JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No12 of 2011
M/s Telecom Foundation
Versus
M/s ASKO Enterprises

Dates of Hearing:	29.01.2020 & 03.06.2020
Appellant by:	Syed Ishtiaq Haider, Advocate,
Respondent by:	Khawaja Farooq Mehta, Advocate, Barrister Ehsan Ali Qazi, learned *Amicus Curiae.*

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 39 of the Arbitration Act, 1940 ("**the 1940 Act**"), the appellant (M/s Telecom Foundation) impugns the order and decree dated 02.12.2010 passed by the Court of the learned Additional District Judge, Islamabad, whereby objections to the arbitration award dated 30.05.2000 filed by the respondent (M/s ASKO Enterprises (Pvt.) Ltd.) were allowed and the said award was set-aside.

2. The facts essential for the disposal of this appeal are that on 02.11.1993, two agreements were executed between the appellant and the respondent. One agreement was for manufacturing of tubular posts for supply to Pakistan Telecommunication Corporation **("P.T.C.")**, and the other one for the sale of the tubular posts for supply to P.T.C. The said agreements contained identical arbitration clauses providing for disputes and disagreements between the appellant and the respondent to be referred to the Managing Director of the appellant.

3. Under clause 7 of the agreement for the sale of tubular posts, the appellant was under an obligation to arrange an advance equal to 20% of the agreed sale price which was to be adjusted proportionately during the currency of the contract according to the supply of the tubes.

4. Vide letter dated 03.04.1995, the respondent requested the appellant to provide an advance of Rs.4 million so as to enable the respondent to undertake the remaining work without loss of time. On 09.04.1995, the appellant paid Rs.2 million to the respondent as an

advance. Vide letter dated 12.04.1995, the respondent requested the appellant for financial help of an additional Rs.3 million. On 17.04.1995, the appellant paid a further amount of Rs.2 million to the respondent. In this way a total amount of Rs.4 million was paid as an advance by the appellant to the respondent.

5. Vide letter dated 13.06.1995, the appellant requested the respondent to refund the amount of Rs.4 million. The respondent, in its letter dated 16.09.1995, informed the appellant that the advance of Rs.4 million paid to the respondent had been adequately secured with immovable property and a personal guarantee. Furthermore, the respondent expressed hope that the said amount would be returned to the appellant by the end of November 1995. It may be mentioned that in the said letter, the position taken by the respondent was that the advance of Rs.4 million had been invested by the respondent *"by way of security/earnest money for a project for supply of GI/MS pipes for quite some time to come."*

6. Vide letter dated 21.09.1995, the appellant informed the respondent that it could not allow further time for the return of the advance. Furthermore, the respondent was requested to repay the advance along with mark-up by 30.09.1995. Vide letter dated 01.10.1995, the appellant once again requested the respondent to repay the advance with mark-up at the rate of 25% per annum. The respondent, for not repaying the advance in time, put recession in the market as an excuse. Vide letter dated 31.10.1995, the respondent sought further time for the repayment of the advance.

7. For partial repayment of the advance, the respondent gave cheque No.38326688, dated 07.12.1995, for Rs.1 million to the appellant. This cheque was dishonoured on 18.12.1995 due to insufficient funds in the respondent's account. Vide letter dated 07.01.1996, the appellant informed the respondent as to the dishonour of the said cheque and called upon the latter to repay the advance along with mark-up within a period of seven days, failing which legal proceedings for the recovery of the said amount would be initiated. The respondent, in its letter dated 22.01.1996, expressed its regrets and tendered an apology for not repaying the advance. In the said letter, the respondent expressed its intention to pay back the advance along with mark-up. Interestingly, the

respondent also requested the appellant to pray for an improvement in the former's financial position so as to enable it to repay the advance.

8. On 22.09.1996, the appellant filed a suit under Order XXXVII C.P.C. for recovery of Rs.1 million along with mark-up before the Court of the learned District Judge, Islamabad. In the month of September, 1996, the respondent filed an application under Section 34 of the 1940 Act praying for the said suit to be dismissed. Vide order dated 10.12.1999, the learned trial Court stayed the proceedings in the suit and referred the dispute between the appellant and the respondent to the Managing Director of the appellant for arbitration.

9. It may also be mentioned that on 22.09.1997, the appellant filed another suit for recovery of Rs.5,383,561/- before the learned Civil Court against the respondent as well as against the owners of the immovable property which had been given as security by the respondent for the repayment of the advance. The defendants in the said suit filed an application under Section 34 of the 1940 Act praying for the appointment of an arbitrator and for the proceedings in the suit to be stayed. Since the appellant did not oppose the prayer sought in the said application, the learned Civil Court vide order dated 26.03.1999 allowed the said application.

10. The appellant filed separate statements of claim with respect to the two references. In addition to filing its defence, the respondent also filed a counter claim against the appellant. The order sheet maintained by the learned Arbitrator shows that on 30.05.2000, the references were decided and a consolidated award was made by the learned Arbitrator. Furthermore, it was ordered that notice of the award along with its copy be sent to the parties through courier service.

11. On 21.10.2000, the appellant filed an application under Section 14(2) of the 1940 Act before the Court of the learned Additional District Judge praying for a direction to be issued to the learned arbitrator to file the award in the Court, and for a judgment and decree to be passed in terms of the award. The respondent contested the said application by filing a written reply. Furthermore, on 23.11.2000 the respondent filed an application to restrain the

learned Arbitrator from filing the award in the Court. This application was filed primarily on the ground that the award had become time barred. Perusal of the order dated 26.05.2001 passed by the learned Additional District Judge shows that the learned counsel for the contesting parties had requested for the entrustment of the case to the Civil Court for its trial as a regular suit. Accordingly, vide the said order, the matter was referred to the learned District Judge, Islamabad with a request to entrust the case to a Civil Court. The learned District Judge, in its order dated 16.06.2001, took the view that a matter arising from proceedings under Order XXXVII C.P.C. could not be transferred to a Civil Court.

12. The appellant's application for review of the above-mentioned order dated 26.05.2001 passed by the Court of the learned Additional District Judge, Islamabad, and its application to strike out the respondent's defence as well as the respondent's application under Order VII, Rule 11 C.P.C. were decided by the Court of the learned Additional District Judge, vide judgment dated 30.07.2001 wherein it was held that the appellant may file an application under Section 14(2) of the 1940 Act before the learned Civil Court for filing the arbitration award in the Court. It was also held that the appellant's suit under Order XXXVII C.P.C. was not competent after an agreement had been made by the parties for reference to arbitration. The said judgment dated 30.07.2001 was assailed by the appellant in F.A.O.No.82/2001 before the Hon'ble Lahore High Court. Vide judgment dated 27.05.2003, the said appeal was allowed and the order dated 30.07.2001 was set-aside. Furthermore, it was held that the suit filed by the appellant as well as the applications arising out of the reference shall be deemed to be pending before the "learned Trial Court" i.e. the Court of the learned Additional District Judge, Islamabad.

13. In the post-remand proceedings, the respondent was proceeded against *ex-parte.* Vide order dated 12.11.2003 passed by the Court of the learned Additional District Judge, Islamabad, the learned Arbitrator was directed to file the award by 20.11.2003. On 13.12.2003, the learned Arbitrator filed the award in the Court. On 10.02.2004, the order to proceed *ex-parte* against the respondent was recalled, and on 10.03.2004 the respondent filed objections to

the award. The appellant contested the respondent's objections to the award. Vide order dated 21.04.2004, the record of the arbitration proceedings was summoned by the Court. On 28.05.2004, the said record along with the arbitration award was filed in the Court. Vide order dated 26.06.2004, the Court framed the following issues:-

> ***"1. Whether award has been made beyond the statutory period of limitation? OPA***
> ***2. Whether the arbitrator has misconducted himself in conducting the proceedings of arbitration? OPA***
> ***3. Whether the award suffers from any legal infirmity/error on the face of award, rendering it invalid? OPA***
> ***4. Relief."***

14. The Court clerk/*ahlmad* of Civil Court appeared as CW.1 whereas the learned arbitrator appeared as CW.2. The Chief Executive Officer of the respondent gave evidence as OW.1. Vide consolidated judgment and decree dated 02.12.2010, the Court dismissed the appellant's application under Section 14(2) of the 1940 Act, and allowed the respondent's objections to the arbitration award. The said judgment and decree has been assailed by the appellant in the instant appeal.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANT:-

15. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that at no material stage during the arbitration proceedings did the respondent object to the arbitration proceedings having been conducted beyond four months from the date of entering upon reference; that it is well settled that a party who does not object to the arbitration proceedings being completed beyond a period of four months cannot subsequently seek to set-aside an arbitration award on the said ground; that the order dated 21.04.2004 passed by the learned Trial Court to summon the record of the arbitration proceedings was not assailed by any party; that pursuant to the said order, the award was filed in the Court on 13.12.2003; that since the respondent had filed objections to the award, and since the award had already been filed in the Court, the said award could not have been set-aside on the ground that the appellant's application under Section 14(2) of the 1940 Act had been filed beyond the limitation period provided in Article 178 of the First Schedule to the Limitation

Act, 1908; that a party's failure to file an application under Section 14(2) of the 1940 Act within the period of ninety days from the date of the service of the notice of the making of the award cannot result in the setting aside of the award by the Court; that at best the consequence of such a failure would be that a party's application for filing the award in the Court would be dismissed as time barred; that in the case at hand since the award had been filed in the Court before the respondent filed objections to the award, the learned Trial Court erred by setting aside the arbitration award on the ground that the respondent's application under Section 14(2) of the 1940 Act was time barred; that the learned arbitrator had rendered the award on 30.05.2000; that the learned arbitrator had appeared as CW.2 and had deposed that he had issued notice as to the making of the award to the parties within one week of rendering the award; and that the mere fact that the award was scribed on stamp paper issued on 01.07.2000 could not result in the award being set-aside. Learned counsel for the appellant prayed for the appeal to be allowed and for the arbitration award to be made a Rule of Court.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE RESPONDENT:-

16. On the other hand, learned counsel for the respondent submitted that under paragraph 3 of the First Schedule to the 1940 Act, the learned arbitrator was bound to make the award within four months from the date of entering upon reference; that the learned arbitrator entered upon reference on 25.06.2000 when he issued notices to the parties; that the learned arbitrator admittedly rendered the award after four months of entering upon reference; that this delay in rendering the award was sufficient to set-aside the award; that the learned arbitrator had not applied to the Court for an extension in time for completing the arbitration proceedings; that the learned arbitrator, in his evidence, had admitted that he had signed the award on 30.05.2000 and had issued notice to the parties a week after that; that the learned arbitrator, after signing the award, could not have scribed the same on stamp paper issued about a month after signing the award; that the limitation period for filing an application under Section 14(2) of the 1940 Act is to be computed from the date when the respondent received notice as to

the rendering of the award; that whether the arbitration award is considered to have been issued on 30.05.2000 or 01.07.2000, either way the appellant's application under Section 14(2) of the 1940 Act filed on 21.10.2000 was time barred having being filed beyond the limitation period of ninety days provided in Article 178 of the First Schedule of the Limitation Act, 1908; and that the impugned judgment and decree does not suffer from any legal infirmity. Learned counsel for the respondent prayed for the appeal to be dismissed.

17. The learned *Amicus Curiae* submitted a well prepared brief on the case supported by case law. In his written submissions, he has set out the grounds for an award to be made a Rule of Court.

18. I have heard the contentions of the learned counsel for the contesting parties and learned *Amicus Curiae* and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 14 and need not be recapitulated.

19. The two grounds on which the respondent's objections to the award were allowed were (i) that the award was rendered beyond the period of four months from the date on which the learned arbitrator entered upon reference, and (ii) that the learned arbitrator committed misconduct by rendering the award on 30.05.2000 and affixing it on a stamp paper issued on 01.07.2000. The only ground on which the learned Trial Court dismissed the appellant's application under Section 14(2) of the 1940 Act was that the said application was filed beyond the limitation period provided in Article 178 of the First Schedule to the Limitation Act, 1908.

WHETHER AN AWARD RENDERED FOUR MONTHS AFTER THE ARBITRATOR ENTERED ON THE REFERENCE IS INVALID:-

20. The arbitration proceedings in question were with the intervention of the Court. The Court, while referring the matter to arbitration, vide order dated 10.12.1999, did not fix any time within which the learned arbitrator was required to render the award. The Court had referred the matter to arbitration and had adjourned the proceedings in the suit *sine die*. The Court that refers the matter to arbitration is the Court where the award is to be filed. Therefore on

13.12.2003, the award was filed before the Court of the learned Additional District Judge, Islamabad.

21. Section 3 of the 1940 Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule to the 1940 Act insofar as they are applicable to the reference. The First Schedule to the 1940 Act sets out the implied conditions of arbitration agreements. Paragraph 3 of the First Schedule to the 1940 Act provides that the arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended period as the Court may allow. The words "entering upon the reference" have not been defined in the 1940 Act. An arbitrator enters on a reference when he first applies his mind to the dispute or the controversy before him and exercises any judicial function in furtherance of the work of arbitration. In the case of Muhammad Shafi Vs. Muhammad Sabir (PLD 1960 Lahore (W.P.) 591), it was held that the arbitrator enters on the reference when the parties are before him and he takes some definite step towards resolving the dispute referred to him for arbitration. Where an arbitrator holds a preliminary meeting and gives directions to the parties as to the progress of the arbitration proceedings before him, he assumes the office of an arbitrator and exercises the functions of an arbitrator. In the case at hand, the record is silent as to a written notice from the appellant or the respondent calling upon the learned arbitrator to act. On 25.06.2000 the learned arbitrator first issued notices to the contesting parties. Hence, it is my view that that the *terminus a quo* of the four-month period contemplated by paragraph 3 of the First Schedule to the 1940 Act would be that date when the parties appeared before the learned arbitrator in response to the said notices.

22. Section 28(1) of the 1940 Act provides that *"a Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award."* This Section confers a very wide power to enlarge time for making an award at any time. A Court can exercise that power even after the award has been made and

filed during the hearing under Sections 14 and 17 of the 1940 Act. Although paragraph 3 of the First Schedule to the 1940 Act provides that the arbitrator must make the award within four months after the date of entering upon reference, this provision also unequivocally indicates that the arbitrator is entitled to make his award within such extended time as the Court may allow. The 1940 Act gives the power to extend the time for making the award and does not impose any obligation on a party to make a formal application in this behalf. In the case of J.K. Enterprises Vs. Win Medicare Ltd. (1998 (1) Arb LR 390), it was held that there is no restriction to grant an extension in time even *suo moto.* When the Court grants an extension in time without a formal application from a party, that by itself cannot affect the validity of the award.

23. The policy of law is that the award of the arbitrator is ordinarily final and conclusive and that the Court should approach the award with a desire to support it and that it would be consonant with justice to extend the time in the exercise of the Courts' discretionary power. The Courts have always favoured enlargement of time for making the award even when one of the parties to the arbitration expresses disinclination or opposes the extension, provided the party seeking such extension has not been guilty of unnecessarily protracting the arbitration proceedings by adopting dilatory tactics.

24. It is well settled that under the provisions of the 1940 Act, an award made beyond the period of four months is neither invalid nor void merely on that account. Where after the expiry of four months if a party had been appearing before the arbitrator without any protest or demur and had never taken the objection that the time for making the award had expired, he will be deemed to have waived the implied condition as to time. In such circumstances, the party would be estopped from challenging the validity of the award on the ground of it having been made beyond time.

25. The power to extend time for making the award can also be exercised by an appellate Court. An appellate Court is also a Court within the meaning of Section 28 of the 1940 Act and can therefore enlarge the time for making the award. Reference in this regard may be made to the law laid down in the case of Tejpal Jamunadas Vs. B. Nathmull & Co. (AIR 1920 Calcutta 115), State of Punjab Vs. Hardyal

(AIR 1985 SC 1920) and Hindustan Steel Works Vs. Rajaasekhar Rao (1987 SCC (4) 93). In the said cases, it was also held that the Court including the appellate Court may extend time when parties took willing part in the arbitration proceedings held after expiry of the prescribed time limit. Although in the instant case, neither the appellant nor the learned arbitrator filed an application seeking an extension in time for concluding the arbitration proceedings, this Court has the jurisdiction to extend the time *suo moto* by taking into consideration the conduct of the parties to such proceedings.

26. It is an admitted position that the award was not rendered within four months from the date on which the learned arbitrator entered upon reference. It is also an admitted position that the respondent had raised no objection to the continuation of the arbitration proceedings beyond the said period of four months. The Chief Executive Officer of the respondent had appeared as OW.1 but did not depose that such an objection had been taken on the respondent's behalf before the learned arbitrator. Even in the respondent's objections to the award, there is no objection as to the award having been rendered beyond a period of four months. The respondent having taken a willing part in the deliberations before the arbitrator after the expiry of four months without any objection is estopped from challenging the validity of the award on the ground of it having been made beyond time. Since no such objection was taken, it is my view that the respondent acquiesced to the continuation of the arbitration proceedings beyond a period of four months from the date on which the learned arbitrator entered upon reference. Had the respondent raised an objection to the continuation of the arbitration proceedings beyond four months, the appellant would have applied to the Court for enlargement of time for the conclusion of the arbitration proceedings. In such circumstances, the learned trial Court could not have set-aside the award on the ground the same had been rendered beyond a period of four months or in derogation of the requirement of paragraph 3 of the First Schedule to the1940 Act. In holding so reliance is placed on the following case law:-

(i) In the case of WAPDA Vs. Messrs Khanzada Muhammad Abdul Haque Khan Khattak & Co. (PLD 1990 SC 359), it was held as follows:-

> ***"Reading section 3, implied Condition No.3 in the First Schedule to the Arbitration Act and section 28 thereof together, the position of law appears to be clear that the parties are free to enlarge the time for making the award with their mutual consent as with the consent of all the parties, a term can be incorporated in the arbitration agreement giving powers to the arbitrator to enlarge the time for making the award. By Condition No.3 in the First Schedule, statutorily an implied term is incorporated in the agreement that the award shall be made within four months after entering upon the reference. By this statutory provision, the term is to be taken as an integral part of the arbitration agreement and is subject to alteration with the consent of the parties like any other term of a contract. If that were not the intention of the legislature, section 28(2) would not make valid a provision in the arbitration agreement empowering the arbitrator or arbitrators to enlarge the time for making the award with the consent of the parties. If the parties after the expiry of the four months submit themselves to the jurisdiction of the arbitrator and take part in the proceedings enabling him to make an award, it cannot be said that the arbitrator acted without jurisdiction. In such a contingency, the principles of waiver and estoppel would apply with full force.***
>
> ***It is now well-settled that where the party had all along submitted to the proceedings of the arbitrator without any protest, he cannot turn round and object or insist that the award was made out of statutory period. In Province of Balochistan v. Malik Haji Gul Hasan PLD 1982 Quetta 52, Messrs Sind Cotton Exporter v. Messrs A.B. Sadiq Brothers PLD 1955 Sind 268 and Messrs. Musa Ismail & Co. v. Amin Agencies Ltd. PLD 1955 Sind 242, it was held by the High Courts of Balochistan and Sind respectively that the party raising no objection before the award is given and voluntarily acquiescing to arbitrator's jurisdiction, such party was debarred from raising objection at later stage. It was also held by a Division Bench of the Lahore High Court in the case of Ghulam Mohiuddin v. Federation of Pakistan PLD 1967 Lahore 204 that if a party takes part in the proceedings even after the expiry of four months without raising any objection, it cannot be allowed to raise such an objection. In this case a large number of cases on the point from Pakistan and other jurisdictions were reviewed and discussed."***

(ii) In the case of Syed Mukhtar Hussain Naqvi Vs. Mst. Hajiani Zubaida (2003 YLR 3289), the Hon'ble High Court of Sindh held as follows:-

"It needs no authority to say that where a party participates in a proceedings without objecting as to the timeframe cannot subsequently agitate such issue and the extension of time would be presumed on such conduct of the parties."

(iii) In the case of Messrs Khan Brothers and Associates Vs. Director General Food, Government of Pakistan (1998 CLC 1671), the Hon'ble Mr. Justice Rana Bhagwan Das (as he then was) held *"there is consensus of opinion that if the parties after expiry of four months submit themselves to the jurisdiction of the Arbitrator and take part in the proceedings enabling the Arbitrator to make an award then such party cannot say that the Arbitrator acted without jurisdiction."* **Furthermore, it was held as follows:-**

"The conduct and participation in the proceedings by the respondent clearly reflects that the respondent had consented to the continuation of the proceedings even after the expiry of four months' period which is deemed to have been extended by consent of the parties. I am, therefore, of the considered view that it is too late in the day to urge at this stage of the case that the award is vitiated by reason of making it beyond the time fixed by law. In fact the time stood impliedly enlarged by consent of the parties and respondent is legally estopped from taking a plea to the contrary."

(iv) In the case of Pakistan Swedish Institute of Technology Garment Production Unit Vs. The Karachi Port Trust (1997 MLD 2034), the Hon'ble High Court of Sindh held as follows:-

"The proceedings before the Arbitrator show that the counsel appearing for the defendant before the Arbitrator took no objection to the continuation of the proceedings and has made no reference to the Court for extension of time. Both the parties, by continuing their appearance before the Arbitrator acquiesced to the enlargement of time and now are estopped from raising objection to the same."

(v) In the case of Haji Ghulam Muhammad Vs. The Federation of Pakistan (PLD 1967 Lahore 204), the Hon'ble Mr. Justice Karam Ellahi Chauhan (as he then was) after referring a catena of case law on the subject held as follows:-

"In view of the above weight of authorities we hold that the award cannot become invalid in the instant case due to the mere fact that it was not given within four months, the reason being that the appellant did not raise this objection at the proper time and rather acquiesced in the continuance of the Arbitration proceedings, led evidence and took the chance of favourable decision and when the decision has gone against him he cannot be allowed to say that the arbitration proceedings extended beyond the time limit implied in the Arbitration Agreement. If the terms of an agreement can be

> ***changed by the parties by their mutual consent (as for example by writing) then it is obvious that the terms about time matter could also be changed with their consent implied from their conduct."***

Law to the said effect has also been laid down in the cases of Civil Aviation Authority Vs. KIST Consultants (Pvt.) Ltd. (1998 SCMR 2393), Managing Director, Karachi Fish Harbour Authority Vs. Messrs Hussain (Pvt.) Ltd. (2014 CLC 1519), Umar Hayat Vs. Province of Punjab through District Officer, Revenue, Jhang (2003 YLR 828), Maj. (Retd.) Humayun Akhtar Vs. Pakistan Defence Officers Housing Authority (PLD 2002 Karachi 427), Pakistan Agricultural Storage and Services Corporation Vs. Messrs Sheikh Muhammad Latif (1999 MLD 2773), Hakim Muhammad Ibrahim Vs. Muhammad Ibrahim (1999 MLD 1738), Saeeda Baig Vs. Mian Muhammad Amin (1995 MLD 187), Messrs Vaseem Construction Co. Vs. Province of Sindh (1991 CLC 1081), and WAPDA through its Chairman Vs. Khanzada Muhammad Abdul Haq Khan Khattak & Co. (1983 CLC 1792).

WHETHER THE LEARNED ARBITRATOR COULD BE SAID TO HAVE COMMITTED MISCONDUCT BY SCRIBING THE AWARD DATED 30.05.2000 ON STAMP PAPER ISSUED ON 01.07.2000:-

27. Now, the question that needs to be determined is whether the award announced on 30.05.2000 and scribed by the learned arbitrator on stamp paper issued on 01.07.2000 amounts to misconduct on his part so as to vitiate the award. The Hon'ble Lahore High Court was confronted with a somewhat similar proposition in the case of Muhammad Shafi Vs. Muhammad Sabir (*supra*) wherein the arbitrator had decided the dispute on 22.08.1955 and a rough draft of the award was written. Subsequently on 11.11.1955, the award was written on stamp paper and registered. An objection was raised to the validity of the award on the ground that the arbitrator had become *functus officio* when the award was written on stamp paper. The said objection was dismissed by the Hon'ble Lahore High Court in the following terms:-

> ***"The arbitrator decided the dispute finally on the 22nd of August 1955. The draft award was written on that day which was copied down in verbatim on the stamped paper on the 11th of November 1955. After the arbitrator decided the dispute between the parties he was incapable of giving a fresh decision upon such dispute, but he cannot be said to have ceased to be arbitrator for the purpose of writing the draft award on a stamped paper and having it***

registered. The arbitrator retains his position as an arbitrator until the award is filed in Court and is made a rule of law. The objection that the arbitrator had become functus officio on the day when the draft of award was written is on the face of it unacceptable."

28. Furthermore, in the case of Shafiq Waheed Vs. Muhammad Hasan Khan (1989 ALD 504), the award was initially written on plain paper but subsequently the arbitrator wrote it on stamp paper. It was held by the Hon'ble High Court of Sindh that the arbitrator by doing so did not commit any misconduct. In the cases of Dasaratha Rao Vs. Ramaswamy (AIR 1956 Madras 134) and Parshottamdas Vs. Kekhushru (AIR 1934 Bombay 6), Courts in India have taken a view in consonance with the one taken by the Courts in Pakistan in the above-referred judgments, the Court in India have subsequently taken a different view viz. an arbitrator cannot engross an award on a stamp paper after it has been signed and announced. My view is not different from the one taken by the Courts of this country. My view is that once the award has been pronounced, the arbitrators become *functus officio* in regard to the reference, but there remains certain ministerial acts such as the engrossing of the award on stamp paper and getting the award registered. Such acts cannot be put on the same footing as proceedings in connection with the pronouncement of the award, and the arbitrator cannot be deemed to have become *functus officio* with regard to carrying on such ministerial acts. The proposition that an arbitrator becomes *functus officio* after making and signing the award only refers to the power of the arbitrator to vary the award or its contents.

29. It is nobody's case that the award that was announced by the learned arbitrator on 30.05.2000 was different in any respect from the one that was engrossed on the stamp paper issued on 01.07.2000. The mere fact that the award dated 30.05.2000 was not written on a stamp paper does not vitiate the same or renders it invalid. If an arbitrator writes the award on plain paper, the parties to the dispute could also take steps to cure the deficiency arising from the award on unstamped paper. In this regard, in the case of Mst. Farida Malik Vs. Dr. Khalida Malik (1998 SCMR 816), the Hon'ble Supreme Court held as follows:-

"The plea, that the Award as was not drawn on properly stamped paper and was made and signed on a plain paper is invalid is without merit. The Award was scribed on a plain paper on which all

the three Arbitrators admittedly affixed their signatures and later proper stamp had been supplied and duty was paid. Section 3 of the Stamp Act read with Article 12 thereof prescribes levying of stamp on the award to be delivered by the Arbitrators. So, an unstamped Arbitration Award contravenes Article 12 of the Stamp Act. But, only because the Award was not on a stamped paper it will not make the Award invalid within the meaning of section 30 of the Arbitration Act. In case of unstamped award, it was open to the parties to take such steps, if any, as were available to them at law for curing the deficiency arising from the Award being on an unstamped paper. Section 33 of the Stamp Act prescribes the procedure of impounding the document which is chargeable with a duty and has been filed before any Authority including the Court, and by that procedure the deficiency for want of stamp can be cured and rectified, as otherwise, in view of section 35 of the Stamp Act, the award in question could not have been admitted in evidence as it was chargeable with duty under Article 12 of the Stamp Act. Learned Judges of the High Court were, therefore, right in holding that the duty having been paid, the Award by Arbitrators, without intervention of the Court could be received in evidence and made rule of the Court."

30. The facts of the case at hand read with the above-referred case law cause me to hold that the learned arbitrator cannot be held to have committed "misconduct" as understood in the arbitration parlance by engrossing the award dated 30.05.2000 on stamp paper issued on 01.07.2000. By doing so, the learned arbitrator simply carried out a ministerial act which was not concerned with any of his adjudicatory responsibilities in regard to the reference.

WHETHER THE APPELLANT'S APPLICATION UNDER SECTION 14(2) OF THE 1940 ACT COULD HAVE BEEN DISMISSED BY THE LEARNED TRIAL COURT ON THE GROUND THAT IT WAS TIME-BARRED:-

31. I now propose to decide whether the learned trial Court was correct in dismissing the appellant's application under Section 14(2) of the 1940 Act on the ground that the said application was time-barred. Section 14(1) of the 1940 Act provides that when an arbitrator has made his award he shall sign it and notify the parties in writing of his making and signing it and of the fees and charges payable. Under Section 14(2) of the 1940 Act provides that an arbitrator shall, at the request of any party to the arbitration agreement or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration, cause the award together with other documents to be filed in Court. Article 178 of the First Schedule to the Limitation Act, 1908 provides a limitation period of 90 days from the date of the service of the notice of making the award for the filing in Court of an award.

32. The notice under Section 14(1) as to the making of the award is to be sent by the arbitrator to the parties in accordance with Section 42 of the 1940 Act, which provides that any notice required by the 1940 Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either (a) by delivering it to the person on whom it is to be served, or (b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in Pakistan and registered under Chapter VI of the Post Office Act, 1898. Where notice as to the making of the award is not set by the arbitrator strictly in accordance with requirements of Section 42 of the 1940 Act, the provision of Article 178 of the First Schedule to the Limitation Act, 1908 will not apply. The fact that the award came to the knowledge of the parties would not dispense with the necessity of service of notice in order to invoke the penalty of dismissal under Article 178 *ibid*. In the case of Frick India Ltd. Vs. Executive Engineer, P.H. Division (AIR 1975 P&H 39), it was held that where a copy of the award was forwarded to the parties by the arbitrator by registered post, the receipt of the copy by the party through registered post is due service in terms of Section 14(1) of the 1940 Act whereas in the case of Gopal Krishan Vs. Union of India (AIR 1955 Punjab 145), it was held that where notice in writing to the parties of the making of the award was not given, the mere fact that the parties signed the award does not bring the case within Section 14(1) of the 1940 Act. It is also well settled that Article 178 of the First Schedule to the Limitation Act, 1908 applies to applications made by a party under Section 14(2) of the 1940 Act. There is no time limit for the arbitrator or umpire to file the award in the Court. The application contemplated by Article 178 *ibid* does not apply to such filing by the arbitrator or umpire on their own.

33. In the case at hand, the application under Section 14(2) of the 1940 Act was filed by the appellant on 21.10.2000. The respondent denies having received notice as to the making of the award from the learned arbitrator. In his evidence, OW.1 deposed that the respondent came to know about the award when he received notice from the learned Civil Court as to the filing of the award after which

its copy was obtained from the said Court. Furthermore, OW.1 deposed that the award was filed before the learned Civil Court on 31.07.2000. It ought to be borne in mind that the consolidated award rendered by the learned arbitrator was pursuant to two separate references made by the Court of the learned Additional District Judge, Islamabad and the Court of the learned Civil Judge, Islamabad. After the award was rendered it was also filed before the learned Civil Court. The present proceedings are only concerned with the reference made pursuant to the order of the Court of the Additional District Judge, and the award only to the extent of dealing with the subject matter of the said reference. The judgment in this appeal shall have no bearing on the proceedings or the award to the extent that it deals with the reference made by the Court of the learned Civil Judge, Islamabad.

34. Now, the learned arbitrator had appeared as CW.2 before the learned trial Court and had deposed that he had rendered the award on 30.05.2000, and that notice about the award had been given to the parties within a week from the said date. However, he did not depose that notice of the award was delivered to the appellant or that it was sent to the appellant by post. The requirement in Section 14(1) of the 1940 Act of the issuance of a notice in writing by the arbitrator to the parties as to the making of the award is considered to be mandatory. There is no evidence on the record to show that the learned arbitrator had sent notice in writing as to the making of the award to the parties in accordance with Section 42(b) of the 1940 Act, or that notice of the award had been actually delivered to the appellant within one week of the making of the award. A copy of the notice sent by post by the arbitrator to the appellant was not brought on record. Even the respondent did not produce any evidence to show that it had received notice as to the making of the award within one week of 30.05.2000. A party's knowledge as to the making of the award from a source other than a notice in writing from the arbitrator in accordance with Section 14(1) read with Section 42 of the 1940 Act would not be the terminus a quo / starting point of the limitation under Article 178 of the First Schedule to the Limitation Act, 1908. Since the limitation period of 90 days provided in Article 178 is to commence from the *"date of service of notice of*

making of the award" **and since the record does not show that the learned arbitrator had issued notices to the parties as to the making of the award in accordance with Section 42 of the 1940 Act, or that or appellant had been served with such a notice, it cannot be held that the appellant's application under Section 14(2) of the 1940 Act was time-barred. In holding so, reliance is placed on the following case law:-**

(i) In the case of Akbar Hussain Vs. Muhammad Tayyeb (PLD 1995 Karachi 452), Section 42 of the 1940 Act was interpreted by the Hon'ble High Court of Sindh in the following terms:-

> ***"5. Section 42 of the Arbitration Act, 1940 provides mode of service of notice by the parties or by an Arbitrator or Umpire. The first mode provides that notice shall be served in a manner as provided in the arbitration agreement and if there is no such provision in the agreement then by delivering it to the person on whom it is to be served or by sending it by post in a letter addressed to that person at his usual or last known address of his residence or business place in Pakistan. This provision envisages that notice must be delivered to the person to whom it is addressed or it must be sent through post. .... Simple issuance of notices is not the actual compliance of section 42 of the Arbitration Act, 1940. The word "delivering" as used in section 42(a) means that a notice must reach hands of the person on whom it is to be served. Word 'delivery' is defined in the Legal Thesaurus Dictionary by William Statsky as "the act by which something is placed within the possession or control of another." In Black's Law Dictionary, it is defined as an act by which the res or substance thereof is placed with the actual or constructive possession or control of another. According to the Ballentine's Law Dictionary, the word 'delivery' is explained as "A handing over; the surrender of possession to another by making a thing available to another, placing it within his reach..." ....***
>
> ***6. The words "sending it by post" used in section 42(b) likewise mean that the notice should reach on the last known address of the person to whom it is addressed. It would be pertinent to observe that before depriving any person of his right to appear and contest the arbitration proceedings, it will be just and proper for the Arbitrator to ensure that the notice has reached to the person it was addressed. Section 42 of the Arbitration Act, 1940 is in no manner violative of the principles of natural justice. However, I am in full agreement with the arguments of Mr. Dewan Bashir Ahmed, Advocate that provisions of Order V, Rule 20, C.P.C. are not attracted before the Arbitrator but in my opinion, it does not mean that the Arbitrators are exempted from recording their satisfaction about service or non-service of the notices on the' parties. This is more essential for the Arbitrators to record their opinion about the service of the notices for the purpose of suppressing any mischief which may be committed by the either side."***

(ii) In the case of Muhammad Wasi Saigal Vs. Shaikh Rashid Ahmad (1994 CLC 1406), an objection was raised by the respondent that the application under Section 14(2) was time-barred by five days as the said application was filed on 28.04.1996 whereas the award was rendered on 23.01.1996 in the presence of the parties whose signatures were taken thereon and they had the notice of the making of the award on that very day. The respondent's position was that the said application should have been filed within 90 days from the date of the making of the award as prescribed under Article 178 of the First Schedule to the Limitation Act, 1908. The said objection was spurned by the Division Bench of the Hon'ble High Court of Sindh in the following terms:-

> ***".... in both the sections 14(1) and 42 the word "shall" has been used for "giving" and "serving" the notice, to lend impetus to the making of the said provisions mandatory. Article 178 of Limitation Act (IX of 1908) is to be read in consonance with the aforesaid provisions of the Arbitration Act and the limitation accordingly is to commence from the date of service of such notice.***
>
> ***The language used in the said section is so plain that no conclusion is possible other than the one that it is mandatory on the part of the Arbitrator or umpire, to give notice by way of letter i.e. in writing by registered post to the parties to the arbitration agreement, of signing and making of the award.***
>
> ***It is the cardinal principle of the interpretation of statutes that nothing is to be added to or subtracted from the statutory language and that where the letters of law clearly and unambiguously convey the intention of the legislature, there is no rule of interpretation that will permit, to infer such intention on the part of the legislature, that will cause devastation to the plain language used in the statute.***
>
> ***We, therefore, with all due respect, do not find ourselves in agreement with the view expressed by the Indian Courts and hold that the limitation under Article 178 of the Limitation Act, 1908, is to be computed from the date of service of notice to be given by the arbitrator or umpire to the parties of the making and signing of the Award as required under sections 14(1) and 42 of the Arbitration Act and that the delivery of the copy of the award or signing of the award by the parties or oral intimation thereof, do not and cannot partake the notice under section 14(1) of the Arbitration Act for commencement of limitation under Article 178 of the Limitation Act, 1908."***

(iii) In the case of Dil Muhammad Vs. Additional District Judge, Sahiwal (1991 MLD 2068), the Hon'ble Lahore High Court held as follows:-

> ***"8. According to section 14(1) of the Arbitration Act, 1940, when the arbitrators or umpire have made their award, they***

shall sign it, and give notice in writing to the parties of the making and signing thereof, and of the amount of fee and charges payable to the arbitrators or umpire in respect of the arbitration and award. The insistence that the notice must be in writing makes service of the formal notice necessary especially as the limitation under Article 178 of the Limitation Act runs from the date of that notice. It is also to be seen that section 42 of the Arbitration Act prescribes the mode for service of the notice required under the Act to be served by a party to an arbitration agreement or by an arbitrator or umpire. It provides that such a notice shall be served by delivering it to the person on whom it is to be served by sending it by registered post at the usual or last known address of the business or residence of the addressee. If section 14(1) and section 42 of Arbitration Act are read conjunctively alongwith Article 178 of the Limitation Act, it becomes abundantly clear that a service of notice is a sina qua non for attracting the provisions of Article 178 of the Limitation Act and knowledge gained aliunde is not sufficient in this behalf. In Messrs Ahmad Bakhsh Abdul Rashid v. Muhammad Aslam and Brothers and another P L D 1954 Lahore 620, it was held that the notice by the arbitrator must be served in the manner prescribed by section 42 and the notice not in accordance with this provision could not be described as valid."

(iv) In the case of Muhammad Wasi Saigol Vs. Shaikh Rashid Ahmad (1988 CLC 267), the Hon'ble High Court of Sindh, after taking into consideration the law laid down in the cases of Holaram Verhomal Vs. Governor General (AIR 1947 Sind 145), Abdul Qayum Khan Vs. M.A. Qudus Khan (PLD 1964 (W.P.) Karachi 66), Misri Lal Vs. Bhagwati Prasad (AIR 1955 Allahabad 573), and Chouthmal Jivrajjee Poddar Vs. Ramchandra Jivrajee Poddar (AIR 1955 Nagpur 126), held as follows:-

"I am, therefore, of the clear view that a notice required to be given by the arbitrator under subsection (1) of section 14 of Arbitration Act must be served upon the parties in writing and it is not a mere formality and the period of limitation had to be computed from the date of service of such notice. In the absence of such notice by the Arbitrator the period cannot be computed under Article 178 of the Arbitration Act."

(v) In the case of Muhammad Shafi Vs. Muhammad Sabir (PLD 1960 Lahore 591), no notice as to the making of the award was given by the arbitrator as the parties were present at the time when the award was rendered. The Hon'ble Lahore High Court held that Article 178 of the First Schedule to the Limitation Act, 1908 did not apply in such a situation. Furthermore, in paragraphs 4 and 5 of the said report it was held as follows:-

"The brief history of the arbitration law which has been given above clearly shows that the words "the date of service of the notice of the making of the award" have a technical meaning attached to A them and can only mean the notice provided by section 14 of the Arbitration Act, i.e., a notice in writing to the parties of the making and signing of the award. The mere fact that the parties had the knowledge of the fact that the award had been made or the fact that they had signed the award would not start the time running under Article 178 of the Limitation Act."

"No limitation has been provided by the Limitation Act for any party to the arbitration agreement to request the arbitrator or the umpire to cause the award to be filed in Court nor is there any limitation prescribed in the Limitation Act for the arbitrators or umpires to cause the award to be filed in Court upon such request. If a party to the arbitration agreement does not make a request to the arbitrator or umpire for filing the award in Court, it can directly come to the Court and request it to order the arbitrator or to umpire to file the award or a signed copy thereof in Court. Such an application will be governed by Article 178 of the Limitation Act if notice of the award has been given to the applicant, as provided by Subsection (1) of section 14."

(vi) In the case of Chouthmal Jivrajjee Poddar Vs. Ramchandra Jivrajjee Poddar (AIR 1955 Nagpur 126), the arbitrators sent a notice to the parties that the award would be pronounced on 13.06.1944. The award was made on that date and signed in the presence of the parties who were asked to sign the order sheet in token of their knowledge. One of the parties applied on 13.11.1944 to the Court for directing the award to be filed and to pass a decree in terms of the award. On an objection taken by the other party that the application was time-barred, it was held that though the award was made on 13.06.1944 in the presence of all the parties concerned, there was no notice in writing of the making and signing of the award and the signatures on the order sheet in token of their presence before the arbitrators could not take the place of the written notice contemplated by the 1940 Act. Therefore, it was held that time did not begin to run against the plaintiff and the application was not barred by time. Furthermore, it was held as follows:-

"Under Article 178 time begins to run from the date of the service of the notice of the making of the award. The notice contemplated by Arbitration Act has to be served as required by Section 42 of the Act. Section 14 has to be complied with

strictly and any other compliance thereof would not make limitation run under Article 178."

(vii) In the case of Misri Lal Vs. Bhagwati Prasad (AIR 1955 Allahabad 573), the view taken was that the date of the award, or the knowledge of the award, would not be the starting point of limitation and instead the starting point would be the date of the service of the notice. It was further observed that if a party does not receive a notice of an award, as prescribed by law, he would evidently be within his right to wait for the receipt of such a notice and if he finds after some time that no notice has been received by him, it would be open to him to make an application for the filing of the award even if no notice has been received. But in all such cases, the application would not become barred by time unless it is presented more than 90 days after the receipt of a written notice of the award.

35. In the absence of a notice from the learned Arbitrator as to the rendering of the award, the limitation period for an application for filing the award in the Court would not be governed by Article 178 of the First Schedule to the Limitation Act, 1908, but by the residuary provisions of Article 181 of the First Schedule to the Limitation Act, 1908 which provides a limitation period of three years. Reference in this regard may be made to the judgment in the cases of Sardar Muhammad Khan Vs. Muhammad Jafar Khan (2010 YLR 164), Muhammad Shafi Vs. Muhammad Sabir (*supra*), and Dil Muhammad Vs. Additional District Judge, Sahiwal (1991 MLD 2068). In the latter case, the Hon'ble Lahore High Court held as follows:-

"9-A. It emerges from the above discussion that Article 178 of the-Limitation Act applies only when a written notice has been served in the manner prescribed upon a party that the award has been made. If there is no such notice, the provision applicable shall be the residuary Article 181 of the Limitation Act. This view finds full support from the judgments of the Karachi High Court in Abdul Qayyum Khan v. M.A. Qudus Khan P L D 1964 (W.P.) Karachi 66 and Muhammad Wasi Saigal v. Sheikh Rashid Ahmad and others 1988 CLC 267."

36. The appellant, in its application under Section 14(2) of the 1940 Act, had made a two-fold prayer. It had prayed for an order to the learned arbitrator to file the award in the Court and for an order in terms of the award i.e. an order to make the award a rule of Court. After the said application was filed, the learned trial Court vide order dated 12.11.2003 directed the learned arbitrator to file the award in

the Court. The learned arbitrator filed the award on 13.12.2003. With the order of the learned trial Court directing the learned arbitrator to file the award in the Court, the appellant's application to the extent of praying for an order for the filing of the award stood decided. Although the said order was not appealable under Section 39 of the 1940 Act, the respondent did not prefer a revision petition against the said order. Therefore, the said order dated 12.11.2003 attained finality. After the award was filed in the Court pursuant to the order dated 12.11.2003 passed by the learned trial Court, what remained to be decided was whether the award should be made a rule of Court.

37. The filing of an award is a ministerial act of the arbitrator and has nothing to do with the validity of the award. After the award was filed, the learned trial Court, on 13.12.2003, issued notices to the parties as to the filing of the award. It was not until 10.03.2004 that the respondent filed the objections to the award. Obviously, the respondent's objections to the award could not have been adjudicated upon without the award having been filed. As mentioned above, by the time the said objections were filed the award had already been filed before the learned trial Court. Assuming that the appellant's application under Section 14(2) of the 1940 Act was time-barred given that the respondent had filed the objections to the award, the question whether the learned trial Court could have ordered the arbitrator to file the award on the respondent's application became immaterial. A decree on the basis of an award can be made only under Section 17 of the 1940 Act, which reads thus:-

> ***"17. Judgment in terms of award. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."***
>
> **(Emphasis added)**

38. It has consistently been held that the Court can, on its own motion and *suo moto,* direct the arbitrator to file the award if under any circumstances, the Court receives information of the making of the award, and that there is no limitation provided for such *suo moto*

summoning of the award by the Court from the arbitrator; the exercise of jurisdiction by the Court under Section 17 of the 1940 Act for making a decree in terms of an award is not necessarily dependent on the filing of an application by a party under Section 14(2) of the said Act with a prayer for the Court's direction to summon the award; and even where no application is filed under Section 14(2) of the 1940 Act for the filing of an award in the Court, when the Court rejects a party's objections to the award it is bound to pass a judgment and decree in terms of the award under Section 17 of the 1940 Act. Since I have already held that the ground on which the learned trial Court held that the learned arbitrator had committed misconduct was not tenable, and that the appellant's application under Section 14(2) of the 1940 Act was not time-barred, the objections filed by the respondent to the award must fail and as a result a decree in terms of the award is to be issued. As regards the period within which the learned arbitrator was supposed to conclude the arbitration proceedings, since an appellate Court can also exercise powers under Section 28 of the 1940 Act to extend such period, and since the respondent by not objecting to the continuation of the arbitration proceedings beyond the period of four months acquiesced to such an extension, I am inclined to extend the period for the conclusion of the arbitration proceedings.

39. Learned counsel for the contesting parties made no submissions on the merits of the dispute. Be that as it may, I am of the view that the learned arbitrator was cognizant of the several letters from the respondent to the appellant wherein the respondent had acknowledged his liability to repay the loan advanced to it by the appellant. The cheque issued by the respondent for an amount of Rs.1 million in the appellant's favour was not disputed. It was also not disputed that the said cheque had been dishonoured on presentation. Even after the dishonor of the said cheque, the respondent had committed to pay the amount along with interest. Therefore, it is my view that there is neither any error apparent on the face of the award nor does the award suffer from any invalidity.

40. In view of the above, the instant appeal is allowed; the impugned judgment and decree dated 02.12.2010 is set-aside; the time for completing the arbitration proceedings is extended until the

date when the award was rendered; the respondent's objections to the award are dismissed whereas the appellant's application under Section 14(2) of the 1940 Act praying for the award to be filed in the Court, and for the award to be made a rule of Court is allowed; the award dated 30.05.2000 is made a rule of Court; and a decree in terms of the award to the said extent shall be issued. This judgment and decree to be issued by this Court shall only be with respect to the reference to arbitration made by the Court of the learned Additional District Judge, Islamabad, and the award only to the extent of deciding the matter referred to arbitration by the said Court. The challenge to the award to the extent of deciding the dispute referred to arbitration by the learned Civil Court shall be for the said Court to decide on its own merits uninfluenced by the observations made in this judgment. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**