becomes necessary to have recourse to the contract to settle the dispute one way or the other then certainly it can be said that it is a dispute arising out of the contract. The test is whether it is necessary to have recourse to the contract to settle the dispute that has arisen. In **Continental Construction Co. Ltd v. State Of Madhya Pradesh (AIR 1988 SC 1166) = [1988 SCR (3) 103]** it was held that if no specific question of law is referred,

the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so he is bound to follow and apply the law, and if he does not the award can be set right by the Court provided the error appears on the face of the award. The arbitrator misconducted himself in not deciding the specific objection raised by the State regarding the legality of extra claim of the contractor. In **Indian Oil Corporation vs Indian Carbon Ltd (AIR 1988 SC 1340)** it was held that when the arbitration clause requires the arbitrator to give a reasoned award and the arbitrator does give his reasons in the award, the sufficiency of the reasons depends upon the facts of the particular case. He is not bound to give detailed reasons. The Court does not sit in appeal over the award and review the reasons. The Court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous. In **Sudarsan Trading Co Vs. Govt. Of Kerala & anr (AIR 1989 SC 890) = [1989 SCR (1) 665]** the questions for consideration before the Court were that as to how the Court should examine an award to find out whether it was a speaking award or not; and if it be a non-speaking award, how and to what extent the Court could go to determine whether there was any error apparent on the face of the award so as to be liable for interference by the court; and to what extent can the Court examine the contract though not incorporated

or referred to in the award. It was held in the said judgment that there are two different and distinct grounds involved in many of the cases. One is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the arbitration agreement but in the former, it can not, unless the agreement was incorporated or recited in the award. One of the grounds of misconduct is that the decision by the arbitrator is on a matter which is not included in the agreement or reference. But in such a case one has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. In **Puri Construction Pvt. Ltd. vs Union Of India (Uol) (AIR 1989 SC 777)** it was held as under: -

> "When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits. However, so far as the present case is concerned, the decision of the arbitrator is supported by the evidence led before him including the evidence of the Union of India, and appears to be correct on merits also.
> ..... Mr. Sibal, therefore, appears to be right that apart from the fact that the award is not vulnerable to any objection which can be entertained under the Arbitration Act, it is a fair one. But this does not lead to the conclusion that for upholding an award the court has to examine the merits of the award with reference to the materials produced before the arbitrator. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials. The scope for setting aside an award is limited to the grounds available under the Arbitration Act, which have been well defined by a long line of decided cases, and none of them is available here. For this reason the decision of the Division Bench of the High Court has to be set aside."

In **Associated Engineering Co. Vs. Government of Andhra Pradesh and Another [1991] 4 SCC 93** the Court set aside the

award by holding that the conclusion is reached not by construction of the contract but by merely looking at the contract. The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award. In **Hindustan Construction Co. Ltd. Vs. State of Jammu & Kashmir (AIR 1992 SC 2192) = [(1992) 4 SCC 217]** the Court observed that where the award was a non-speaking one and contained no reasoning which could be declared to be faulty; the scope of the Court's jurisdiction in interfering with the non-speaking award is extremely limited. It was further observed that even if, in fact, the arbitrators had interpreted the relevant clauses of the contract in making their award on the impugned items and even if the interpretation is erroneous, the Court cannot touch the award as it is within the jurisdiction of the arbitrators to interpret the contract. ... The clauses are not so clear or unambiguous as to warrant an inference that the interpretation placed on them by the arbitrators is totally unsustainable. This is purely a technical matter and we have no material to hold that the arbitrators' interpretation was erroneous. It is difficult to say that the arbitrator's interpretation is erroneous on the face of it. In **The Superintending Engineer Vs. B. Subba Reddy [1993 (2) ALT 687]** the Andhra High Court while explaining the concept of "misconduct" by an arbitrator highlighted some of the examples of the term, which reads as under:

(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;

(ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference; ...

(iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt;

(iv) if there has been irregularity in the proceedings, as, for example, where the arbitrator failed to give the parties notice of the time and place of meeting, or where the agreement required the evidence to be taken orally and the arbitrator received affidavits, or where the arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the arbitrator failed to have foreign documents translated, or where, the reference being to two or more arbitrators, they did not act together, or where the umpire, after hearing evidence from both arbitrators, received further evidence from one without informing or hearing the other, or where the umpire attended the deliberations of the appeal board reviewing his award.

In **State Of Rahjasthan Vs. Puti Construction Co. Ltd [(1994) 6 SCC 485]** it was observed as under: -

> "The arbitrators have given the award by referring to various documents and statements available on record and indicating the reasons for basing the findings. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. Judicial decisions over the decades have indicated that an error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award."

In **The Punjab State Through ... Vs. Amar Nath Aggarwal [(1993) 105 PLR 1]** Punjab-Haryana High Court summed up the legal principles as under: -

(1) The arbitrator is the final Judge of all questions, both of law and of fact. The only exceptions to this rule are cases of corruption or fraud or where the basis of the award is a proposition of law which is erroneous. (Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Ltd.,5 A.I.R. 1923 P.C. 66).

(2) The arbitrator is the sole judge of quality as well as quantity of evidence. (M/s Sudarshan ah 41 Trading Co. v. The Govt. of Kerala and Anr.,6 A.I.R. 1989 S.C. 890 and Municipal Corporation of Delhi v. M/s. Jagan Nath Ashok Kumar, A.I.R. 1987 S.C. 2316). It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong. (Union of India v. Kalinga Construction Co. (Private) Limited), A.I.R. 1971 S.C. 1646).

(3) The Court cannot sit in appeal over the view of the arbitrator by re-examining and reappraising the materials. (Puri Construction Pvt. Limited v. Union of India,16 A.I.R. 1989 S.C. 777).

(4) Where two views are possible, the Court is not justified in interfering with the award by adopting its own interpretation. (M/s Hind Builders v. Union of India,19 A.I.R. 1990 S.C 1340).

(5) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. (Subhash Chandra Das Mushib v. Ganga Prosad Das Mushib and Ors.,20 A.I.R. 1967 S.C. 878 and M/s. Hindustan Tea Co. v. K. Sashikant and Co. and Anr., 19 A.I.R. 1987 S.C. 81).

(6) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not a misconduct on the part of the arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence. (Food Corporation of India v. Joginderpal Mohinderpal and Anr.,17 A.I.R. 1989 S.C. 1263).

(7) Assuming that there is an error of construction of the agreement by the arbitrator, it is not amenable to correction even in a reasoned award. (UP. Hotels etc. v. U.P. State Electricity Board,21 A.I.R. 1989 S.C. 268).

(8) Even in cases where the arbitrator is required to give his reason, it is not obligatory to give a

detailed Judgment. (Indian Oil Corporation Ltd. v. Indian Carbon Ltd.,14 A.I.R. 1988 S.C. 1340).

(9) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd (Gujarat Water Supply A Sewerage Board v. Unique Electors (G) (P) Ltd.,15 A.I.R. 1989 S.C. 973). The amount awarded being quite high does not per se vitiate the award. (State of Orissa v. Dandasi Sahu,22 A.I.R. 1988 S.C. 1791 (para 30).

(10) It is necessary to bear in mind that the arbitrator was a highly qualified engineer, fully conversant with the nature of work and should be presumed to correctly evaluate the additional work done. (Puri Construction Pvt. Ltd. v. Union of India,16 A.I.R. 1988 S.C 777).

(11) Where additional work is done under a building contract, Section 70 of the Contract Act applies. (V.R. Subramanyam v. B. Thayappa (deceased) and Ors.,23 A.I.R. 1966 S.C. 1034, P. Hanumanthiah & Co. v. Union of India,24 U J. (S.C.) 134 (69).

In **Rajasthan State Mines & Minerals ... vs Eastern Engineering Enterprises (AIR 1999 SC 3627)** after discussing the case-law in detail, principles enunciated thereunder were summarized as under: -

(a) it is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the

finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of wider arbitration clause such claim amount cannot be awarded as agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd.(supra) by relying upon the following passage from M/s. Alopi Parshad Vs. Union of India [1960] 2 SCR 703 which is to the following effect: -

> There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an

unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous.

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.

The same principles were reiterated in the case of **Bhagawati Oxygen Ltd vs Hindustan Coper Ltd [2005 (6) SCC 462]**

7. Coming to cases from our own jurisdiction, in the case of **Abdul Ghani Vs. Inayat Karim and others (PLD 1960 SC (Pak) 98),** wherein one arbitrator remained absent on one or two sittings with the consent of the other arbitrators and nothing of a disputed nature was done in those sittings and the decision was made by all the arbitrators; it was held by this Court that neither the arbitrator absenting himself or the remaining arbitrators continuing the work, could be said to constitute misconduct. In **A. Z. Company v. S. Maula Bukhsh Muhammad Bashir (PLD 1965 SC 505)** it was held that the expression “error” on the face of the award as described in **Champesy Bhara’s case** *(supra)* has been accepted as a general rule since the decision in Hodgkinson’s case (supra), however, later an exception was engrafted onto this rule to the effect that when a specific point of law is referred to the arbitrator the award cannot be set aside if the arbitrator wrongly decides the

point of law. In the case of **Messrs Badri Narayan Agarwala Vs. Messrs Pak Jute Balers Ltd (PLD 1970 SC 43)**, where the appellant therein wanted the award to be set aside on the ground that he did not execute the agreement which contained the arbitration clause, the Court while interpreting sections 30 and 33 of the Arbitration Act held that “Section 33, no doubt, uses the word "challenge" as compared to the words "set aside" in section 30 but that in my view does not make any difference. Section 33 says also that when the existence of the agreement is challenged "the Court shall decide the question". Since the agreement in question was challenged by the appellant after the award had been made there was no bar for him to do so in the present suit.” Resultantly, the case was remitted to the trial Court to determine whether the appellant had executed the contract. In the case of **Haji Mushtaq Ahmad Vs. Mst. Hajra Bi and others (1980 SCMR 394)**, it was observed that the arbitrator has not given any reasons whatsoever for the payments ordered by him. As his silence about the reasons for his decision are like that of the sphinx, could any Court have read an error in the award much less an error on the face of the award? The question is of the meaning of the words “an error apparent on the face of the award”, the petitioner can succeed only by showing that the award itself or a note attached to it contained some legal propositions which were erroneous. But, as the arbitrator has not given any reasons whatever for his findings it follows that this sphinx like award could not possibly be set aside on the ground of an error apparent. In the case of **Province of Punjab Vs. Habib Ullah (1982 SCMR 243)**, it was held that the decision of the Arbitrator must be based upon evidence produced

before him and law applicable thereto. If the Arbitrator had not done so the award was liable to be set-aside. In the case of **National Construction Company Vs. West Pakistan Water and Power Development Authority (PLD 1987 SC 461),** it was observed that where the arbitrator himself did not wish to give a decision on an item, as the parties had agreed that the said question did not fall within the reference, the award in respect of that item was a mistake or accidental error which somehow crept in the body of the award made by the arbitrator. Such an error was incidental to all actions performed by human agency and could not be made the basis for reaching a finding of misconduct. In the case of **Joint Venture KG/RIST Vs. Federation of Pakistan (PLD 1996 SC 108)**, where the scope of a certain clause of an agreement was the main bone of contention between the parties, it was held by this Court that even if the parties had not specifically referred the question of interpretation of the said clause, its interpretation fell within the scope of reference, for without interpreting the said clause the dispute referred to the arbitration could not be resolved. In the case of **Hitachi Limited Vs. Rupali Polyester (1998 SCMR 1618)**, it was observed by this Court that Section 33 of the Arbitration Act not only covers the question as to the existence or validity of an arbitration agreement but also of an award, and also to have the effect of either determined. In the case of **Trading Corporation of Pakistan Pvt. Limited, Karachi Vs. Messrs Nidera Handelscompagnie B.V and another (2001 SCMR 646)**, it was observed that under Section 32 of the Arbitration Act no suit for a decision upon the existence, effect or validity of an arbitration agreement or award could be filed; however, a party could in terms

of Section 33 *(ibid)* file an application in the Court for challenging the existence or validity of arbitration agreement or an award, or to have the effect of either determined. In the case of **Pakistan Steel Mills Corporation, Karachi Vs. Messrs Mustafa Sons (Pvt.) Ltd (PLD 2003 SC 301)**, while interpreting the word "misconduct" with reference to arbitration proceedings it was held that it (misconduct) is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator. In the case of **President of the Islamic Republic of Pakistan Vs. Syed Tasneem Hussain Naqvi and others (2004 SCMR 590)**, this Court observed that the award could be challenged only on the grounds mentioned in section 30 of the Arbitration Act i.e. if the Arbitrator had misconducted himself in the proceedings and not on merits. The Court while hearing objections against the award could not sit as a Court of appeal against the award and interfere with it on merits. In the case of **Sh. Saleem Ali Vs. Sh. Akhtar Ali (PLD 2004 Lahore 404)**, the "misconduct" in terms of Arbitration Act was described to be of two kinds i.e. 'legal misconduct' and 'moral misconduct'. The detail of this was observed by the Court in the following words:

> Legal misconduct:
>
> 14. "Legal misconduct" means misconduct in the judicial sense of the word,, for example, some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. ... To sum up, an arbitrator misconducts the proceedings when (i) there is a defect in the procedure followed by him; (ii) commits breach and neglect of duty and responsibility (iii) acts contrary to the principles of equity and good conscience; (iv) acts without jurisdiction or exceeds it; (v) acts beyond the reference; (vi) proceeds on extraneous circumstances; (vii) ignores material documents; and (viii) bases the award on no evidence.

> These are some of the omissions and commissions which constitute legal misconduct or, in other words, that an arbitrator has mis-conducted the proceedings within meaning of clause (a) of section 30 of the Arbitration Act, 1940.
>
> Moral Misconduct:
>
> 15. It is difficult to define exhaustively and exactly what amounts to "misconduct" on the part of an arbitrator. ... it is essential that there must be abundant good faith, and the arbitrator must be absolutely disinterested and impartial, as he is bound to act with scrupulous regard to the ends of justice. An arbitrator must be a person who stands indifferent between the parties. ... An arbitrator should in no sense consider himself to be the advocate of the cause of party appointing him, nor is such party deemed to be his client."

In the case of **Province of Punjab Vs. Messrs Sufi Construction Company (2005 SCMR 1724)**, the award was upheld when the allegations against the arbitrators were vague and nebulous. In the case of **Mian Brothers Vs. Lever Brothers of Pakistan Ltd (PLD 2006 SC 169)** it was observed that the arbitrator acts in a quasi-judicial manner and his decision is entitled to the utmost respect and weight, unless the misconduct is not only alleged, but also proved against him to the satisfaction of the Court. While examining the award, the Court does not sit in appeal over the award and has to satisfy itself that the award does not run counter to the settled principles of law and the material available on record. An award cannot be lawfully disturbed on the premise that a different view was possible, if the facts were appreciated from a different angle. In fact the Court cannot undertake the reappraisal of evidence recorded by an arbitrator in order to discover the error or infirmity in the award. In the case of **Allah Din & Company Vs. Trading Corporation of Pakistan (2006 SCMR 614)** this Court held that it is true that the trial Court does not sit in appeal upon

the finding of the arbitrator but at the same time the Court is empowered to reverse the finding 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. In the case of **Muhammad Farooq Shah Vs. Shakirullah (2006 SCMR 1657)**, this Court observed that where an Umpire has applied his mind honestly and arrived at a decision to the best of his ability, the fact that a Judge might take a different view is not a ground for holding the award illegal. In the case of **Premier Insurance Company and others Vs. Attock Textile Mills Ltd. (PLD 2006 Lahore 534)**, it was observed by the Court that the Court while considering the validity of the award should not sit as a Court of appeal; trying to fish or dig out the latent errors in the proceedings or the award, but should only confine itself to examining the award by ascertaining, if there is any error, factual or legal, which floats on the surface of the award or the record and further, if such an error is allowed to remain, grave injustice would be done to the aggrieved party. The award of an arbitrator, who is the Judge selected by the parties themselves, should not be lightly interfered with until and unless as earlier held that it is established that the error committed by him is so glaring that if it is overlooked, it would lead to miscarriage of justice. But certainly the award cannot be intercepted on the ground that on the reading of the evidence, a conclusion other than that arrived at by the arbitrator, is/was possible. In the case of **Federation of Pakistan Vs. Joint Venture Kocks K.G / Rist (PLD 2011 SC 506)** it was observed that while

considering the objections under Sections 30 and 33 of the Arbitration Act the court is not supposed to sit as a court of appeal and fish for the latent errors in the arbitration proceedings or the award. In the case of **A. Qutubuddin Khan Vs. CHEC Mill Wala Dredging Co. Pvt. Ltd**. **(2014 SCMR 1268)**, in the unanimous opinion given by Mr. Justice Sh. Azmat Saeed, J. it was observed that even in the absence of objections, the award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only. Mr. Justice Khilji Arif Hussain, in his separate opinion observed that while hearing the objections and examining the award, the Court cannot sit as a Court of appeal on the award rendered by the arbitrator and substitute its own view for the one taken by the arbitrator. It is a settled principle of law that the award of the arbitrator who is chosen as Judge of facts and of law, between the parties, cannot be set aside unless the error is apparent on the face of the award or from the award it can be inferred that the arbitrator has misconducted himself under Sections 30 and 33 of the Arbitration Act. While making an award the Rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like the post office and put its seal on it but has to look into the award and if it finds patent illegality on the face of the award, it can remit the award or any of the matter(s) referred to arbitrator for reconsideration or set aside the same. However, while doing so, the Court will not try to find out patent irregularity, and only if any

patent irregularities can be seen on the face of award/arbitration proceedings like the award is beyond the scope of the reference or the agreement of arbitration was a void agreement, or the arbitrator awarded damages on black market price, which is prohibited by law, or the award was given after superseding of the arbitration, etc., can the same be set aside.

8. The principles which emerge from the analysis of above case-law can be summarized as under: -

(1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.

(2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.

(3) 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 that the reasons are not inconsistent and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court.

(4) A dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Such dispute would fall within the arbitration clause.

(5) The test is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is

necessary, then the matter must come within the scope of the arbitrator's jurisdiction.

(6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.

(7) The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part but it may tantamount to mala fide action and vitiate the award.

(8) If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally.

(9) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award.

(10) The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise.

(11) It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong.

(12) Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation.

(13) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd.

(14) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.

(15) The only exceptions to the above rule are those cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award, which one can say is erroneous.

(16) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(17) It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

(18) The Court does not sit in appeal over the award and should not try to fish or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect.

(19) The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record.

(20) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not do so he can be set right by the Court provided the error committed by him appears on the face of the award.

(21) There are two different and distinct grounds; one is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.

(22) An error in law on the face of the award means that one can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous.

(23) A contract is not frustrated merely because the circumstances in which the contract was made are altered.

(24) Even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only.

(25) While making an award rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner,

like a post office but must subject the award to its judicial scrutiny.

(26) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not misconduct on the part of the arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence.

(27) Misconduct is of two types: “legal misconduct" and “moral misconduct”. Legal misconduct means misconduct in the judicial sense of the word, for example, some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.

(28) The arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party.

(29) some of the examples of the term "misconduct" are:

(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;

(ii) if by his award the arbitrator or umpire purports to decide matters which have not

in fact been included in the agreement or reference;

(iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and

(iv) if there has been irregularity in the proceedings.

(30) Misconduct is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator.

9. Now we shall consider the facts of the instant case. The challenge has been thrown by the learned counsel for the appellant to the decree of the Court making the award the rule of the Court, mainly on the ground that it is vitiated because the GSA had been procured by the respondent through fraud, misrepresentation and concealment of facts. According to the learned counsel, in Clause 2 of the GSA, it is unequivocally mentioned that the appellant would be the exclusive general sales agent for *inter alia* the sale of the tickets on behalf of the respondent but it was not disclosed that the earlier bilateral agreement *(dated 13.12.1963)* executed between the respondent and the Pakistan International Airline *(PIA)* had not been terminated and hence, PIA was already working in the same capacity at the relevant point of time. In contrast, learned counsel for the respondent submitted that the GSA was unquestionably a valid agreement between the parties and the PIA was already an earlier agent of the appellant, thus to hold that the respondent had misrepresented this fact to the appellant is absolutely misconceived, even otherwise this issue was not taken up in

defence by the appellant before the arbitration tribunal or if it was raised as a defence the same had been accurately and validly considered and discarded by the learned arbitrators. In order to decide this issue, recourse has to be made to Article 2 of GSA, which provides that "*unless otherwise agreed between the parties, the principal* ***shall*** *not appoint any third party to carry out on its behalf service similar to those described in this agreement in the territory in which the General Sales Agent has undertaken the service".* From the language of above Article, it is abundantly clear that the respondent had bound down itself not to appoint any other person as its agent to carry out the same functions as were being done by the appellant, which commitment must be for the future and this is evident from the word "shall" used therein. At the time of entering into the agreement, it was the duty of the appellant to enquire and ensure that no other person had been granted such authority. It is the stance of the appellant before this Court that the GSA was a result of fraud and misrepresentation, as such, the award as well as the decree is vitiated on this score, however, the appellant itself filed a suit for specific performance not only relying upon the GSA but also for its specific performance and recovery of certain amounts thereunder. It is settled law that no one can be allowed to blow hot and cold in the same breath. Both the stances taken by the appellant are not just contradictory, rather they are self-destructive.

10. It was also argued that the Court while considering the validity of the award is not supposed to go into the latent errors of the award but must simply confine itself to the patent illegalities on account of which merely by looking at the award it can be said

that the same is vitiated or that there exist patent errors in the appreciation of the evidence or the arbitrators have gone wrong in the application of law. These factors were not involved in the present matter. Resultantly, the learned Courts below have rightly passed the impugned decree.

11. It is submitted on behalf of the appellant that as no arbitrator had been appointed by the appellant, one should have been appointed by the learned Court as per the provisions of Sections 20 and 8 of the Arbitration Act, because according to the Article 15 of GSA the governing laws of the agreement were the laws of Pakistan, and thus, the IATA had no power in this regard. The learned counsel for the respondent has argued that the award has been passed by a competent arbitral forum which was appointed as per the terms of the GSA. We have considered the relevant provisions of GSA as well as the Arbitration Act. Undoubtedly, under Sections 8 and 20 of the Arbitration Act, in certain cases, the Court has the authority to appoint one or more arbitrators. However, with regard to the applicability of said provisions recourse has to be made to the relevant provisions of GSA. In this regard reliance has been placed by the learned counsel for the appellant on Article 15 of GSA, which provides that the agreement shall be interpreted and governed in all respects with the laws of the principle place of business of the agent. There is another Article i.e. 14.4, which deals with the appointment of the arbitrator in case of failure of a party to do so. It provides that "i*f a Party has notified the other Party of its appointment of an Arbitrator and the other Party fails to appoint an Arbitrator within fifteen/15 days of such notification the First Party may apply to the*

Director General of IATA who shall appoint the arbitrator on behalf of the Party which has failed to do so". It is to be noted that Article 15 of GSA is a general provision which deals with the interpretation of the GSA as a whole, whereas, Article 14.4 is a specific provision which deals explicitly with the appointment of the arbitrator. Thus, in the circumstances, the special provision shall take effect to the exclusion of the general provision. Further, the appellant did not take up any objection regarding the constitution of the arbitration tribunal and participated in the proceedings voluntarily. Consequently, we are inclined to hold that the arbitrator was validly appointed and the award cannot be vitiated on this score.

12. It is also submitted that the appellant was not afforded sufficient opportunity to participate in the arbitration proceedings, inasmuch as, the witnesses of the respondent had not been permitted to be cross-examined by the appellant although in contrast the opportunity of cross-examination had been provided to the respondent. Reliance in this regard has been placed on the judgments reported as **Khardah Company Ltd. Vs. Raymon & Co. (India) Private Ltd. (AIR 1962 SC 1810)** and **Waverly Jute Mills Co. Ltd. Vs. Rayfrom and Co. (India) Private Ltd. (AIR 1963 SC 90)**. It was submitted by the learned counsel for the respondent that the appellant was provided full opportunity to participate in the arbitration proceedings, to cross-examine the witnesses produced by the respondent and to provide evidence in rebuttal. In this regard it is to be noted that in the award, the summary of proceedings before the arbitration tribunal has been provided, from the perusal whereof it is evident that the appellant

was notified about each date of hearing and his counsel was present on almost all the dates but most of the time the appellant sought adjournment(s). The appellant was also provided opportunity to provide a list of its witnesses but not only did it fail to provide the same but also remained absent on many occasions, and as such was proceeded ex-parte. Another objection was raised to the validity of the award by claiming that heavy costs have been imposed by the arbitrators in the award which is absolutely unjustified. Besides, the fee of Dr. Parvez Hassan has been unilaterally and arbitrarily fixed.

13. After considering the material available on record, we are of the view that no illegality has been committed in the arbitration proceedings. It is only on the basis of the factual conclusions drawn by the arbitrators on the basis of the material available on the record that the award has been pronounced. The award does not suffer from any illegality, either in law or fact, nor is there any misreading or non-reading of evidence. In view of the law highlighted above the Court considering the validity of the award could not sit in appeal; it had no power to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator was wrong or substitute its own view for the one taken by the arbitrator for the reason that another view was possible. It could only confine itself to find an error apparent on the face of the award, or determine the misconduct of the arbitrators in the course of the arbitration proceedings. In the instant case, we are of the view, that none of the said conditions existed. As such, the learned Trial Court rightly declined to interfere in the award and made the same Rule of the

Court, which decision was rightly upheld by the learned Division Bench of the High Court in appeal.

14. It was also argued by the learned counsel for the appellant that the suit filed by the respondent was not maintainable as the provisions of Sections 451 and 456 of the Companies Ordinance were not complied with. According to him, the respondent being a foreign company was not registered in Pakistan as required under the law, therefore, it was precluded and prohibited from initiating any legal proceedings against the appellant. It was further argued that this was an incurable defect, which could not be cured by the Court. Reliance in this regard has been placed on the judgments reported as **Hala Spinning Mills Ltd. Vs. International Finance Corporation (2002 SCMR 450 at page 458)**, **Maulana Abdul Haque Baloch Vs. Government of Balochistan through Secretary Industries and Mineral Development and others (PLD 2013 SC 641 at 714 and 715)**. The case of the appellant is that for the purpose of having a foreign company registered in terms of the Sections mentioned above, the limitation period is only 30 days from the date of establishment of place of business. When we questioned the learned counsel for the appellant whether the respondent had any office established in Pakistan and as to what was the time frame in this regard, he was not been able to provide any assistance on this point, because there is no material available on the record, except relying upon the plaint filed by the respondent wherein the address of the respondent is given as "*Holiday Inn Crown Plaza Hotel, Shahrae Faisal, Karachi*".

15. Subsection (1) of Section 451 of the Companies Ordinance requires that every foreign company which establishes a place of business in Pakistan shall, within thirty days of the establishment of the place of business, deliver to the registrar certain documents. Section 456 *ibid* which is a remedial clause, provides that any failure by a foreign company to comply with any of the requirements of Sections 451 or 452 *ibid* shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof; but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until it has complied with the provisions of section 451 and section 452 *ibid*. Thus, the defect, of non-registration under Section 451 *ibid*, is not a fatal defect, rather, it is curable. The material was duly placed before the learned Judge to justify that valid registration of the respondent-company had taken place. This fact, thus, was taken into consideration, and was prudently and reasonably decided by the learned Judge.

16. It is also submitted by the learned counsel for the appellant that the decree on the basis of which the winding up proceedings have been founded by the respondent, had not been executed by the respondent within the prescribed period of limitation, resultantly, such decree, now having been rendered inexecutable, could not be made the basis of the winding up proceedings. It is also submitted that the winding up proceedings cannot be used to coerce the company to make the payment to the creditors. There is a difference between a company in a running

condition and a company not in a running condition, and the spirit of law is to save the institutions rather to destroy them by winding up. According to him, because the object of winding up is to determine the solvency or insolvency of the company, only a company which is found to be insolvent could be wound up. Reliance in this behalf has been made on the judgments reported as **Hala Spinning Mills Ltd.** *(supra)*, **M/s Metito Arabia Industries Limited Vs. M/s Gammon (Pakistan) Limited (1997 CLC 230) and M/s Khyber Textile Mills Ltd. Vs. M/s Allied Textile Mills Ltd. (PLJ 1979 Kar 295)**. It was however, submitted by the learned counsel for the respondent that as the appellant was unable to pay its debt on the basis of the decree which, after notice to the appellant under Section 305 of the Companies Ordinance, remained outstanding, therefore it should be presumed that the appellant-company is unable to pay its debt and therefore, the order for winding up was justified. Considering the submissions made by the learned counsel for the appellant, notwithstanding the merits of the case, we are inclined to provide an opportunity to the appellant to pay the decretal amount along with costs to the respondent.

17. These are the reasons of our short order of even date, which reads as under: -

> *"For the reasons to be recorded later, Civil Appeal No.1773/2016 is dismissed with costs of Rs.500,000/- (rupees five hundred thousand). However, as regards Civil Appeal No.539/2003 is concerned, which has been filed against the winding up order dated 19.3.2003 passed by the learned Single Judge of the Sindh High Court, an opportunity is provided to the appellant to pay the decretal amount involved in Civil Appeal No.1773/2016 along with*

the costs of Rs.500,000/- to the respondent within two months from today in order to avoid the winding up of the company. The learned counsel for the respondent has consented to the above order and stated that he would not press the winding up petition if the abovestated decretal amount and the costs are paid accordingly. Needless to observe that if such amount is not paid within the said period, this appeal shall also be deemed to have been dismissed."

CHIEF JUSTICE

JUDGE

JUDGE

ISLAMABAD.
1st January 2018.
Approved for reporting
Mudassar/*