JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

E.F.A.No.09 of 2019
Overseas Pakistanis Foundation
Versus
M/s Joint Management (Pvt.) Limited

Date of Hearing: 07.06.2021
Appellant by: M/s Ch. Haseeb Muhammad, Aftab Alam Yasir and Ijaz Mehmood Ch., Advocates
Respondent by: Mr. Khurram M. Hashmi, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellant, Overseas Pakistanis Foundation, impugns the order dated 18.11.2019 passed by the learned Executing Court whereby Mr. Muhammad Ameen, Advocate was appointed as a local commission to determine the gold rate prevailing on 15.05.2019 as well as in the year 1997.

2. On 15.05.2019, an amount of Rs.120 million was paid by the appellant to the respondent in purported satisfaction of the judgment and decree dated 11.04.2017 passed by the Court of the learned Civil Judge, Islamabad. Vide the said judgment and decree, the learned Civil Court (i) dismissed the appellant's application under Sections 30 and 33 of the Arbitration Act, 1940 **("the 1940 Act")** praying for the arbitration award dated 14.05.2016 to be set-aside, and (ii) allowed the respondent's application under Sections 14 and 17 of the 1940 Act praying for a judgment and decree to be passed in terms of the said award.

3. Civil revision petition No.315/2017 preferred before this Court by the appellant against the said judgment and decree was dismissed by this Court vide judgment dated 19.11.2018, reported as *2019 CLC 497.* Civil petition No.4410/2018 filed by the appellant against the said judgment was dismissed by the Hon'ble Supreme Court vide order dated 26.03.2019. With the dismissal of the said petition, the judgment and decree dated 11.04.2017 passed by the learned Civil Court attained finality for all intents and purposes.

4. The factual background leading to the passing of the said judgment and decree dated 11.04.2017 has been set out in

sufficient detail in paragraphs 1 to 11 of the said judgment reported as *2019 CLC 497*. For the sake of brevity, the recapitulation of the dispute between the parties is not necessary. Suffice it to say that the learned Arbitrator, in his award dated 14.05.2016, had held that an amount of Rs.1,16,59,101/- was payable by the appellant to the respondent. Since this amount had been withheld by the appellant from the respondent ever since February 1997, the learned Arbitrator also held that the respondent was entitled to compensation by being paid the said amount at the gold rate prevailing in the year 1997. The learned Arbitrator justified the said compensation by observing *inter alia* that the market value of the land procured by the respondent for the appellant had undergone a tremendous increase whereas the rupee had been devalued.

5. On 27.04.2017, the respondent filed an execution petition for the execution of the judgment and decree dated 11.04.2017. During the pendency of said petition the appellant, on 15.05.2019, paid an amount of Rs.120 million to the respondent. The respondent's stance was that with this payment the appellant had not completely discharged its liability under the said judgment and decree. Therefore, on 09.05.2019, the respondent filed an application before the learned Executing Court praying for a direction to be issued to the appellant to pay an additional amount of Rs.54,155,843/- to the respondent. The position taken by the respondent in the said application was that in the year 1997 gold rate was Rs.400.8 per gram; that 29,089 grams of gold could be purchased for Rs.1,16,59,101/- in the year 1997; that on 07.05.2019, the gold rate was Rs.5,987 per gram; and that the total amount payable under the judgment and decree to the respondent was Rs.174,155,843/- (29,089 grams of gold multiplied by Rs.5,987/-). The appellant subtracted Rs.120 million (already paid by the appellant on 15.05.2019) from Rs.174,155,843/-, and claimed the balance amount of Rs.54,155,843/- from the appellant.

6. The appellant's contention is that although in the arbitration award it was held that an amount of Rs.1,16,59,101/- was payable

to the respondent by the appellant since February 1997, and that the appellant had been directed to compensate the respondent by paying the said amount on the gold rate prevailing in the year 1997, the learned Civil Court, while drawing the decree, did not obligate the appellant to compensate the respondent by paying the said amount at the gold rate prevailing in 1997. Learned counsel for the appellant contended that the arbitration award dated 14.05.2016 had been modified by the learned Civil Court since the decree drawn by the learned Civil Court makes no mention for the amount to be paid at the gold rate prevailing in the year 1997. This argument of the learned counsel for the appellant is not just devoid of common sense but is absurd inasmuch as if this argument is to be accepted, there would have been no reason for the appellant to have paid Rs.120 million to the respondent on 15.05.2019. No assistance was rendered by the learned counsel for the appellant as to the rate which was applied for coming to the figure of Rs.120 million as the decretal amount.

7. The learned Arbitrator had, in no uncertain terms, held that the amount of Rs.1,16,59,101/- payable by the appellant to the respondent in the year 1997 was to be paid at the prevailing gold rate so as to satisfy the judgment and decree dated 11.04.2017. For the purposes of clarity, paragraphs 31 and 32 of the award are reproduced herein below:-

> ***"31. The claimant's amount Rs.1,16,59,101/- remained outstanding for payment by OPF from February 1997 till to-date. The value of land in the market has undergone tremendous increase. The currency has devalued. Had the claimant been paid this amount in the year, 1997, he would have invested this amount in some profit-able business and earned profits. Callous attitude and deep slumber of respondent in not releasing the amount due on their part cannot be compounded. They have been utilizing this amount of claimant for their benefit and cherished itself.***
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> ***32. It is, thus, equitable and fair to compensate the claimant by directing the respondent to return the amount due in 1997, Rs.1,16,59,101/- on the prevailing gold rate and award is made accordingly. Cost of litigation is not awarded in absence of any provision in the agreement."***

8. Vide judgment and decree dated 11.04.2017, the said award was made a Rule of Court and a judgment in terms of the award was passed in terms of Section 17 of the 1940 Act. The learned

Civil Court also dismissed the appellant's objections to the arbitration award; it is explicitly so stated in the decree drawn by the learned Civil Court. For the purposes of clarity, the operative part of the decree dated 11.04.2017 is reproduced herein below:-

> ***"This Award coming on this day for final disposal before me in the presence of Barrister Khurram Hashmi Advocate for the petitioner and Mian Abdul Razzaq, Advocate for the respondent, it is ordered that the objections raised through objection petition are not tenable, hence, the same are dismissed having no force. Therefore, the petition in hand is accepted and the Award submitted by the learned Arbitrator based on sound reasons supported with the evidence, therefore, same is made rule of the Court and a judgment in the terms of Award is made U/S 17 of the Arbitration Act, 1940 as objections have been dismissed. The Award is decreed in the manner that the petitioner is entitled for Rs.1,16,59,101/- (rupees one crore, sixteen lacs, fifty-nine thousands, one hundred and one only) on the prevailing Gold rate at the time of payment subject to filing of court fee amounting to Rs.3,000/- within 15 days of passing this order, failing which this order deemed to be cancelled. There is no order as to costs."***

9. I do not find any ambiguity in the decree when read with the operative part of the judgment dated 11.04.2017, which is reproduced herein below:-

> ***"8. For what has been discussed above, it is found that the objections raised through objection petition are not tenable, hence, the same are dismissed having no force. Therefore, the petition in hand is accepted and the Award submitted by the learned Arbitrator based on sound reasons supported with evidence, therefore, same is made rule of the Court and a judgment in the terms of Award is made U/S 17 of the Arbitration Act, 1940 as objections have been dismissed. <u>The Award is decreed in the manner that the petitioner is entitled for Rs.1,16,59,101/- on the prevailing Gold rate at the time of payment</u> subject to filing of court fee amounting to Rs.3,000/- within 15 days of passing this order failing which this order deemed to be cancelled. There is no order as to costs. Decree sheet be prepared accordingly. File be consigned to the record room after its due completion."***
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> **(Emphasis added)**

10. Even if it is assumed that there was an ambiguity in the decree, which in fact there isn't, the learned Executing Court can construe the decree by looking into the pleadings or the judgment. Although an Executing Court cannot go behind a decree and must execute it as it stands, yet where it finds any ambiguity in a decree it may, in order to ascertain its precise meaning, look into the contents of an arbitration award and the pleadings. Reference in this regard is made to the law laid down in the case of <u>Muhammad</u>

Lal Vs. Abdul Quddus (PLD 1975 Quetta 29). In the case of Azad Government of the State of Jammu and Kashmir Vs. Muhammad Aslam Khan (1990 MLD 2333), the Hon'ble Supreme Court of Azad Jammu and Kashmir, after referring to a number of judicial precedents on the subject, held as follows:-

> ***"It is evident from the above authorities that in case the decree is ambiguous, the executing Court can look into the pleadings, judgment, award or any other relevant document to ascertain the connotation of the decree which is sought to be executed."***

Law to the said effect has also been laid down in the cases of Mirza Khan Vs. Ajaib Sultan (2014 MLD 1547) and Topanmal Chhotamal Vs. Messrs Kundomal Gangaram (AIR 1960 SC 388).

11. The appellant was made liable to pay to the respondent an amount equivalent in value to the quantity of gold which could be purchased with Rs.1,16,59,101/- in the year 1997. For this purpose, it had to be first ascertained what the rate of gold was in February 1997 when the amount of Rs.1,16,59,101/- was held by the learned Arbitrator to have been payable by the appellant to the respondent. If on 15.05.2019 (when Rs.120 million was paid by the appellant), the same quantity of gold could be purchased with Rs.120 million as could have been purchased with Rs.1,16,59,101/- in the year 1997, nothing would remain payable to the respondent. Therefore, it is my view that the learned Civil Court has committed no illegality by appointing a local commission with the direction to visit at least three jewelers to ascertain the rate of gold per gram in the year 1997 and the rate of gold per gram on 15.05.2019 (when Rs.120 million was paid by the appellant to the respondent). It is only after these rates are ascertained that the learned Civil Court will be in a position to determine as to in what proportion the decree had been satisfied and what amount remains payable by the appellant out of the decretal amount. The obvious reason why the learned Civil Court wants the gold rate on 15.05.2019 to be ascertained is that it is the date of payment which would be crucial in determining whether or to what extent the decree had been satisfied.

12. In the case of Terni S.P.A. Vs. PECO (Pakistan Engineering Company) Ltd. (1992 SCMR 2238), the Hon'ble Lahore High Court had allowed the claim of Terni S.P.A./plaintiff in US Dollars against PECO/defendant but converted it into Pakistan Rupees at the exchange rate prevalent at the time when the amount had become due and payable. The plaintiff's appeal was partly allowed by the Hon'ble Supreme Court by enhancing the rate of interest on the decretal amount. Since the plaintiff had, in the suit, made a claim against the defendant in foreign currency or its equivalent in Pakistani Rupees at the rate prevailing on the institution of the suit, the Hon'ble Supreme Court did not apply the exchange rate prevailing on the date of payment under the decree. However, after referring to a catena of case law from different jurisdictions including the House of Lords' judgments in the cases of Re United Railways of the Hwana and Regala Warehouses Ltd. [1960] 2 All ER 332 and Miliangos Vs. George Frank (Textiles) Ltd. [1975] 3 All ER 801, the Hon'ble Supreme Court held as follows:-

> ***"28. ... in keeping with the moving trend and the sweeping changes in the economic field that have been ushered in and to support the same and be in line with the law in England, we would, for reasons stated in para. 27 above, hold that if a judgment and decree is given for "so much in foreign currency or the Pak rupees equivalent thereof at the time of payment", we would be articulating the correct law in keeping with the changing time. In stating this rule, we would like to make it clear that questions of cause of action or limitation must be treated separately, which shall continue to be governed by the law on those subjects and the application of this rule should be treated as without prejudice to these two matters. We would therefore, hold that where the money of account in respect of a contract is a foreign currency, or where it is not so but under the contract the particular account claimed is payable in a particular foreign currency, and demand is made for payment in that foreign currency, the Pakistani Courts can give judgment in "so much of that. foreign currency or the Pak rupees equivalent thereof at the time of payment". Here it must be stated that where the decree is in such terms, the language of the decree, as stated in para 18 above, would give the judgment-debtor the option to either make payment in foreign currency or in Pak rupees, and execution can always be taken out by the decree-holder if no payment is made by the judgment-debtor in respect of so many Pak rupees as equal the foreign currency at the rate of exchange prevalent on the date the payment is made."***

13. True, in the case at hand, the decretal amount has not been denominated in gold or in foreign currency but the learned Civil

Court has passed a judgment and decree in terms of the arbitration award which provides a mechanism for the calculation of the compensation for the delay of more than two decades in the payment of Rs.1,16,59,101/- by the appellant to the respondent. The sooner that the appellant would have paid in accordance with the arbitration award, the lesser it would have had to pay. Instead of accepting the award with grace, it decided to raise objections thereto, which did not find favour with the learned Civil Court. As mentioned above, this Court dismissed a time-barred revision petition filed by the appellant against the learned Civil Court's judgment and decree whereby the appellant's objections to the award were spurned and it was made a Rule of Court. The appellant did not stop at that and challenged the judgment passed by this Court before the Hon'ble Supreme Court. It was only after the appellant did not succeed before the Hon'ble Supreme Court that it paid Rs.120 million to the respondent.

14. It ought to be borne in mind that the said payment of Rs.120 million was not made by the appellant on its own volition but after the learned Executing Court had issued bailable warrants of arrest against the Managing Director of the appellant. The learned Executing Court had issued the said warrants after the appellant had furnished a bank guarantee for only Rs.1,16,59,101/- when the learned Executing Court had required it to furnish a bank guarantee equivalent to the entire decretal amount. The learned Executing Court's order to issue the bailable warrants of arrest was suspended by this Court vide order dated 19.01.2018 subject to the furnishing of a pay order for an amount of Rs.120 million before the learned Executing Court.

15. In the period during which the appellant had embroiled the respondent in litigation in an endeavor to set-aside the award, the value of gold steadily increased. In the event, the learned Executing Court holds that the payment of Rs.120 million already paid by the appellant to the respondent did not satisfy the decree, the appellant would only have itself to blame for the unsavory consequences in which it will find itself. Since I do not find any

legal infirmity in the order dated 18.11.2019 passed by the learned Executing Court for the appointment of a local commission, the instant appeal is dismissed. Since the execution petition has been pending since 27.04.2017, it is expected that the same would be decided expeditiously.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 15/06/2021

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*