JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.10/2015
Capital Development Authority
Versus
M/s Signage Security Systems (Pvt) Ltd.

Date of Hearing:	28.02.2019
Appellant by:	M/s G. Shabbir Akbar, Aamir Latif Gill and Saadia Noreen Malik, Advocates.
Respondent by:	Mian Shafaqat Jan, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellant, Capital Development Authority, impugns the judgment and decree dated 22.12.2014, passed by the learned Judge-in-Chambers, whereby the appellant's objections to the arbitration award dated 27.04.2013, were dismissed, and the said award was made a rule of Court.

2. The facts essential for the disposal of the instant appeal are that on 22.11.2007, an agreement for the development of select toll facilities on Build, Operate and Transfer ("B.O.T.") basis was executed between the appellant and the respondent. Section XVIII.01 to 03 of the agreement dated 22.11.2007 provided for a mechanism for the settlement of the disputes and differences between the parties arising from or related to the terms of the said agreement. The said clauses are reproduced in **"Schedule-A"** hereto. After disputes and differences arose between the appellant and the respondent, the respondent, on 11.03.2011, filed an application (C.M. Arb.02/2011) before this Court praying for the reference of the dispute between the said parties to arbitration and for the appointment of an arbitrator. Vide order dated 26.06.2012, passed by this Court, the said application was allowed and the matters in dispute between the said parties were referred to arbitration. Vide order dated 18.12.2012, this Court, with the consent of the parties, appointed the Hon'ble Mr. Justice (Retd.) Sardar Muhammad Aslam as the sole arbitrator. The said order dated 26.06.2012 was assailed by the appellant in civil petition

No.1674/2012 before the Hon'ble Supreme Court. Vide order dated 20.02.2013, the Hon'ble Supreme Court dismissed the said petition. The contention of the learned counsel for the appellant that the respondent's application seeking the reference of disputes to arbitration was not maintainable on the ground that the respondent had earlier filed a writ petition on the same subject matter, was spurned by the Hon'ble Supreme Court as the writ petition had been dismissed on the legal ground that since the matter involved factual controversy, the same could not be resolved in Constitutional jurisdiction.

3. On 02.01.2013, the respondent filed a statement of claim before the learned sole arbitrator seeking an award for an amount of Rs.2,40,277,376/- along with markup. On 03.04.2013, the appellant filed its counter claim for an amount of Rs.428,858 Million as well as reply to the respondent's statement of claim.

4. From the divergent pleadings of the contesting parties, the learned arbitrator framed the following issues:-

> ***"1. Whether the claimant was bound under contract to pay B.O.T. fee unconditionally and to complete construction of toll plaza and installation of electronic gadgets in accordance with section 11.02 of the agreement? O.P. Parties***
> ***2. Whether the claims for loss of revenue lodged by claimant was adjudicated by CDA? O.P. Claimant***
> ***3. Whether the claimant was authorised under the contract to adjust its claim on account of loss of revenue qua the monthly B.O.T. fee. If so, whether the respondent is not estopped to raise objection at belated stage, when termination of contract attained finality? O.P. Claimant***
> ***4. Whether the claimant was within its right under the contract to lodge claims of loss of revenue on account of decline in traffic due to acclaimed diversion of transport to other plazas by the respondent? O.P. Claimant***
> ***5. Whether the respondent took over the physical possession of the toll plaza by use of force, in sheer violation of the contract? O.P. Claimant***
> ***6. Whether the collection of revenue by the respondent, immediately after taking physical possession, was much smaller then the B.O.T. fee paid by the claimant? O.P. Claimant***
> ***7. Whether the respondent granted permission to any other party for erecting sign boards? O.P. Claimant***
> ***8. Whether the respondent caused harassment to the claimant? O.P. Claimant***
> ***9. Whether the claimant is entitled to claim amount of Rs.240,277 million alongwith mark up at the rate of 17% per an[n]um? O.P. Claimant***

10. Whether the respondent can lodge counter claim? O.P. Claimant
11. Whether the respondent is entitled to Rs.428.856 million, in counter claim? O.P. Respondent
12. What should be the Award? O.P. Parties."

5. Syed Farrukh Hussain (CW-1) appeared as the respondent's sole witness and gave his affidavit-in-evidence as Exh.CW1/1. Mr. Sajjad Zaidi, Director, C.D.A. (RW-1) appeared as the appellant's sole witness.

6. After the recording of evidence and hearing the arguments advanced on behalf of the contesting parties, the learned arbitrator rendered award dated 27.04.2013 awarding an amount of Rs.231.42 Million in the respondent's favour.

7. On 27.12.2013, the appellant filed objections under Sections 30 and 33 of the Arbitration Act, 1940 ("the 1940 Act") against the said arbitration award. The respondent contested the said objections by filing a written reply on 18.04.2014. Vide order dated 22.12.2014, this Court dismissed the appellant's said objections and made the award dated 27.04.2013 a rule of Court by passing a judgment and decree in terms of the said award. The said judgment and decree has been impugned by the appellant in the instant appeal. The appeal was filed on 17.01.2015, and after the removal of the office objection, the same was re-filed on 20.01.2015.

8. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the learned Judge-in-Chambers erred by making the arbitration award into a rule of Court; that under the terms of the agreement, the respondent had to complete the construction of toll plaza within a period of six months from the date of handing over possession of the site with an additional three months for the installation and commissioning of the equipment; that under the terms of the said agreement, the respondent had been authorized to collect the toll money subject to the payment of a monthly B.O.T. Fee to the appellant from the date of handing over of the site to the respondent; that the appellant had accepted the respondent's bid only with respect to the Kashmir Highway Toll Plaza; that the respondent failed to construct the ancillary facilities required in

"Annexure-B" of the agreement; that these facilities included a mosque, washrooms for ladies and gents, PCO, small canteen outlet, tyre repair workshop/recovery vehicle, etc.; that the respondent had defaulted in the payment of the monthly B.O.T. Fee payable to the appellant from 22.12.2008 to 01.07.2009 when the respondent was in possession of the site; that the learned arbitrator did not give any finding on the appellant's counter claim; that the respondent had not even filed a reply to the appellant's counter claim so as to controvert the appellant's assertions made therein; that the learned arbitrator erred by not appreciating that the respondent had to complete the works within a period of six months from the date of the approval of the detailed designs; that the detailed designs were approved on 18.01.2008; that the learned arbitrator erred by holding that the site was actually handed over to the respondent on 07.06.2008; that even if 07.06.2008 is considered as the date on which the six-month period for the completion of the project was to start, the respondent did not even complete the project within six months from 07.06.2008; that the reasons for not accepting the respondent's claim for compensation on account of loss of revenue were set out in the appellant's minutes of the meeting dated 10.01.2008 (Exh.R/9); that the learned arbitrator erred by not appreciating that the decline in traffic was not jointly measured by the appellant and the respondent; that the respondent's assertion as to the decline in traffic was not substantiated by any evidence; that the learned arbitrator erred by holding that there is no provision of counter claim in the agreement; that the agreement executed between the parties was not exhibited in evidence; that the learned arbitrator could not hold that the agreement contained no provision for a counter claim without going through the provisions of the agreement; that the learned arbitrator erred by not appreciating that the appellant, vide letter dated 16.03.2009, had called upon the respondent to pay the outstanding B.O.T. fee and penalties amounting to Rs.11,550,329/-; that the details on the basis of which the said claim was made, was also attached to the said letter; and that the appellant, vide letter

dated 02.05.2009, had called upon the respondent to pay Rs.29.413 Million and similarly, vide letter dated 05.11.2009, the respondent was called upon to pay Rs.75.007 Million as B.O.T. Fee and penalties. Learned counsel for the appellant prayed for the appeal to be allowed and for the judgment and decree dated 22.12.2014, passed by the learned Judge-in-Chambers as well as the arbitration award dated 27.04.2013 to be set-aside.

9. On the other hand, learned counsel for the respondent submitted that the instant appeal was not maintainable since Section 17 of the 1940 Act provided that an appeal would lie from a decree only on the ground that it was in excess of the award; that the arbitration award was not invalid and warranted no interference by the Court; that the appellant had never prayed for its claim against the respondent to be referred to arbitration; that the appellant's counter claim was not the subject matter of the arbitration proceedings; that the appellant's counter claim was an afterthought and raised only to defeat the respondent's claims against the appellant; that the appellant was barred from raising its counter claim before the learned arbitrator; that even otherwise, the learned arbitrator has, in the award, dealt with the appellant's counter claim; that the learned arbitrator has correctly held that *"lodging of a counter claim is not provided in the agreement"* and that *"undisputably such a claim is extraneous to the contract"*; that the learned arbitrator had correctly held that the appellant had *"failed to point out any clause in the agreement entitling them to lodge a claim"*; that Section XIX.21 of the agreement provided that unless a longer approval period was explicitly provided, otherwise, all written requests by the respondent shall be deemed approved if not objected to by the appellant within three days of the receipt of such request; that since the respondent's requests for extension in time were expressly declined by the appellant, they would be deemed to have been approved; and that since there was no error apparent on the surface of the award, and since it did not suffer from any invalidity, the learned Judge-in-Chambers committed no

illegality by making the said award a rule of Court. Learned counsel for the respondent prayed for the appeal to be dismissed.

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

11. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 7 above, and need not be recapitulated.

12. The respondent did not deny its obligation under the agreement to pay the B.O.T. Fee, but took the position that the same was paid after the deduction of the losses incurred by it due to the breach of contractual obligations on the part of the appellant. In the award dated 27.04.2013, it has clearly been mentioned that the *"claimant has paid the BOT Fee through Ex C/132 to Ex C/138, but adjusted it[s] loss."* The appellant, on the other hand, asserted that no breach of contract was committed by it, and that the respondent had defaulted in making payment of the B.O.T. Fee, which also entitled the appellant to impose a penalty on the respondent.

13. Section I.12 of the agreement provided that the B.O.T. Fee means the fee schedule as appended at Annex-C to the said agreement. Annex-C to the said agreement provides the year wise B.O.T. Fee which the respondent was under an obligation to pay for a period of five years. Section II.06 entitled the appellant to charge a penalty at the rate of 10% per week on account of the respondent's failure to pay the B.O.T. Fee. There is no provision in the contract which entitled the respondent to make an adjustment of the B.O.T. Fee against the losses it claimed to have suffered due to breach of contract on the part of the appellant. Section XI.02 of the agreement titled "periodic adjustment of toll charges" does not entitle the respondent to adjust the amount payable as B.O.T. Fee to the appellant against the losses which the respondent claims to have suffered.

14. Although the learned arbitrator while deciding issue No.3 held that the respondent was entitled to adjust its claim regarding

loss of revenue after seeking approval of the appellant, and that since the appellant had not responded to the respondent's letters Exh.C/139 to Exh.C/143, the respondent's claims stood approved since no objection had been raised by the appellant within a period of three days of the said claims having been made. This reasoning does not appeal to reason since the arbitrator being the arbiter of the fact and law had to give a finding on the correctness and legality of the respondent's claims, especially if the claimant was seeking an adjustment of its claims against the amounts payable to the appellant as B.O.T. Fee. As regards the reliance placed by the learned arbitrator on Section XIX.21 titled "written approvals" for holding that the respondent's claims stood approved due to the appellant not raising an objection within a period of three days suffers from a misconception. Submission of a claim and making a *"written request"* cannot be equated. A monetary claim made by a contractor is to be assessed and verified in accordance with the provisions of the contract. The learned arbitrator has overlooked Section XII.02 of the agreement which provides that each party shall promptly notify the other party of any loss or proceeding in respect of which it is or may be entitled to indemnification. Such notice is required to be given as soon as reasonably practicable after the relevant party becomes aware of the loss or proceeding. Under Section XII.01(a), the parties have been liable to each other for breach of contract. A claim made by one party against the other for breach of contract, cannot, by any stretch of imagination, be deemed to be admitted if responded to within three days by the other party.

15. It is indeed the payment of the B.O.T. Fee and the penalty which the appellant sought to recover from the respondent through its counter claim submitted during the arbitration proceedings. True, the matter had been referred to arbitration by this Court on the respondent's application, however, the order of reference did not in any manner debar the appellant from making a counter claim against the respondent in the arbitration proceedings. Simply because the contract between the parties did not specifically

entitle the appellant from making a counter claim against the respondent in the arbitration proceedings, would not amount to a restraint on the appellant from making a counter claim. The agreement certainly did not restrict the entitlement to file claims in favour of the respondent. The right to file claims was bestowed on both the parties to the agreement. Since the claim made by the appellant in its counter claim was for the recovery of the B.O.T. Fee and the penalty for which there was a specific provision in the contract i.e. Section II.06, the learned arbitrator holding that the appellant's counter claim was *"extraneous to the contract"* is a clear error on the surface of the record rendering the award unsustainable. Since the arbitration clause in the contract entitled both the parties to have their disputes against each other resolved through arbitration, the finding of the learned arbitrator that there was no clause in the contract entitling the appellant to lodge a claim is also not sustainable. Section II.06 of the agreement read with Appendix-C thereof entitled the appellant to the payment of B.O.T. Fee and penalty in the event of a delay in the payment of such a fee. If such fee was not paid, the appellant was undoubtedly entitled to make a claim for the payment of the amount as B.O.T. Fee.

16. The learned arbitrator had framed specific issues on whether the appellant was entitled to the payment of Rs.428.856 Million as its counter claim against the respondent. It is an admitted position that the respondent had not even bothered to file a reply to the appellant's counter claim. The award of Rs.231.42 Million in favour of the respondent by the learned arbitrator presupposes that the respondent was correct in adjusting its alleged losses against the B.O.T. Fee while making a claim against the appellant. By outrightly rejecting the appellant's counter claim as inadmissible, the appellant was in fact denied an opportunity to dispute the figures put forth by the respondent as B.O.T. Fee payable to the appellant. Additionally, since the respondent's claim was based upon an adjustment of the B.O.T. Fee having been made, the respondent's said claim could not be decided in isolation and without reference

to the counter claim for the B.O.T. Fee and penalty made by the appellant.

17. Since we are of the view that the agreement between the parties did not, in any manner, prevent the appellant from raising a counter claim against the respondent, and since the learned arbitrator awarded Rs.231.42 Million in favour of the respondent without taking into consideration the appellant's counter claim, we hold that there was an error apparent on the face of the arbitration award rendering the same unsustainable.

18. There is no cavil with the preposition that a Court while scrutinizing the award while hearing objections against the same does not sit as a Court of appeal. It is nonetheless obligatory upon the Court to examine the award in order to determine whether it suffers from any invalidity or inconsistency with the provisions of the contract.

19. In the case of Pakistan Steel Mills Corporation Limited Vs. Progressive Engineers Alliance Limited (2009 CLC 100), the Division Bench of the Hon'ble High Court of Sindh held that when an award comes before the Court for making a rule of Court, the Court can do the following things:-

> ***(i) In exercise of powers under section 15 of the Arbitration Act modify or correct an award if a part of the award is upon a matter not referred and can be separated or containing any obvious error, which can be amended without affecting such decision or contains a clerical mistake or an error arising from an accidental slip or omission.***
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> ***(ii) Remit the award to Arbitrator or umpire for reconsideration upon such terms as it thinks fit.***
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> ***(iii) In exercise of power under section 17 of Arbitration Act, Court to see that there was no cause to remit award or to set aside the award even if no application to set aside the award is filed or an application to set aside the award is refused, proceed to pronounce the judgment according to the award.***
>
> ***(iv) In exercise of power under section 26(A), for want of reasons for award insufficient, remit the award to the arbitration or umpire to give reasons in sufficient details within time fixed by the Court.***
>
> ***(v) After hearing objections filed under sections 30 and 33 of Arbitration Act, if any, set aside the award if Arbitrator or umpire has misconducted.***

20. Since the said judgment was authored by Hon'ble Judge who rose to grace the Hon'ble Supreme Court, hence the same judgment deserves reverence and respect.

21. The instant appeal has been filed under Section 39 of the 1940 Act. Section 39(vi) makes an order refusing to set-aside an award appealable. Therefore, the objection raised by the learned counsel for the respondent as to the maintainability of the instant appeal is not sustainable. Section 17 of the 1940 Act provides *inter-alia* that where the Court sees the cause to remit the award or any of the matters referred to arbitration for reconsideration or to set-aside the award, the Court shall proceed to pronounce the judgment according to the award. Since we have found that there was sufficient cause and material on the record for the learned Judge-in-Chambers to have remitted the award to the learned arbitrator, the instant appeal is allowed; the impugned judgment and decree dated 22.12.2014, is set-aside and the matter is remitted to the learned arbitrator who shall render his award after adjudicating upon the appellant's counter claim.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON 02/05/2019

(CHIEF JUSTICE) **(JUDGE)**

APPROVED FOR REPORTING

*Qamar Khan**

"SCHEDULE-A"

"Section XVIII.01 Amicable Resolution

If any dispute or difference of any kind whatsoever shall arise between CDA and the Concessionaire in connection with or arising out of this Agreement or related to the relationship between the Parties by virtue of this Agreement, the Parties shall attempt to settle such dispute in the first instance within thirty (30) days by mutual discussions and negotiations between the Concessionaire and C.D.A. If the dispute cannot be settled by mutual discussion, the dispute shall be dealt with in accordance with this Clause.

Section XVIII.02 Expert Determination

(a) If the dispute is, or related to, whether (but only where CDA and the Concessionaire have agreed that this Clause shall apply to such dispute) (i) the Concessionaire is undertaking the Works in a proper and workman like manner, using good quality materials, plant and equipment or in accordance with the requirements of this Agreement, or (ii) the Outline Design, Design Proposal or Detailed Design diverge from statutory requirements, or (iii) to any other dispute, the dispute shall be determined by an independent expert in the relevant or by an independent expert in each of the relevant fields (if there is more than one field) as agreed upon and appointed jointly by the Parties. In the event that the Parties hereto cannot agree on such appointment, upon the application of either Party the independent expert(s) shall be appointed by [the president of the Federation of Pakistan Chamber of Commerce and Industry].

(b) The decision of the independent expert shall be made as an expert and not as an arbitrator and shall be binding on the Parties if they acquiesce in such decision. The Concessionaire and the CDA shall share equally the costs incurred by any such expert in making the determination unless otherwise awarded by the expert.

Section XVIII.03 Arbitration and Governing Law

If any dispute or difference shall arise between the Parties hereto touching any Section or subject matter or thing whatsoever herein contained or the operation or construction thereof or any subject matter or thing in any way connected with this Agreement or the rights, duties and liabilities of either of the Parties under or in connection with this Agreement and such dispute or difference cannot be settled through mutual discussion or expert determination then, and in every such case, the dispute or difference shall be referred to arbitration under the following provisions:

(a) the rights and obligations of the Parties under or pursuant to this Agreement shall be governed and construed in accordance with the Laws of Pakistan;

(b) the dispute shall be referred to arbitration and finally in accordance with the Arbitration Act, 1940, and any amendment or substitution thereof. The arbitration shall be undertaken by a retired judge of the Supreme Court or a High Court of Pakistan appointed with the mutual agreement of both Parties. If the Parties cannot agree to the appointment of a sole arbitrator, such an arbitrator shall be appointed by the court. The decision of the arbitrator(s) shall be final and shall not be challenged or assailed in any court on any ground whatsoever; for the avoidance of doubt, the arbitrator shall have all the requisite authority to provide interim relief to either Party if the circumstances so warrant; and

(c) notwithstanding any provision under (a) and (b) above, (i) the Concessionaire undertakes to continue the construction, development, operation, maintenance and transfer of the Project and (ii) CDA undertakes to continue to perform its services and obligations under this Agreement, in either case without any stoppages/impediments during the discussions between the Parties and pending any arbitration proceeding pursuant to this Section."