JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

F.A.O. No.165 of 2015
M/s Pakistan Real Estate Investment & Management Company (Private) Limited
Versus.
Sohail A. Khan Associates-Assign JV and another

Date of Hearings: 03.10.2017 & 25.01.2018
Appellant by: Mr. Khurram Mahmood Qureshi, Advocate,
Respondents by: M/s Rizwan Shabbir and Asim Shafi, Advocate for the respondents, and
Mr. Abdul Ahad Memon, Deputy Director EOBI

MIANGUL HASSAN AURANGZEB J.- Through this common judgment, we propose to decide F.A.O. No.165/2015, and F.A.O. No.167/2015, since they entail common questions of law and fact.

2. Through F.A.O. No.165/2015, filed under Section 39 of the Arbitration Act, 1940 ("the 1940 Act"), the appellant, M/s Pakistan Real Estate Investment & Management Company (Private) Limited ("PRIMACO"), impugns the order dated 23.09.2015, passed by the Court of the learned Civil Judge, Islamabad, whereby the application filed by respondent No.1 (Sohail A. Khan Associates-Assign JV, ("SAKA-JV")) under Section 20 of the 1940 Act, was allowed and the matter in dispute between the parties was referred to arbitration. Furthermore, the learned civil Court required the said parties to propose the names of the Arbitrators. It appears that on 28.10.2015, respondent No.1 had proposed names for appointment as Arbitrators, but the appellant/PRIMACO did not do so. Vide order dated 05.11.2015, the learned civil Court appointed a two-member Arbitral Tribunal comprising of Brig. (Retd.) Nasar Ahmed Mir and Mr. Rafi-ud-Din Babar, Advocate Supreme Court.

3. Through F.A.O. No.167/2015, filed under Section 39 of the 1940 Act, the appellant, Employees Old-Age Benefits Institution ("EOBI"), impugns the above mentioned order dated 23.09.2015, as well as the order dated 05.11.2015, passed by the learned civil Court. EOBI was respondent No.1 in the application under Section 20 of the 1940 Act filed by SAKA-JV.

4. The facts essential for the disposal of these appeals are that on 17.01.2011, M/s. Sohail A. Khan Associates ("Sohail Associates") and PRIMACO entered into a joint venture agreement ("JVA"). The purpose of the JVA was that the said parties would submit a bid as a joint venture in the tender for the award of the contract by EOBI for consultancy services for the design and construction management of an office building for Overseas Employees Corporation at Plot No.10, Mauve Area, G-9/4, Islamabad. In the event, the contract was awarded to the joint venture of Sohail Associates and PRIMACO, they would provide consultancy services as a joint venture. For this purpose Sohail Associates and PRIMACO constituted and incorporated a private limited company called "Sohail A. Khan Associates & Pakistan Real Estate Investment and Management Company (Private) Limited JV".

5. The JVA sets out the objects of the joint venture; the responsibilities, participating interests and shareholding of each joint venture partner; the management structure of the joint venture; the duties and functions of the design consultant and the project manager; etc. Clause 12 of the JVA permitted the parties thereto to assign their rights, obligations and interests under the JVA after obtaining the written consent of the other party.

6. The joint venture of Sohail Associates and PRIMACO was successful in the tender bidding process, which culminated in the execution of a contract dated 22.04.2011 between EOBI and the joint venture of Sohail Associates and PRIMACO, for consultancy services for the design and construction management of the office building for Overseas Employees Corporation. Under the said contract, the joint venture of Sohail Associates and PRIMACO were to provide certain consultancy services as defined in the General Conditions of Contract. As per Clause 6 of the General Conditions of Contract, an amount of Rs.55.2 Million was to be paid as remuneration to the joint venture of Sohail Associates and PRIMACO. The disputes between the parties to the said contract were to be resolved through arbitration. In this regard, Clause 7.2 of the contract is reproduced herein below:-

> ***"7.2 Dispute Settlement***

Any dispute between the Parties as to the matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be submitted by either Party for settlement in accordance with the provisions of the Arbitration Act, 1940 (Act No.X of 1940). Services under the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due to or by the Client shall be withheld on account of such proceedings."

7. By an assignment agreement dated 24.01.2013, PRIMACO assigned its rights, benefits, liabilities and obligations under the JVA dated 17.01.2011 to M/s. Assign Engineering Consult International ("Assign Engineering"). Sohail Associates released PRIMACO from all its liabilities and obligations under the said JVA.

8. By another assignment agreement dated 24.01.2013, EOBI assigned all its rights, benefits, liabilities and obligations under the contract dated 22.04.2011, to its wholly owned subsidiary, PRIMACO. Furthermore, EOBI was released from its liabilities and obligations under the said contract.

9. Amendment No.1 to the JVA dated 17.01.2011 was executed on 24.01.2013 between Sohail Associates and Assign Engineering, whereby the terms of the JVA were amended in order to *inter-alia* replace PRIMACO with Assign Engineering as Sohail Associates' joint venture partner.

10. Additionally, Amendment No.1 to the contract dated 22.04.2011 was executed on 24.01.2013 between EOBI and Sohail Associates, whereby the terms of the contract dated 22.04.2011 were amended to *inter alia* replace the joint venture of Sohail Associates and PRIMACO with the joint venture of Sohail Associates and Assign Engineering, as consultants.

11. The cumulative effect of the four agreements executed on 24.01.2013 was that PRIMACO stepped into the shoes of EOBI as the employer in the contract dated 22.04.2011; Assign Engineering stepped into the shoes of PRIMACO as a joint venture partner with Sohail Associates in the contract dated 22.04.2011 as well as the JVA dated 17-01-2011; and EOBI was released from all liabilities and obligations under the contract dated 22.04.2011 and went out of the picture.

12. As a result of the aforementioned agreements, the contract dated 22.04.2011 is now a contract between PRIMACO as the employer, and SAKA-JV (i.e. the joint venture of Sohail Associates and Assign Engineering) as the consultants. EOBI is no longer a party to the contract dated 22-04-2011.

13. On 24.07.2014 the joint venture of SAKA-JV filed an application under Section 20 of the 1940 Act, before the Court of the learned Civil Judge, Islamabad, with a prayer to appoint an arbitrator to decide the disputes between the said applicants and PRIMACO. EOBI was also arrayed as a respondent in the said application.

14. In Paragraphs 13 and 14 of the said application, the applicant admitted that it had been paid Rs.117.61 Million plus Rs.11.83 Million. Its case was that the contract price under the consultancy contract dated 22-04-2011 was to be 9.2 % of the construction cost of EOBI Tower at Plot No.10, Mauve Area, G-9/4, Islamabad; that as EOBI had enhanced the construction cost of the said building to Rs.1,539.976 Million, the consultants were liable to be paid Rs.141.677 Million (i.e. 9.2% of Rs.1,539.976 Million); and that the initial consultancy contract price of Rs.55.2 Million was based on the assumption that the contract price of the construction contract would be Rs.600 Million.

15. The appellant, in the reply filed before the learned civil Court and in the memo of appeal, has admitted that the contract price was enhanced from Rs.55.2 Million to Rs.141.677 Million, but takes issue with the said enhancement on the ground of procedural impropriety, violation of the contractual mechanism as well as the transgression of the internal procedures at EOBI and PRIMACO. This shows that disputes and differences arising from and relating to the contract dated 22.04.2011 had developed between the parties. In the case of Novelty Cinema, Lyallpur Vs. Firdaus Films (PLD 1958 Lahore 208), the great jurist B. Z. Kaikaus, J. held *inter-alia* that a dispute is constituted by a proposition of a fact or law being alleged by one party and denied by the other. Furthermore, in the cases of Ghulam Ishaq Khan Institute of Engineering, Science and Technology Vs. Messrs Hassan Construction Co. (Pvt.) Ltd.

(1998 CLC 485) and AJ Corporation Vs. Fauji Fertilizer Bin Qasim Limited (2013 CLD 363), it was held that an assertion of a claim by one party and the repudiation thereof by the other party would constitute a dispute warranting a reference to arbitration under Section 20 of the 1940 Act.

16. As mentioned above, vide order dated 23.09.2015, the learned Civil Court allowed respondent No.1's application under Section 20 of the 1940 Act, and referred the matters in dispute SAKA-JV and PRIMACO to arbitration. Furthermore, vide order dated 05.11.2015, the learned civil Court appointed a two member Arbitral Tribunal. PRIMACO filed an appeal (i.e F.A.O. No.165/2015) against the said order dated 23.09.2015.

17. Even though EOBI (i.e. the appellant in F.A.O. No.167/2015) had exited the contractual scheme and was released from all liabilities and obligations under the contract dated 22.04.2011, it was nonetheless arrayed as a respondent in the application under Section 20 of the 1940 Act. Therefore, EOBI has filed FAO No.167/2015 against the orders dated 23.09.2015 and 05.11.2015. Since due to the assignment agreements dated 24.01.2013 and the amendments in the contract dated 22.04.2011, EOBI had assigned all its rights, benefits, liabilities, and obligations under the contract dated 22.04.2011 to PRIMACO, it is my view that EOBI did not have the *locus standi* to file an appeal and/or to resist the reference of the matters in dispute between SAKA-JV and PRIMACO to arbitration. An assignee receives his rights pursuant to the instrument of assignment. An assignee succeeds to the assignor's right in the arbitration provided that the other party to the agreement has notice of such an assignment. In the case at hand, it is not disputed that SAKA-JV had notice of the assignment of EOBI's rights and obligations under the contract dated 22.04.2011 to PRIMACO. Consequently, F.A.O. No.167/2015 is liable to be dismissed as not maintainable.

18. EOBI could not be termed as a party to the contract containing the arbitration clause. Only a party to an arbitration agreement could file an application under Section 20 of the 1940 Act. Section 20 (1) of the 1940 Act is reproduced herein below:-

> ***"20. Application to file in Court arbitration agreement.—(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court."*** **(Emphasis added)**

19. It is only the parties to the arbitration agreement who can take advantage of it and it is only they who can make an application for the appointment of arbitrator(s) as provided in the agreement. A person who is not a party to the arbitration agreement cannot take advantage of such an agreement or take steps for its enforcement. By the adoption of the words "they or any of them" in Section 20 (1) ***ibid,*** **the legislature has conveyed its intention that only a party to an arbitration agreement can file an application for the reference of contractual disputes with the contracting party to arbitration with the intervention of the Court. In the case of Pakistan through Secretary, Ministry of Religious Affairs Vs. Dallah Real Estate and Tourism Holding Company (2003 CLC 1411), it was held that a person who was not a party to the arbitration agreement could not be proceeded against under the arbitration agreement, and that an award cannot be implemented against a person who was not a party to the arbitration agreement. Additionally, in the case of Medhi K. Lavji Vs. Province of Sindh (2010 MLD 561), the Division Bench of the Hon'ble High Court of Sindh did not refer the matter in dispute between a petitioner and the Government of Sindh to arbitration because the latter, whose order had been challenged in the petition, was not a party to the arbitration agreement.**

20. The appellant/PRIMACO assailed the order dated 23-09-2015, passed by the learned civil Court primarily on jurisdictional grounds. Learned counsel for the appellant objected to the jurisdiction of the learned civil Court to entertain and decide the application under Section 20 of the 1940 Act on the ground that since the contract dated 22-04-2011 was executed at Karachi, the Learned Civil Court at Islamabad was bereft of territorial jurisdiction in the matter.

21. The contract dated 22-04-2011 does not obligate the parties to file legal proceedings in a certain Court. It is an elementary principle of civil litigation that the plaintiff seeks the defendant. In other words, it is the plaintiff, or in this case the applicant, who will have to institute the proceedings before a Court where the respondent resides or has its principal place of business. Another reason why the applicant in the application under Section 20 of the 1940 Act did not fault in filing the same before the learned civil Court at Islamabad is because the services under the Contract dated 22-04-2011 were to be performed at Islamabad. As mentioned above, under the contract dated 22-04-2011, SAKA-JV was to provide consultancy services with respect to the design and construction management of office building for Overseas Employees Corporation at Islamabad. Hence, the objection taken by the appellant to the territorial jurisdiction of the learned civil Court is untenable.

22. Another ground on which the appellant/PRIMACO resisted respondent No.1's application seeking reference of the disputes between the appellant and respondent No.1 to arbitration was that although the consultancy agreement dated 22.04.2011 was executed for a lump sum price of Rs.55.2 Million, its enhancement to Rs.141.677 Million was unlawful and without the approval of the competent forum. Learned counsel for the appellant submitted that an inquiry into the illegal enhancement of the consultancy fee culminated in findings in inquiry reports dated 19.12.2013 and 26.03.2014 showing that the consultancy fee was enhanced in colourable exercise of authority and in violation of the applicable rules; and that the matter had been referred to the Federal Investigation Agency and FIR No.92/2014 has been registered. Learned counsel for the appellant also submitted that an excess payment had been made to respondent No.1, which was liable to be recovered by the appellant.

23. The appellant/PRIMACO does not seem to be serious in resisting the reference to the disputes to arbitration on the said ground because the appellant has not bothered to bring on record copies of FIR No.92/2014 or the inquiry reports dated 19.12.2013

and 26.03.2014. No mention was made as to the progress in the said case. By not filing the said documents, the learned counsel for the appellant has not equipped us to gauge the veracity of the allegations of fraud or deceit against the respondents. Even the contract which contains the arbitration clause has not been assailed by PRIMACO as void or vitiated by fraud. The record before us does not show any *prima facie* case of fraud which could be considered as sufficient for interfering with the order of reference.

24. Bare and unsubstantiated allegations of fraud made by a party in order to resist a reference to arbitration has to be discouraged by Courts. Every allegation imputing some sort of dishonesty or fraud would not be "sufficient cause" to refuse reference to arbitration. It is only in cases where serious allegations of fraud are made against a party or an arbitration agreement in a criminal complaint, and such a party is charged with fraud and desirous that the matter should be tried in an open Court, that the Court can decline to refer a dispute which is also the subject matter of the criminal charge to arbitration. Simple allegations of fraud or even the filing of a criminal complaint, without the framing of a charge by a Court of competent jurisdiction, cannot be held to be 'sufficient cause' for refusing a reference to arbitration. In holding so, we are guided by the principles of law laid down in the following cases-:

(i) In the case of Haji Soomar Haji Hajjan Vs. Muhammad Amin Muhammad Bashir Ltd. (1981 SCMR 129), it has been held as follows:-

> ***"7. ... in a case covered by an arbitration clause Courts would ordinarily be inclined to stay a suit on the application of the party against whom fraud is alleged and allow the dispute to be settled through arbitration, unless that party itself wants the matter to be decided through a public inquiry by a Court of law. If, however,' that party does not wish the dirty linen to be washed in the public, the proceedings in the trial should be stayed: But even in such cases where a prima facie case of fraud is made out, the case may be allowed to proceed in al civil Court."***

(ii) In the case of Sir E. Haroon Jaffar & Sons Ltd. Vs. Haji E. Dossa & Sons (PLD 1956 Sindh 4), it was held as follows:-

> ***"It is not settled law that a Court will generally not grant a stay of suit when the party resisting the stay charges the party wanting the stay with fraud, and that it will not stay the suit at the instance of the party charged with fraud, because he is entitled to be cleared of it in open Court. The authorities have long since recognized that submission clauses would easily be defeated if the party resisting the stay could make allegations of fraud against the party moving for stay. But here we have more than allegations; we have a prima facie case of fraud made out and evidence that the party charged with it does not desire an independent or just inquiry into it."*** **(Emphasis added)**

(iii) In the case of Aswan Tentage & Canvas Mills Limited Vs. M. A Razzaq & Company (1993 MLD 243), it was held by the Hon'ble Lahore High Court that where it was simply pleaded that the agreement containing an arbitration clause had been procured by the respondent through fraud and misrepresentation, giving no details of the fraud or misrepresentation, the question of fraud and misrepresentation had been determined by the arbitrator and not the Court.

(iv) In the case of Syed Muddasar Shah Vs. Managing Director, N.-W.F.P. Forest Development Corporation (1999 MLD 736), the petitioner had filed a suit for declaration against the respondent before the Court of Senior Civil Judge, Mansehra. Since the agreement between the petitioner and the respondent contained an arbitration clause, the respondent filed an application under Section 34 of the 1940 Act prayed for the proceedings in the suit to be stayed and the disputes between the parties to be referred to arbitration. One of the grounds on which the petitioner resisted the respondent's application under Section 34 of the 1940 Act was that fraud had been alleged by the petitioner in the plaint. This ground was spurned and the proceedings in the suit were stayed. Paragraph 17 of the said report, is reproduced herein below:-

> ***"17. The insertion of section 34 in the Arbitration Act has got its own object and its effect should not be nullified by the argument that once fraud is alleged in the plaint then the civil Court should not stay the proceedings i.e. should not invoke the provisions of section 34 is misconceived. All statutes and enactments are to be given such interpretation so to make them operative and not to bye-pass them by advancing mere technical objections."***

(v) In the case of Government of Sindh Vs. Tausif Ali Khan (2003 CLC 180), the Division Bench of the Hon'ble High Court of Sindh held that an allegation of fraud by a party to a contract containing

an arbitration clause could not deprive the other party of its right to have disputes resolved through arbitration. The allegation of fraud by the party who was resisting a reference to arbitration had not been substantiated in the said case.

(vi) In the case of Nilofar Saqib Vs. Siaban Builders and Developers (2011 CLC 157 = 2011 CLD 341), it was held that where the plaintiff, in his suit, had alleged the commission of fraud by the defendants, and where such an allegation appears to be *"substantial, weighty and bonafide,"* the case should be tried by the Court, and not be stayed due to an arbitration clause in the agreement between the plaintiff and the defendant.

(vii) In the case of Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar (AIR 1962 SC 406), it was held *inter alia* that it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen.

(viii) In the case of Russel Vs. Russel (1880) LR 14 Ch D 471, Lord Jessel (Master of Rolls), held as follows:

> ***"The next question I have to consider is, what foundation there is for the charges, because, if the mere making of a charge of fraud would entitle the person making it to call upon the Court, in the exercise of its discretion, to refuse to refer to arbitration, there would be a very easy way of getting rid of all these clauses of arbitration. I am satisfied that the mere making of a charge will not do that, even in a case where the Court ought to exercise its discretion by refusing to refer the case to arbitration. There must be sufficient primâ facie evidence of fraud, not conclusive or final evidence, because it is not the trial of the action, but sufficient primâ facie evidence."***

25. In England the power of the Court to order that the arbitration agreement shall cease to have effect, or to revoke the arbitrator's authority in certain cases where there are allegations of fraud, has been omitted from the Arbitration Act, 1996. Therefore, in England, there is no limitation on the arbitrator deciding an issue of fraud. Thus, there is no longer any justification for a Court to refuse to stay an action brought in breach of an arbitration agreement even if a concrete and specific issue of fraud was raised by the parties opposing the stay. (see Russell on Arbitration, 21st Edition, Paragraph 7-016).

26. 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 insofar as they are applicable to the reference. The first schedule to the 1940 Act contains the implied conditions of arbitration agreements. Paragraph-1 of the first schedule provides that unless otherwise expressly provided, the reference shall be to a sole arbitrator. Perusal of the arbitration agreement reproduced above shows that the same is silent as to the number of Arbitrators who are to adjudicate upon dispute between the parties to the said agreement. Therefore, in terms of Section 3 read with Paragraph-1 of the First Schedule to the 1940 Act, the reference is to be made to a sole Arbitrator. Consequently, the impugned order dated 05.11.2015, whereby the matter in dispute between the parties to the said agreement has been referred by the learned civil Court to a two member Arbitral Tribunal, is not sustainable. Reference in this regard may be made to the law laid down in the cases of Mujtaba Hussain Siddiqui Vs. Sultan Ahmad (2005 YLR 2709), Government of Sindh Vs. Tausif Ali Khan (2003 CLC 180), and Mohammad Jamil Vs. Iqbal Ahmad (PLD 1977 Karachi 886).

27. Since an appeal under Section 39 of the 1940 Act is a continuation of the proceedings before the learned trial Court, the appellate Court has ample power to pass an order which the learned trial Court could have passed or ought to have passed. The appellate Court while hearing an appeal exercises the same jurisdiction which is vested in the trial Court, and the *lis* becomes open without any restriction placed by the order or judgment appeal against. Therefore, it is our view that even though the learned civil Court, vide order dated 05.11.2015, appointed a two member Arbitral Tribunal (*albeit* in derogation of the arbitration agreement between the parties), this Court has the power in its appellate jurisdiction not just to modify the said order dated 05.11.2015, but also to appoint a sole arbitrator in terms of the arbitration agreement between the parties. The contesting parties were not able to arrive at a consensus on the appointment of a sole arbitrator. Therefore, the said order dated 05.11.2015 appointing a

two member arbitral tribunal is modified and Mr. Rizwan Faiz Muhammad, Advocate, is appointed as the sole arbitrator. The learned arbitrator shall fix his own fees, which shall be paid by the parties to the arbitration agreement in equal proportion.

28. Both the appeals are dismissed in the above terms. There shall be no order as to costs.

(ATHAR MINALLAH)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018

(JUDGE) **(JUDGE)**

APPROVED FOR REPORTING

Qamar Khan*