

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.48 of 2019
Oil & Gas Development Company Limited
Versus
Admore Gas (Pvt.) Limited

Date of Hearing: 08.06.2021
Appellant by: Mr. Saad M. Hashmi, Advocate
Respondent by: M/s Sheikh Naveed Anwaar and Rai
Azhar Iqbal Kharral, Advocates

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 39 of the Arbitration Act, 1940 (“the 1940 Act”) the appellant, Oil & Gas Development Company Limited, impugns the order dated 11.02.2019 passed by the Court of the learned Civil Judge, Islamabad, whereby the appellant’s application under Sections 14 and 17 of the 1940 Act praying for the arbitration award dated 07.09.2016 to be made a Rule of Court was dismissed, and the said award was set-aside. Furthermore, the matter was adjourned for the parties’ assistance regarding the remittance of the award.

2. The record shows that on 07.02.2012, the appellant filed an application under Section 20 of the 1940 Act before the Court of the learned Civil Judge, Islamabad, praying for the disputes between the appellant and the respondent arising from and related to the Gasoline Sale and Purchase Agreement dated 17.10.2007 to be referred to arbitration. Vide order dated 03.02.2014, the said application was allowed and the respondent was directed to nominate an arbitrator within a period of fifteen days.

3. Vide order dated 26.02.2014, a two-member arbitral tribunal comprising of Mr. Mushtaq Ahmad, General Manager (Accounts), Oil and Gas Development Company Limited and Mr. Muzaffar Hussain, Regional Sales Manager (North), Admore Gas (Pvt.) Ltd. was appointed with the consent of the contesting parties.

4. On 28.03.2015, the respondent filed an application for substituting Mr. Muzaffar Hussain with Mr. Sabtain Jafar Zaidi as its nominee on the arbitral tribunal. The appellant had filed a reply to the said application agreeing to the appointment of Mr. Zaidi on the arbitral tribunal. Before an order could be passed on the said application, the respondent filed another application on 25.04.2015 praying for Barrister Salman Hamid Afridi to be appointed as its nominee on the arbitral tribunal. In the said application, it had been pleaded that Mr. Zaidi had *“refused to proceed as arbitrator.”* Vide order dated 10.06.2015, the learned Civil Court passed the following order:-

“After adjournment of the case learned counsel for the respondent submitted reply of application, wherein he has given the conceding statement to the extent of acceptance of the application filed by the petitioner subject to direction given to the arbitrator to nominate an umpire within 15 days of passing this order. In the light of statement given by learned counsel for the respondent application of petitioner is hereby accepted as prayed for. Both learned Arbitrator are directed to conclude their proceedings within the stipulated time period. Application in hand is hereby disposed of. File be consigned to record room after due completion.”

5. The arbitration proceedings continued with Barrister Afridi as one of the members on the arbitral tribunal. The respondent did not request Barrister Afridi not to proceed with the arbitration proceedings. However, on 27.06.2016, the respondent filed an application before the learned Civil Court praying for the arbitration proceedings to be stayed on the ground that the Court had not appointed Barrister Afridi as a member of the arbitral tribunal, and that the parties had not appointed an umpire. This application remained undecided and the award was rendered on 07.09.2016.

6. On 27.09.2016, the respondent filed objections to the award under Sections 16, 30 and 33 of the 1940 Act. One of the grounds taken in the said application was that no order had been passed by the Court appointing Barrister Afridi as a member of the arbitral tribunal, and that the parties had not appointed an umpire. The said application was contested by

the appellant by filing a written reply praying for the award to be made a Rule of Court.

7. Vide order dated 11.02.2019, the learned Civil Court allowed the respondent's objections to the award and set the same aside. Furthermore, the learned Civil Court sought the parties' assistance regarding remittance of the award. It ought to be borne in mind that the learned Civil Judge who had passed the said order dated 11.02.2019 was different from the one who had passed the order dated 10.06.2015 on the respondent's application for the substitution of a member on the arbitral tribunal.

8. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that it was none other than the respondent who had filed an application for Barrister Afridi's appointment on the arbitral tribunal; that the appellant had not objected to the respondent's said application; that the learned Civil Court was well aware that Mr. Zaidi had refused to sit as an arbitrator when the learned Civil Court passed the order dated 10.06.2015 for the substitution of a member of the arbitral tribunal; that after Barrister Afridi's appointment on the arbitral tribunal, the respondent participated in the arbitration proceedings; that the respondent is estopped by its own conduct from objecting to Barrister Afridi's appointment on the arbitral tribunal; that the learned Civil Court has set-aside the arbitration award dated 07.09.2016 on the sole ground that no order had been passed appointing Barrister Afridi on the arbitral tribunal; and that the impugned order dated 11.02.2019 is contrary to the facts as discerned from the respondent's applications for the substitution of an arbitrator and the orders passed thereon. Learned counsel for the appellant submitted a well-prepared compendium of case law on the subject and prayed for the appeal to be allowed and for the matter to be remanded to the learned Civil Court for a decision on the respondent's objections to the award on merits.

9. On the other hand, learned counsel for the respondent submitted that although the appellant had filed a conceding reply to the respondent's application for the appointment of Mr. Zaidi as a member of the arbitral tribunal, no reply was filed to the respondent's application for the appointment of Barrister Afridi on the arbitral tribunal; that even though the arbitrator's name is not mentioned in the learned Civil Court's order dated 10.06.2015, the said order was for the appointment of Mr. Zaidi and not Barrister Afridi; that when Barrister Afridi sat on the arbitral tribunal, the respondent was prompt in filing an application before the learned Civil Court praying for the arbitration proceedings to be stayed; that since the arbitral tribunal which had rendered the award dated 07.09.2016 had not been duly constituted inasmuch as there was no order of the Court appointing Barrister Afridi on the arbitral tribunal, the said award was correctly set-aside; and that the impugned order dated 11.02.2019 does not suffer from any legal infirmity. Learned counsel for the respondent prayed for the appeal to be dismissed.

10. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 7 above and need not be recapitulated.

11. When the learned Civil Court passed the order dated 10.06.2015 for the substitution of a member of the arbitral tribunal, the respondent's application dated 25.04.2015 for the appointment of Barrister Afridi had already been filed. In the said application, it had clearly been pleaded by the respondent that Mr. Zaidi had refused to proceed as an arbitrator. Therefore, the learned Civil Court's order dated 10.06.2015 could, by no stretch of imagination, be considered as an order for the appointment of Mr. Zaidi as a member of the arbitral tribunal. It was clearly an order for the appointment of Barrister Afridi as a member of the arbitral tribunal. The learned Civil Court, while passing the order dated 10.06.2015,

was cognizant of the fact that Mr. Zaidi had refused to proceed as an arbitrator. This material aspect seems to have escaped the attention of the learned Civil Court while passing the impugned order.

12. Furthermore, the learned Civil Court had also erred by not appreciating that Mr. Zaidi had in fact appeared as a witness for the respondent and had also submitted an affidavit in evidence on 16.05.2016. The learned Civil Court was expected to take this fact into account while interpreting the order dated 10.06.2015. Therefore, the contention of the learned counsel for the respondent that the order dated 10.06.2015 was for the appointment of Mr. Zaidi as a member of the arbitral tribunal suffers from a manifest absurdity.

13. There is nothing on the record to show that the respondent had taken an objection in the arbitration proceedings to Barrister Afridi's presence on the arbitral tribunal. True, the respondent had filed an application on 27.06.2016 before the learned Civil Court for the arbitration proceedings to be stayed on the ground that an order for the appointment of Barrister Afridi had not been passed by the Court but the said application was misconceived inasmuch as the order dated 10.06.2015 was indeed for the appointment of Barrister Afridi on the application of none other but the respondent itself.

14. The respondent would be deemed to have acquiesced to Barrister Afridi's appointment on the arbitral tribunal since it had, on 07.03.2016, filed a reply to the appellant's statement of claim and had participated in the arbitration proceedings without any demur or reservation. In its reply, the respondent had raised no objection to Barrister Afridi being one of the members of the arbitral tribunal. Learned counsel for the respondent did not deny the fact that the respondent had even paid Barrister Afridi's fee. Given these circumstances, the respondent is estopped from objecting to Barrister Afridi's membership of the arbitral tribunal. In holding so, reliance is placed on the following case law:-

- (i) In the case of Karachi Dock Labour Board Vs. Quality Builders Ltd. (PLD 2016 S.C. 121), the Hon'ble Supreme Court held as follows:-

“Though under the arbitration law the parties, as mentioned above, can choose their own forum for the adjudication of their disputes, but that forum has to be constituted strictly in terms of the arbitration agreement and in any case according to the express mandate of law and not in violation thereof. If the constitution is violative of both, the agreement and the law, and the objecting party has also not submitted to the jurisdiction of the arbitrator, the rule of waiver and acquiescence cannot be pressed into service against such party. However in this context there then needs to be express consent to submit to the jurisdiction of an arbitrator having no jurisdiction otherwise, and if there is clear acquiescence and waiver on part of the party aggrieved of the jurisdiction, such as participation in proceedings without any protest or objection, which conduct shall mean that they have accepted by choice the jurisdiction of the arbitrator.”

- (ii) In the case of Saifullah Khan Vs. Karachi Customs Agents Association (2011 YLR 202), the Hon'ble High Court of Sindh held as follows:-

“8. The principle of estoppel and acquiescence would apply with full force to which the parties have consented to arbitrate and participate in the proceedings before the said Arbitrator. In such circumstances the parties are estopped from making an attempt to challenge the jurisdiction of the said Arbitrator: It is a trite proposition that law leans in favour of upholding the Award and not vitiating the same, when a party having submitted to the jurisdiction of the arbitration, as in the present case. It is established beyond any iota of doubt that defendant No.3 has fully participated in the proceedings and has specifically mentioned in the objections that his averments have duly been incorporated by the learned Arbitrator in his Award and having allowed to deal with the matter, in my opinion, is estopped and acquiesced with the matter of objecting to the same on the ground that he was either not heard or not given sufficient opportunity to present his case.”

- (iii) In the case of Saleem Ali Vs. Akthar Ali (PLD 2004 Lahore 424), the Division Bench of the Hon'ble Lahore High Court held as follows:-

“The general principle that where a Court inherently lacks jurisdiction, mere consent of parties cannot confer the jurisdiction, has no application to arbitration proceedings where the arbitrator is a person appointed by agreement between the parties. The principle of

estoppel and acquiescence will be aptly attracted where a party having consented to arbitration by a person and participated in the proceedings before him subsequently attempted to challenge the jurisdiction of the arbitrator. The principle is based on the oft-quoted expression that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. We are, therefore, clearly of the view that since Sh. Murtaza Ali, having full knowledge of the facts, stood by and took his chance of an award in his favour and when it has gone against him, cannot be permitted, in law, to have it set aside on an objection which he never took before the learned Arbitrators. The position would have been different if he had participated in the proceedings under protest which is not the case here."

- (iv) In the case of Development Construction Corporation Limited Vs. West Pakistan Pak PWD (PLD 1971 Karachi 292), a party had raised an objection to the jurisdiction of an arbitrator at a stage when the evidence before the arbitrator had been recorded and only the award was to be announced. The arbitrator, whose jurisdiction had been challenged, had been appointed on the application of the party raising the objection and it had also participated in the arbitration proceedings. It was held by the Hon'ble High Court of Sindh that any irregularity in the appointment of the arbitrator stood cured by the acquiescence of the party raising the objection and its submission to his jurisdiction.
- (v) In the case of Muhammad Sagheer Bhatti and Sons Vs. Federation of Pakistan (PLD 1958 S.C. 221), an objection was taken to the arbitration award on the ground that it had been rendered by an arbitrator who had been substituted without leave of the Court. This objection was spurned on the ground that since the party raising the objection had participated in the arbitration proceedings, he would be deemed to have agreed to the appointment of the arbitrator who had rendered the award.

Law to the said effect has also been laid down in the cases of National Highway Authority Vs. Lilley International (Private) Limited (2016 CLC 1757), Hussain (Pvt.) Ltd. Vs. Karachi Fish Harbour Authority (2011 CLC 108), Reliance Construction Co. Vs. Agha Khan Medical College Foundation (1994 MLD 248), Chief Engineer, Building Department, Provincial PWD, Government of Sind Vs. Pak National Construction Company (PLD 1981 Karachi 553), S. Zahir Hussain Vs. Province of Sindh (1981 CLC 379) and Habib and Sons Vs. Virah & Co. (PLD 1957 Karachi 245).

15. The respondent also attempted to impeach the award by contending that the order of the learned Civil Court to appoint an umpire had not been complied with. This contention is belied by the record. In paragraph 2 of the award, it is mentioned that an umpire had been appointed by the arbitrators and that the appellant had paid his fees but the respondent had failed to do so.

16. 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 of the 1940 Act sets out the implied condition of the arbitration agreements. Paragraph 2 of the First Schedule provides that if the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

17. It is not disputed that in the case at hand the award dated 07.09.2016 was a unanimous award. On account of such unanimity between the members of the arbitral tribunal, the occasion for referring the matter to an umpire did not arise. Even if it is assumed that the arbitrators had not appointed an umpire, I am of the view that failure to do so would not *ipso facto* invalidate the award. Since, in the instant case, the award was a unanimous one, no prejudice would have been caused to either party had the umpire not been appointed. The

requirement to appoint an umpire is intended to meet the contingency of the arbitrators being of a divided opinion and to cure such division by making a reference to the umpire.

18. Section 8(1)(c) of the 1940 Act provides that where the parties or the arbitrators are required to appoint an umpire and do not appoint him, any party may serve the other party or the arbitrators, as the case may be, with a written notice to concur in the appointment or in supplying the vacancy. Again assuming that in the case at hand the arbitrators did not appoint an umpire, the respondent is estopped from challenging the arbitration award on this ground since it did not at any material stage serve a written notice on the arbitrators for the appointment of an umpire.

19. The learned Civil Court has set-aside the arbitration award on the sole ground that Barrister Afridi had not been appointed as an arbitrator. The learned Civil Court has not scrutinized the award or determined if the award suffers from invalidity on any other ground.

20. In view of the above, the instant appeal is allowed; the impugned order dated 11.02.2019 passed by the learned Civil Court is set-aside; the matter is remanded to the learned Civil Court for a decision on the appellant's application to make the award a Rule of Court as well as the respondent's objections to the award. It is expected that the learned Civil Court would decide the matter within a period of two months from the date of the receipt of this judgment. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 25/06/2021

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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