JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.193/2017
Syed Munir Syed
Versus
Sardar Muhammad Kamal Khan and others

Date of Hearing: 19.09.2018
Petitioner by: Mr. Muhammad Shahzad Siddiq, Advocate.
Respondents by: Mr. Hassan Rashid Qamar, Advocate and Ch. Aziz ur Rehman Zia, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Syed Munir Syed, impugns the order dated 16.03.2017, passed by the Court of the learned Additional District Judge-V (West), Islamabad, whereby the petitioner's appeal against the order dated 09.11.2016, passed by the Court of the learned Civil Judge, Islamabad, was dismissed. Vide the said order dated 09.11.2016, the learned Civil Court, allowed respondent No.1's application under section 31 of the Arbitration Act, 1940 ("the 1940 Act") and stayed the proceedings before the Arbitrator. In the said application, respondent No.1 had prayed for the arbitration proceedings to be stayed on account of having lost confidence in the Arbitrator.

2. The facts essential for the disposal of the instant civil revision petition are that on 01.05.2015, an agreement was executed between the petitioner (Syed Munir Syed) and respondent No.1 (Sardar Muhammad Kamal-ud-Din). As per the contents of the said agreement, the petitioner was to help respondent No.1 in vacation and demarcation of his land situated in village Sarai Madhu, District Islamabad. It is not disputed that the land which was the subject matter of the said agreement spread over 255 *kanals*, details whereof are set out in "Schedule-A" thereto. Respondent No.1 was to pay the petitioner Rs.2 million as earnest money. This amount was to be repaid/returned to respondent No.1 out of the petitioner's share in the sale proceeds of the said land. All other costs associated with the vacation and demarcation of the said land were to be borne by

the petitioner but be repaid to him by deducting 20% from the sale proceeds of the said land. The amount remaining after the deduction of said 20% from the sale proceeds was to be equally divided between the petitioner and respondent No.1 at the time of the sale mutation. The petitioner was placed under an obligation to present the purchaser of the land to respondent No.1 for the approval of the sale price. Upon agreement of the sale price with the purchaser, respondent No.1 was to be responsible for arranging the transfer by mutation. The said agreement contained an arbitration clause which is reproduced herein below:-

> ***"In case of any dispute arising between both parties, both parties are barred from going to the Court of Law and Sardar Mansoor Hayat Tamman will be the Sole Arbitrator. And his judgment will be final."***

3. A unique feature in the said agreement is that the sole Arbitrator/respondent No.2 has signed the said agreement as a witness and as an Arbitrator.

4. After disputes and differences developed between the petitioner and respondent No.1, the petitioner, on 24.06.2015, filed a suit for declaration, specific performance of agreement dated 01.05.2015 and permanent injunction, before the Court of the learned Civil Judge, Islamabad. The Arbitrator had also been arrayed as a defendant in the said suit. The petitioner had sought specific performance of the said agreement as well as a declaration to the effect that the petitioner was entitled to 60% share from the sale proceeds of the said land. Along with the said suit, the petitioner filed an application for interim injunction under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908 ("C.P.C.").

5. In respondent No.1's written reply to the petitioner's application for interim injunction, preliminary objection to the maintainability of the suit was taken on the ground that an arbitration clause existed in the agreement between the parties. Respondent No.1 also filed an application under Order VII, Rule 11 C.P.C. praying for the rejection of the plaint on *inter-alia* the ground that the said agreement was merely a "*memo of*

understanding to gauge the intention of the parties before a deal is officially signed and concluded into a legally enforceable agreement".

6. Vide order dated 16.09.2015, the learned Civil Court, dismissed the petitioner's application for interim injunction. The petitioner's appeal against the said order dated 16.09.2015 was dismissed by the learned Appellate Court, vide order dated 28.10.2015.

7. While the said suit was pending, the petitioner, on 05.12.2015, submitted his request for arbitration before the Arbitrator. As per the order sheet maintained by the Arbitrator, summons were issued to both the parties for 27.07.2016. The said order sheet also shows that respondent No.1's attorney appeared before the Arbitrator on 27.07.2016 and submitted his *Vakalatnama.* On 04.08.2016, respondent No.1's counsel was asked by the Arbitrator to present his case on the next date of hearing.

8. Respondent No.1 filed an application before the Arbitrator, wherein it was pleaded *inter-alia* that respondent No.1 had lost confidence in the arbitration proceedings; and that by filing a civil suit, the petitioner had expressed his intention not to arbitrate. Before the Arbitrator could pass any order on the said application, respondent No.1, on 04.10.2016, filed an application before the learned Civil Court under section 31 of the 1940 Act, praying *inter-alia* for the proceedings before the Arbitrator to be stayed. Vide order dated 09.11.2016, the learned Civil Court, allowed the said application and stayed the arbitration proceedings. The operative part of the said order dated 09.11.2016, is reproduced herein below:-

> ***"...It is an admitted position that the respondent approached the arbitrator after instituting the civil suit. If the respondent intends to invoke the arbitration clause of the alleged agreement then he should not have file the civil suit. The respondent cannot simultaneously approach two forums for the redressal of his grievances. Before instituting the suit it was an open choice for the respondent to either approach the civil court or to invoke the arbitration clause of the alleged agreement but once he has filed the civil suit by weaving the arbitration clause of the agreement then he cannot approach the arbitrator. Moreover, the allegations of biasness and partiality leveled against the***

arbitrator by the petitioner have force in it as the arbitrator is party to the lis. Hence, in my view the arbitrator cannot carry out the proceedings on the basis of agreement dated 1.05.2015. The proceedings being carried out by the arbitrator on the basis of agreement dated 01.05.2015 are hereby stayed."

9. It may be mentioned that when the said order dated 09.11.2016 was passed, the petitioner's suit had been dismissed for non-prosecution and the petitioner's application for the restoration of the suit was pending.

10. The said order dated 09.11.2016 was assailed by the petitioner in an appeal. Vide order dated 16.03.2017, the learned Appellate Court, dismissed the petitioner's said appeal. The said concurrent orders dated 09.11.2016, passed by the learned Civil Court and 16.03.2017, passed by the learned Appellate Court, have been assailed by the petitioner in the instant civil revision petition.

11. The petitioner's suit had been dismissed for non-prosecution on 23.12.2015. Although an application for the restoration of the said suit was filed within the limitation period provided by law, the petitioner, on 31.05.2017, filed an application for the withdrawal of the application for the restoration of the suit. Vide order dated 31.05.2017, the learned Civil Court, after recording the petitioner's counsel's statement, dismissed the said application as withdrawn.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-

12. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the agreement dated 01.05.2015 had been written by respondent No.1 in his own handwriting; that the petitioner and respondent No.1 had agreed to appoint respondent No.2 as the sole Arbitrator; that the mere fact that respondent No.2 had signed the said agreement as a witness and Arbitrator did not disqualify him from entering upon reference with respect to the disputes between the petitioner and respondent No.1; that the mere fact that the petitioner had instituted a civil suit against respondent No.1 did not disentitle him from initiating arbitration proceedings; that at no material stage, had any adjudication on

merits taken place in the proceedings before the learned Civil Court; that respondent No.1 had sought the dismissal of the suit on the ground that there existed an arbitration agreement between the petitioner and respondent No.1; and that the stance taken by respondent No.1 is with the intention to deprive the petitioner from seeking adjudication of his claim against respondent No.1 before any forum.

13. Learned counsel for the petitioner further submitted that respondent No.1 had not specified any instance which would indicate bias on respondent No.2's part; that in the proceedings before respondent No.2, respondent No.1 did not raise any allegation of bias; that the mere fact that respondent No.2 had signed the agreement or was impleaded as a defendant in the suit did not disqualify him from sitting as an Arbitrator on the dispute between the petitioner and respondent No.1; and that respondent No.1 is a prudent person of business and had consciously agreed to respondent No.2's appointment as an Arbitrator. Learned counsel for the petitioner prayed for the revision petition to be allowed and for the concurrent orders passed by the learned Courts below to be set-aside.

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.1:-

14. On the other hand, learned counsel for respondent No.1 submitted that the impugned orders passed by the learned Courts below were strictly in accordance with the law; that the petitioner could not be allowed to approbate and reprobate by instituting a civil suit against respondent No.1 and thereafter abandoning the said suit by instituting arbitration proceedings on the same dispute; that the petitioner instead of pursuing his application for the restoration of the suit decided to withdraw the said application; that by instituting a civil suit, the petitioner had waived his right to institute arbitration proceedings against respondent No.1; that prior to the institution of the suit, no affirmative action was taken by the petitioner to initiate arbitration proceedings; that just like a defendant in a suit waives his right to arbitration by not filing an application under section 34 of the 1940 Act, the petitioner waived his right to

arbitration by instituting a civil suit; that the institution of the civil suit manifestly displayed the petitioner's unequivocal intention to give-up his right to have his disputes with respondent No.1 resolved through arbitration; and that the learned Civil Court had the jurisdiction to decide questions regarding the validity, effect or existence of the arbitration agreement entered into between the petitioner and respondent No.1. Learned counsel for respondent No.1 prayed for the civil revision petition to be dismissed. In making his submissions, learned counsel for respondent No.1 placed reliance on the judgments reported as *2002 SCMR 1964* and *2006 YLR 807*.

15. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

16. The facts leading to the filing of the instant civil revision petition have been set out in sufficient detail in paragraphs 2 to 11 above and need not be recapitulated.

17. The vital questions that need to be determined in these proceedings are (1) whether the petitioner, by instituting a suit for declaration etc. against respondent No.1, had waived his right to initiate arbitration proceedings against respondent No.1; and (2) whether the sole Arbitrator appointed by the petitioner and respondent No.1 in the agreement dated 01.05.2015 can be said to be biased on account of him having signed the said agreement as a witness and Arbitrator.

18. The admitted position is that disputes and differences arising from and related to the terms of the agreement dated 01.05.2015 had developed between the petitioner and respondent No.1. The petitioner claims to have performed his obligations under the agreement and was seeking to recover his alleged dues. The petitioner said claim had been repudiated by respondent No.1.

19. Despite there being an arbitration agreement between the petitioner and respondent No.1, the petitioner instituted a civil suit against respondent No.1. Respondent No.1 had sought the rejection of the plaint in the said suit. The first ground agitated by

respondent No.1, in his application under Order VII, Rule 11 C.P.C., was that the suit was barred due to the arbitration agreement between the parties. An objection to the said effect was also taken in respondent No.1's reply to the petitioner's application for ad-interim injunction under Order XXXIX, Rules 1 and 2 C.P.C. The said objection to the maintainability of the suit cannot be lost sight of while determining whether the learned Courts below were correct in holding, in effect, that the petitioner could not have had his disputes with respondent No.1 resolved through arbitration.

20. Given the fact that the petitioner's suit was dismissed for non-prosecution and that he had withdrawn his application for the restoration of the suit, there is hardly a chance for the revival of the said suit. Order IX, Rule 8 C.P.C. provides *inter-alia* that where the defendant appeared and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. It is an admitted position that vide order dated 23.12.2015, the learned Civil Court had dismissed the petitioner's suit by invoking the provisions of Order IX, Rule 8 C.P.C. The petitioner did apply to the learned Civil Court for an order to set the said dismissal aside, but unconditionally withdrew the application. Order IX, Rule 9(1) provides *inter-alia* that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. Therefore, the petitioner is precluded from filing a fresh suit against respondent No.1 on questions that were the subject matter of the suit which had been dismissed for non-prosecution.

21. What Order IX, Rule 9 C.P.C. bars the institution of a fresh "suit" on the same cause of action which was the subject matter of the earlier suit dismissed for non-prosecution. The invocation of the arbitration clause in the agreement dated 01.05.2015 by the petitioner cannot be termed as institution of a fresh "suit". Arbitration with or without the intervention of the Court is not a "suit". In the cases of Messrs James Construction Company (Pvt.) Limited through Executive Director Vs. Province of Punjab

through Secretary to the Government of Punjab (PLD 2002 SC 310), Mohamed Abdul Latif Faruqi Vs. Nisar Ahmad (PLD 1959 Karachi 465), Bismal Kumar Ghosh and another Vs. Saikat Sarkar (AIR 1987 Calcutta 208), Inderpal Singh Hassan Walia Vs. Messrs Bir Tibetan Wollen Mills and others (AIR 1974 Delhi 95) and S.P Consolidated Engineering Company (Pvt.) Limited Vs. Union of India and another (AIR 1966 Calcutta 259), it has been held *inter-alia* that an application under section 20 of the 1940 Act is not a suit *stricto senso* but only to be registered and numbered as a suit.

22. Section 69 of the Partnership Act, 1932 bars a partner in an unregistered partnership from instituting a "suit" to enforce a right arising from a contract. In the case of "*Messrs United Cotton Factory, Hyderabad Vs. Ahmad Khan" (PLD 1960 Karachi 774)*, it was held that an application under section 20 of the 1940 Act does not fall within the ambit of section 69 *ibid*. Furthermore, it was held that although the word "suit" had not been defined in any statute, it had a well understood forensic connotation, including its main *indicia* of the presentation of a plaint.

23. I am of the view that if the legislature had intended to bar the institution of all sorts of proceedings, including arbitration proceedings, subsequent to the dismissal of the suit for non-prosecution, it would have included the words *"and other proceedings"* after the words *"fresh suit"* in Order IX, Rule 9 C.P.C. Since Order IX, Rule 9 C.P.C. is a penal provision imposing a disability on a party to institute a fresh suit after his earlier suit on the same cause of action had been dismissed for non-prosecution, it has to be construed strictly.

24. The suit instituted by the petitioner did not culminate in a judgment or a decree. In other words, an adjudication of the disputes between the petitioner and respondent No.1 had not taken place before the learned Civil Court. Since the said suit had not been decided on merits, the principle of *res judicata* will not apply as regards the institution of the arbitration proceedings by the petitioner. The legal effect of the impugned

orders is that the petitioner has been deprived of seeking adjudication of his claim before any forum.

25. True, when a defendant in a suit takes a step in the proceedings or files a written statement, he disentitles himself from seeking a stay of the suit on the basis of an arbitration agreement executed with the plaintiff. The case in hand, however, is on a different footing. Here the petitioner instituted a suit against respondent No.1 on a matter which both the parties had agreed to resolve through arbitration. It is my view that since respondent No.1 had objected to the maintainability of the suit on the basis of the arbitration agreement executed between the petitioner and respondent No.1, the institution of the said suit or its dismissal for non-prosecution could not operate to place a legal disability on the petitioner from instituting arbitration proceedings against respondent No.1. There is no express provision in the 1940 Act or the C.P.C. which debarred the petitioner from instituting arbitration proceedings in such circumstances.

26. In staying the arbitration proceedings, the learned Courts below placed reliance on paragraphs 47 and 48 of the judgment in the case of "*Societe Generale De Surveillance S.A. v. Pakistan' (2002 SCMR 1694)*. I have gone through the said paragraphs and find that they record the contentions of the learned counsel for the respondent in the said case and his reliance on "Domke on Commercial Arbitration (The Law of Practice of Commercial Arbitration)". The contents of the said Treaties have been reproduced in paragraph 47, whereas in paragraph 48, the opinion and observations of the author of the said Treaties have been set out.

27. Perusal of the judgment in the case of *Societe Generale De Surveillance S.A. v. Pakistan' (supra)* shows that the facts in the said case were different from the ones in the case at hand. In the said case, the termination of a contract caused the appellant to institute an action for recovery before a Court in Switzerland. The said action was dismissed on the ground that there existed an arbitration clause in the contract between the appellant and

the respondent providing for the settlement of the disputes between the said parties through arbitration in accordance with the provisions of the 1940 Act. After the said action was dismissed, the respondent filed an application under section 20 of the 1940 Act before a Court in Pakistan. Along with the reply to the said application, the appellant filed a counter claim against the respondent. Soon after filing the said reply, the appellant filed a request for the initiation of arbitration before the International Centre for Settlement of Investment Disputes ("ICSID"). The respondent's application before the trial Court in Pakistan to restrain the appellant from pursuing the remedy through arbitration before ICSID was dismissed. The Hon'ble Supreme Court, in the said judgment, held *inter-alia* that the appellant's conduct of instituting an action before the Court in Switzerland and filing a reply to the respondent's application under section 20 of the 1940 Act, was sufficient to constitute waiver of his right to seek arbitration before ICSID. The distinguishing feature in the case of *Societe Generale De Surveillance S.A. v. Pakistan' (supra)* was that even though the appellant had instituted an action against the respondent before the Court in Switzerland, the appellant was able to agitate its claim in the form of a counter-claim against the respondent before the Courts in Pakistan. Given this peculiar and distinguishable feature in the instant case, I am of the view that the petitioner could not have been denied his right to institute arbitration proceedings against respondent No.1 on the ground that the petitioner had earlier instituted a civil suit against respondent No.1. It is worthwhile to mention once again that respondent No.1 had raised an objection to the maintainability of the said suit on the ground that there existed an arbitration agreement between the petitioner and respondent No.1.

28. The judgment in the case of *Societe Generale De Surveillance S.A. v. Pakistan' (supra)* aids the petitioner more than the respondent inasmuch as the institution of the action by the appellant in the said case before the Court in Switzerland did not disentitle it from raising a counter-claim against the

respondent in the arbitration proceedings under the provisions of the 1940 Act. What the appellant in the said case was not permitted to do was the institution of yet another arbitration proceeding against the respondent, i.e., arbitration under the ICSID Rules. Another distinguishing feature of the case at hand is that as a result of the impugned orders, the petitioner has been deprived of his right to seek the adjudication of his claim against respondent No.1 before any forum, be it through arbitration or through a civil suit before a Court of plenary jurisdiction.

29. Now the learned counsel for respondent No.1 had submitted that no agreement had formally been entered into between the petitioner and respondent No.1; and that the document executed on 01.05.2015 was *"not an agreement according to the law"* and was merely *"a memo of understanding to gauge the intention of the parties before the deal is officially signed and concluded into a legally enforceable agreement."* By taking this plea, respondent No.1 adopted two positions which are mutually exclusive. On the one hand, he took the plea mentioned above, and on the other hand, he objected to the maintainability of the petitioner's suit on the ground that there existed an arbitration agreement between the said parties. A party cannot be permitted to take such contradictory pleas.

30. Having gone through the agreement dated 01.05.2015, I am of the view that the same contains a valid arbitration agreement between the parties thereto. Section 2(a) of the 1940 Act defines an arbitration agreement as a written agreement to submit present or future differences to arbitration, whether an Arbitrator is named therein or not. An arbitration agreement is not required to be in any particular form. To constitute an arbitration agreement in writing, it is not necessary that it should be signed by the parties, and it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established. All that is necessary is that the parties should accept the terms of the arbitration agreement. The acceptance may be in writing or by conduct. The arbitration agreement need not be incorporated in a formal deed or be under seal. It may well

be entered into through correspondence or by a less formal document. What is required to be ascertained is whether the parties had agreed that if disputes arose between them in respect of the subject matter of the contract, such disputes would be referred to arbitration, then such an agreement would spell out an arbitration agreement. All these requirements appear to have been satisfied in the case at hand. Had the parties to the agreement dated 01.05.2015 not had consensus *ad idem* regarding the execution of an arbitration agreement, respondent No.1 would not have objected to the maintainability of the petitioner's suit on the basis of the arbitration agreement between the said parties.

31. Now respondent No.1 in his application under section 31 of the 1940 Act has alleged bias against the Arbitrator named in the agreement dated 01.05.2015. The allegations of bias hurled by respondent No.1 against the Arbitrator in the said application are reproduced herein below:-

> ***"Besides <u>many other things which reflects bias</u> against the respondent; the respondent is not getting a fair opportunity and as such has lost confidence in arbitrator (defendant No.2) and arbitration proceedings conducted by him <u>because he is bent upon to decide the matter against the respondent</u> without deciding the issue of lack of jurisdiction and deciding legal and very complicated issues raised by the respondent which can only be decided by the civil courts, yet exercising jurisdiction not vesting in him during the pendency of the subject matter in the competent court of law."***
> **(Emphasis added)**

32. On the basis of the above-mentioned allegations, respondent No.1 claimed to have lost confidence in the Arbitrator. The learned Civil Court in the impugned order dated 09.11.2016 held *inter-alia* that *"the allegation of biasness and partiality leveled against the Arbitrator by the petitioner have force in it as the Arbitrator is a party to the lis"*.

33. As mentioned above, the Arbitrator was named in the agreement dated 01.05.2015. At the time when respondent No.1 entered into the said agreement he, as a prudent person of business, was aware that in the event of disputes arising between him and the petitioner, the same would be referred for arbitration to the person named in the said agreement. Since it is

not disputed that the said agreement was voluntarily entered into, the parties thereto could not be allowed to resile from it lightly.

34. In the case of *Director Housing, A.G'S Branch, Rawalpindi Vs. M/s Makhdum Consultants Engineer and Architects (1997 SCMR 988*), the Hon'ble Supreme Court quoted with approval the law laid down in the cases of *Islamic Republic of Pakistan Vs. Abdul Waleed Khan (PLD 1976 SC 57*) and *M.H. Khondkar Vs. The State (PLD 1976 SC 40*) that the bias which disqualifies a person to act as a Judge in a dispute must be in the nature of personal bias or prejudice or of such a nature as would necessarily render him unable to exercise his functions impartially in a particular case; that this bias or prejudice must be shown as a matter of fact and not merely as a matter of opinion; that mere apprehension in the mind of a litigant that he may not get justice, such as is based on inferences drawn from circumstantial indication, would not justify raising the plea of bias; and that the facts adduced in support of the plea of bias must be such that the conclusion of bias necessarily flows therefrom. These principles have been held by the Hon'ble Supreme Court to be equally applicable in cases where an allegation of bias is raised against an Arbitrator.

35. In the case of "*Pak. U.K. Association (Pvt.) Ltd. Vs. The Hashemite Kingdom of Jordan (2017 CLC 599*)", I had the occasion to hold as follows:-

> ***"26. ... It has been consistently held that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person.***
> ***27. Now, can a simple allegation of possible or probable bias be a ground for the removal of the Engineer, who is supposed to adjudicate upon contractual disputes between contracting parties, or to nullify a term of a contract which requires a party to a contract to refer such disputes to the Engineer before initiating arbitration proceedings. I think not ..."***

36. In holding so, reliance was placed on the law laid down in the cases of "*The President v. Mr. Justice Shaukat Ali (PLD 1971 SC 585), Azhar Ali v. Punjab Public Service Commission (PLD*

2004 SC 4), Sain Rakhio v. Abdul Ghaffar (2011 CLC 1160), International Airport Authority of India v. K.D. Bali (AIR 1988 SC 1099), **and** ***Bristol Corporation v. John Aird & Co. (1913 AC 241*****)".**

37. When an Arbitrator is named in the arbitration agreement, the party alleging bias against him must come up with grounds stronger than those required for throwing a challenge to an appointment made by a Court. Once a party has entered into an agreement with eyes wide open, it cannot wriggle out of the situation by making a bare allegation of bias against the named Arbitrator. In *Eckersley Vs. Mersey Dock and Harbour Board (1894 (2) QB 667)*, it was held as follows:-

> ***"The rule which applies to a Judge or other person holding judicial office, namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties, does not apply to an Arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the court in saying that such an Arbitrator is disqualified from acting, circumstances must be shown to exist which establish, at least, a probability that he will, in fact, be biased in favour of one of the parties in giving his decision..... Where, in a contract for the execution of works, the Arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employer in respect of the carrying out of the contract."***

38. It is well settled that vague suspicions or unsubstantiated apprehensions cannot be made the standard for the removal of an Arbitrator. In the case at hand, respondent No.1 has not pleaded with specificity the basis on which he has alleged that the Arbitrator is *"bent upon to decide the matter against him"*. Respondent No.1 has also not particularized the *"many other things"* reflecting bias against the Arbitrator. Respondent No.1 has not given any instance as to how the named Arbitrator has not acted independently or impartially. Although the Arbitrator was impleaded as a defendant in the suit instituted by the petitioner, it is an admitted position that no relief, whatsoever, was sought against the Arbitrator. The mere fact that the Arbitrator had been impleaded as a defendant in the suit would not disqualify him from sitting in an adjudicating capacity over the dispute between the petitioner and respondent No.1.

39. Learned counsel for respondent No.1 did not deny that respondent No.1 had filed an application before the Arbitrator praying for a direction to the petitioner to "*get adjudication upon very complicated question of law and facts regarding lack of jurisdiction and loss of confidence in the arbitration proceedings*". No order had been passed by the Arbitrator on the said application. I have gone through the order sheet maintained by the Arbitrator and have seen no indication of bias on his part. In fact, no substantive proceedings had taken place before the learned Arbitrator due to the pendency of the application under section 31 of the 1940 Act.

40. As regards the contention of the learned counsel for respondent No.1 that since the Arbitrator had also signed the agreement dated 01.05.2015 in his capacity as an Arbitrator as well as a witness, he cannot sit as an Arbitrator. The parties to the said agreement permitted the named Arbitrator to sign the said agreement. This *ipso facto* does not make the named Arbitrator *de jure* or *de facto* unable to perform his functions as an Arbitrator. As mentioned above, an arbitration agreement is not required to be in a particular form. The mere fact that the named Arbitrator was aware of the terms and conditions of the agreement between the petitioner and respondent No.1 cannot be a valid ground for his removal.

41. Now it is an admitted position that the Arbitrator did not file any pleadings (i.e., written statement to the petitioner's suit or replies to any of respondent No.1's applications). The learned Civil Court ought to have discussed the allegations of bias made by respondent No.1 against the Arbitrator and after doing so ought to have determined whether such allegations had satisfied the test for the removal of the Arbitrator laid down in the above referred case law. Equally erroneous if not more erroneous is the impugned order dated 16.03.2017, passed by the learned Appellate Court. Without applying his mind as to whether the learned Civil Court had adequately considered the precise allegations of bias made by respondent No.1 against the Arbitrator before returning a finding of bias, the learned

Appellate Court held that since the Arbitrator had not challenged the findings of the learned Civil Court in an appeal, the petitioner could not be allowed to plead the Arbitrator's case otherwise *"it would be prima facie deemed to be a connivance of the Arbitrator with the [petitioner]"*.

42. Arbitrators are not expected to attend Court and actively participate in proceedings before the learned Civil Court in which their removal or revocation of their authority is sought, whether or not they are impleaded as parties to such proceedings. In the case at hand, it was not for the Arbitrator to have attended the Court in order to contradict respondent No.1's allegations of bias against him. Indeed, it was for the petitioner to have opposed respondent No.1's application for staying the arbitration proceedings by levelling allegations of bias against the Arbitrator. To term this as *"connivance"* between the petitioner and the Arbitrator is not just regretful but reflects scant appreciation of the law. Both the learned Courts below committed a jurisdictional irregularity by not applying their minds to the fact that the allegations of bias levelled by respondent No.1 against the Arbitrator were not just vague and lacking particularity but were such which would not satisfy the test for the removal of an Arbitrator on the said ground. Bearing the above principles in mind and having considered respondent No.1's above referred pleadings in his application under section 31 of the 1940 Act, I am of the view that there is no legal or factual basis for respondent No.1 to have lost confidence in the Arbitrator named in the said agreement.

43. Section 31 of the 1940 Act provides *inter-alia* that all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement shall be decided by the Court in which the award under the agreement has been or may be filed. This section simply identifies the Court in which such applications could be filed. An application to challenge the existence or validity of an arbitration agreement or to have its effect determined can be filed under section 33 of the 1940 Act. No plausible explanation

was given by the learned counsel for respondent No.1 when asked as to why respondent No.1 did not file an application under section 33 of the 1940 Act. Nowhere in the application under section 31 of the 1940 Act had respondent No.1 sought the effect of the arbitration agreement to be determined by the Court. No challenge was thrown by respondent No.1 as regards the existence and validity of the arbitration agreement between the petitioner and respondent No.1. This is an added reason why the learned Courts below ought to have dismissed respondent No.1's application.

44. Now section 5 of the 1940 Act provides that the authority of an appointed Arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. Additionally, section 11 of the 1940 Act empowers the Court to remove an Arbitrator in certain circumstances. Bias of an Arbitrator is one of the recognized grounds on which an Arbitrator can be removed or his authority be revoked. At no material stage, did respondent No.1 file an application either under section 5 or section 11 of the 1940 Act for the revocation of the authority of the Arbitrator named in the agreement or for his removal on the ground of bias. This omission on respondent No.1's part leads me to conclude that he was not serious in his allegation of bias against the Arbitrator named in the agreement; and that the purpose behind raising such an allegation in the application under section 31 of the 1940 Act was to thwart and frustrate the arbitration proceedings.

45. Proceedings on hypothesis, even if it is assumed that respondent No.1 is successful in his allegation of bias against the Arbitrator, it would not result in the quashment of the entire arbitration proceedings but in the replacement of the Arbitrator. In the case at hand, the learned counsel for respondent No.1, after taking instructions, submitted that respondent No.1 does not desire the replacement of the Arbitrator named in the said agreement but that arbitration proceedings cannot take place at all on account of the petitioner having earlier instituted a civil

suit against respondent No.1. This wishful thinking on respondent No.1's part would leave the petitioner remediless.

46. In view of the above, the instant revision petition is allowed; the concurrent orders dated 09.11.2016 and 16.03.2017, passed by the learned Civil Court and the learned Appellate Court, respectively, are set-aside; and respondent No.1's application under section 31 of the 1940 Act is dismissed. It is excepted that the Arbitrator named in the agreement dated 01.05.2015 shall proceed expeditiously with the reference. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018.

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING