Form No: HCJD/C.

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Civil Suit No.01 of 2015.

Rakshani Builders (Pvt.) Limited.
Vs.
Capital Development Authority (CDA),
Islamabad through its Chairman.

Plaintiff's by:	*Barrister Ehsan Ali Qazi, Advocate.*
Defendant's by:	*Mr. Tariq Mehmood Jahangeri, Advocate* *Mr. Muhammad Rizwan, Deputy Director (Road) CDA.*
Date of decision:	*28.04.2015*

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Aamer Farooq, J.- This is an application under Section 20 of the Arbitration Act, 1940 (the **Act**) for filing of the arbitration agreement in Court and making an order for appointment of an Arbitrator and referring dispute to him.

2. The facts, in brief, are that the applicant entered into a contract on June 12, 2012 with respondent for construction of 'Margallah Avenue Project' to connect 'Khayaban-e-Margalla' from G.T. Road to Sector D-12, Islamabad (the **Contract**). The time period for completion of contract was 364 days and the contract price was Rs:588,428,354/- (Rupee five hundred eighty eight million four hundred twenty eight thousand three hundred

and fifty four only). The pre-requisite for completion of the contract in the stipulated time, as provided in the Contract, was timely delivery of the land on which the road was to be constructed and delivery of the work design and profile drawings. The dispute arose between the applicant and respondent with respect to the fulfillment of the referred prerequisites and in this behalf the work could not be completed within time and at present the work has been stopped.

3. The learned counsel for the applicant, inter alia, submitted that the respondent delayed payments which were due to the applicant for the work done and because of the same the applicant failed to meet its running costs. It was further contended that the mobilization advance was released by the respondent to the applicant belatedly and in this regard problems which were faced by the applicant were duly communicated to the respondent/authority, however, it paid no heed to the same. The learned counsel emphasized that due to the following four (4) contraventions on part of the respondent the timely completion of the project became impossible and ultimately work had to be stopped:

a) failure to provide unencumbered and free possession of the land over which the road was to be constructed,

b) failure to provide the profile of contract,

c) failure on part of the respondent to remove/shift public utility lines and

d) failure on part of the respondent to provide drawings for the construction of the bridge.

The learned counsel further submitted that because of the above mentioned violations of the contract, by the respondent,

the applicant suffered damages/ additional cost to the tune of Rs:234,066,535/- (Rupees two hundred thirty four million sixty six thousand five hundred and thirty five only). Due to the referred situation the applicant invoked suspension of project under clause 69 of the contract and intimated about the same to the respondent. The learned counsel also pointed out that on 27.02.2014 an interim claim was submitted to the respondent for consideration due to various delays and violations of the contract by the respondent. In this behalf on July 09, 2014 the applicant made a request for settlement of dispute under clause 67 of the contract to the Project Manager and ultimately on October 15, 2014 notice was served to commence arbitration under clause 67(1) of the contract. On December 24, 2014 the request for referring the matter to the Arbitration by the applicant was denied by the respondent. The learned counsel further contended that since there are disputes between the parties and the applicant is entitled to claim additional sum of money, therefore, applicant has invoked the arbitration clause for settlement of the same. The learned counsel in support of his contentions placed reliance on cases reported as "Project Director, Balochistan Minor Irrigation and Agricultural Development Project, Quetta Cantt. Vs. M/s Murad Ali & Company" ***(1999 SCMR 121)***, "M/s Crescent Steel and Allied Products Ltd. vs. M/s Sui Northern Gas Pipeline Limited and another" ***(2013 CLD 1110)*** and M/s Global Energy & Commodity Exchange Group Italy SPA (GECX Group) and another vs. Trading Corporation of Pakistan through Chairman and another" ***(2013 CLD 681)***.

4. The learned counsel for the respondent opposed the application filed by the applicant. It was contended by the learned counsel that the application is pre-mature. The learned

counsel submitted that in order to make a claim for additional sum of money the procedure under clause 57 of the contract is to be followed which the applicant has not, therefore, question for referring of the dispute to the arbitration does not arise. It was further contended that the Engineer has not passed any order which can lead ultimately to referring the matter to the arbitration, hence the application merits dismissal.

5. The execution of the contract between the parties is not in dispute. Similarly, the existence of arbitration clause in the agreement by virtue of which the disputes between the parties are to be referred to the Arbitrator is also not a matter of controversy. The sole difference between the parties is that whether under the contract the applicant has rightly invoked the arbitration clause or the same is pre-mature. The applicant feels that that it is entitled to compensation for additional sum and that respondent has committed various violations of the contract due to which the contract could not be completed in stipulated time and the work had to be stopped. Under clause 53 of the contract the procedure is prescribed for claims other then the contract price. In this behalf the relevant clauses are as follows:

> ***53.1. Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the even giving rise to the claim has first arisen.***
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> ***53.2. Upon the happening of the even referred to in Sub-clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer's liability, the Engineer shall, on receipt of***

a notice under Sub-Clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer so instructs.

53.3. Within 28 days, or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based. Where the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the Contract shall, at such intervals as the Engineer may reasonably require, send further interim accounts giving the accumulated account of the claim and any further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the contractor shall send a final account within 28 days of the end of the effects resulting from the event. The Contractor shall, if required by the Engineer so to do, copy to the Employer all accounts sent to the Engineer pursuant to this Sub-Clause.

53.4. If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3).

53.5. The Contractor shall be entitled to have included in any interim payment certified by the Engineer pursuant to Clause 60 such amount in respect of any claim as the Engineer, after due consultation with the Employer and the Contractor, may consider due to the Contractor provided that the

Contractor has supplied sufficient particulars to enable the Engineer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim, the Contractor shall be entitled to payment in respect of such part of the claim as such particulars may substantiate to the satisfaction of the Engineer. The Engineer shall notify the Contractor of any determination made under this Sub-Clause, with a copy to the Employer.

Likewise the relevant clause i.e. 67 for settlement of dispute is reproduced below and is as follows:

67.1. If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works o after their completion and whether before or after repudiation or other termination of the Contract including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause, No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement of an arbitral award.

If either the employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day

after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contract and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

67.2. *Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.*

67.3. *Any dispute in respect of which:*

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2,

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

67.4. Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance Sub-Clause 67.3. The provisions of Sub-Clauses 67.1 to 67.2 shall not apply to any such reference.

6. The record clearly shows that the applicant did send notice to Engineer for amicable settlement of the matter and raised therein its grievances. In this behalf interim claim for

compensation was sent to the Engineer on 27.02.2014. The second letter on the same subject was sent on 03.07.2014 followed by another letter on 09.01.2014. There is nothing on record that the Engineer replied to the referred correspondence. The applicant on 15.10.2014 invoked the arbitration clause and sent notice to commence arbitration under clause 67 of GCC. In this regard the claim was filed in July, 2014 and the Engineer failed to give notice of his decision within 84 days and hence the applicant was entitled to give notice of arbitration under clause 67.1 ibid and asked the respondent to nominate the arbitrator (s). The case law cited by the learned counsel for the applicant is instructive. In this behalf in ***1999 SCMR 121*** supra it was observed as follows:

> ***".14. According to subsection (1) of section 20, before a person can make an application under the provisions of the Act for a prayer that an agreement to be filed in Court, following conditions have to be satisfied: --***
>
> ***(i) That there is an agreement between the parties containing arbitration clause.***
>
> ***(ii) That the agreement had been entered into before institution of the suit with respect to the subject-matter of the agreement.***
>
> ***(iii) That a difference has arisen between the parties to which the agreement applies.***
>
> ***(iv) That the Court to which application is made has jurisdiction in the matter to which the agreement relates.***
>
> ***17. We are inclined to approve the law enunciated by the learned Single Judge in the case of Manzoor Construction Co. Ltd. (supra) that whenever there is a dispute between the parties which is covered by the arbitration clause of the contract, the crucial question is whether there is sufficient cause within the meaning of subsection (4) of section 20 of the Act for not making an order for filing an agreement and***

referring the matter to Arbitration or in other words whether such undertaking which is the sheet anchor of the case of the employer was such a sufficient cause as debarred the Court from making such an order. The answer to this question is that in claims for arbitration, all the questions relating to the original contract or matters which can be decided by Arbitrator alone is by virtue of the relevant clause of Contract, they are by mutual consensus, committed to the judgment of the arbitrator and do not fall within the jurisdiction of the Civil Court."

Similarly, in ***2013 MLD 1499*** (supra) the Sindh High Court observed as follow:

"In any case, while considering an application under section 20 of the Arbitration Act, 1940, the court has to examine only the existence or non-existence of an arbitration agreement between the parties, and in case of such an agreement, then the existence or non-existence of dispute(s) between the parties."

In ***2004 CLC 544*** titled "Lithuanian Airlines vs. Bhoja Airlines (Pvt.) Ltd & others" the Sindh High Court observed as follows:

"The apex Court, in Lahore Stock Exchange v. Fredrick, J. Whyte Group (Pakistan) Ltd. and others PLD 1990 SC 48 has recorded the passage on the scope of Arbitration agreement from Chittay on Contracts, 24th Edition p.873 as follows:--

> ***"Scope of the arbitration agreement.--- An unqualified arbitration clause referring difference arising in respect of or `with regard to' or 'under' a contract covers a dispute as to whether a breach of contract by one party has operated to discharge the other. For a repudiation by one party even when accepted by the other, does not entirely abrogate the contract. It survives for the purpose of measuring the claims arising out of the breach. Accordingly, a party declining to perform may***

still rely, on an arbitration clause in the contract. So can a party who has committed a fundamental breach of the contract. The question whether a contract has been frustrated is also within the scope of such a clause, no matter whether the contract is purely executory or has been partly executed .... But disputes as to whether the contract was ever entered into at all, or whether it is void, or illegal, are not within the scope of an arbitration clause contained therein, for if the contract is not binding on the parties, neither is the arbitration clause. If the question is whether the making of the contract was induced by fraudulent misrepresentation, the issue of whether or not the dispute is within the scope of the arbitration clause depends on the construction of the clause .... "

A dispute implies an assertion of a right by one party and a repudiation thereof by another party. Chandmull Ganeshmull v. Nippon Munkwa Kabushiki Kaisha AIR 1921 Cal. 342.

A failure to pay a claim constitutes a matter in difference between the parties to a submission (Messrs Beith Stevenson & Co. Ltd. v. Firm of Naroomal Khemchand AIR 1924 Sindh 117)."

In 2013 CLD 1110, the principles on which an application under section 20 of the Arbitration Act was to be decided were examined by Sindh High Court and the following observations were made:

"In my humble opinion, the very facts that the parties are unable to resolve any of the above, and that the assertions made by both the parties have been repudiated by the other, prove that there is an obvious dispute between them. Moreover, none of the above disputes can be decided by the parties themselves, but can be decided only by an independent and impartial person/forum in a fair and proper manner. It is a well established principle of law that a party cannot be the judge of its own cause.

In case of an arbitration agreement, the only independent and impartial forum is the Arbitrator appointed by the parties.

13. It was held by this Court in the case of Messrs Friends Trading Co. v. Messrs Muhammad Usman-Moula Bux, PLD 1954 Sindh 56, that an existing dispute is an essential condition for reference to an arbitration. In the case of Ghulam Ishaq Khan Institute of Engineering, Science and Technology and another v. Messrs Hassan Construction Co. (Pvt.) Ltd. Engineer and Consultants, 1998 CLC 485, it was held by the Lahore High Court that assertion of a claim by one party and repudiation thereof by the other party, would constitute a dispute to warrant recourse to section 20 of the Arbitration Act. Similarly, in the case of Muhammad Umar v. Yar Muhammad through his legal heirs and others, 2009 CLC 348, it was held by this Court that, before referring the matter to arbitration, three conditions are necessary; (1) existence of an arbitration agreement, (2) existence of a dispute under the agreement, and (3) proceedings under Chapter-II of the Arbitration Act, 1940, not having been commenced. Lastly, I refer to the case of Muhammad Azam Muhammad Fazil & Co., Karachi v. Messrs N. A. Industries, Karachi, PLD 1977 Karachi 21, wherein it was held by this Court that if the challenge to the arbitration clause is founded on disputed question of interpretation of other terms of the contract, the decision of such a question would amount to usurping the jurisdiction of the domestic forum which the parties have chosen for adjudication of their disputes, and that on authority and principle both, it is proper to leave such question to be adjudicated and decided by the Arbitrator.

14. Where the parties enter into a contract, which incorporates an arbitration clause, it constitutes an arbitration agreement. However, the arbitration clause and the contract which incorporates it are two distinct contracts. The arbitration clause provides an agreement by the parties to resolve present and future disputes by arbitration, whereas the contract which incorporates the arbitration clause by reference, is the underlying contract. It must be kept in mind that the dispute between the parties arises

from the underlying contract, and not from the arbitration agreement. In the present case, the dispute between the plaintiff and defendant No.1 has arisen from the underlying contract, as the Contract I purchase order No.HOP/M/022/08 dated 9-7-2008 along with all its general terms, instructions, etc., is the underlying contract.

Similarly, in case titled "M/s Global Energy & Commodity Exchange Group Italy SPA (Gecx Group) and another vs. Trading Corporation of Pakistan through Chairman and another" reported as ***(2013 CLD 681)***, the guidelines for deciding application under section 20 were elaborated and it was observed as follows:

"There is no cavil to the proposition expounded in the case of Messrs Jamia Industries Ltd. supra that the existence of a difference or dispute is an essential condition that constitutes a cause of action for an application ' under section 20, Arbitration Act. A dispute implies an assertion of a right by one party and repudiation thereof by another. The scope of the power conferred on the Court under section 20 is merely limited to determination of the factum of a real dispute and no more. It is not for the Court to go into the questions pertaining to the disputes raised or suggest the manner of decision thereof, which was amount to usurping the jurisdiction of arbitrator. If court passes an order or reference of the matter to arbitrators, it amounts to acceptance of application and no formal order of filing of arbitration agreement is necessary for the court while passing such an order it would be deemed to have taken the agreement on the file."

In the case titled "Chandmull Goneshmull vs. Nippon Munkwa Kabushiki Kaisha" reported as ***A.I.R. 1921 Calcutta 342***" it was held that a dispute implies as assertion of a right by one party and a repudiation thereof by another.

7. As already observed that the execution of the contract between the parties is not controverted. The pleadings of the parties and record appended with the same clearly show that there is a dispute between them. In light of the same respondent is, therefore, directed to file original contract in the Court on 20.05.2015. In term of the admitted arbitration agreement the applicant as well as respondent are directed to proceed with appointment of the Arbitrator (s) within thirty (30) days from the date of this judgement.

8. The application filed by the applicant under section 20 of the Arbitration Act, 1940 is allowed in the above terms.

(AAMER FAROOQ)
JUDGE

Blue slip added *Altaf Malik*

Approved for reporting