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ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No. 98 of 2010.

Oil & Gas Development Company Limited

Versus

M/s Marathon Construction Company & one another.

Date of Hearing: 26th March, 2013:

Appellant By: - Mr. Khalil-ur-Rehman Abbasi, learned ASC.

Respondents By: - Mr. Muhammad Shahid Paracha, learned ASC. Advocate for respondent No.1.
Syed Tanvir Haider, Advocate for respondent No.2.

JUDGMENT

MUHAMMAD ANWAR KHAN KASI, CJ: This judgment shall dispose of captioned Regular First Appeal filed by appellant [Oil & Gas Development Company Limited] under Section 39 Read with Section 17 of the Arbitration Act, 1940, challenging the Judgment & Decree dated 22.3.2010 and orders dated 3.3.2010 & 22.3.2010, passed by learned Civil Judge, Islamabad, whereby the objections of the appellant under Sections 16, 30 & 33 of the Arbitration Act, 1940, against the Award dated 29.8.2007 were turned down and the Award rendered by the Sole Arbitrator was made Rule of the Court and decree thereon was passed.

2. The facts of the case, relevant for disposal of this appeal. are that the appellant (OGDCL), in order to develop Chanda Gas Field located in District Kohat, NWFP [now KPK] invited bids for "Dismantling, Procurement (Supply), Refurbishment, Construction, Pre-commissioning, Start up and Commissioning of Chanda Gas Processing Facilities". In response thereto, the respondent No.1 alongwith other contractors submitted tender on 15th November 2003, for contract price of Rs.149,234,073. The appellant accepted the tender of respondent No.1 vide Letter of Intent dated 31st March, 2004 and thereafter, Contract Document was executed between the parties according to which the respondent No.1 was required to complete "Dismantling, Procurement (Supply), Refurbishment, Construction, Pre-Commissioning, Start-up and Commissioning for Chanda Gas Processing Facilities Phase–I" within a period of four months from effective date of contract and the Phase–II was required to be completed within six months from the date of notification, to be issued by appellant to start work. According to stipulations of contract, the respondent No.1 was required to execute works under directions and subject to approval in all respects, of Engineering Consultant.

3. During the execution of the works, disputes arose between the parties and respondent No.1 vide letter dated 22nd December 2004 rescinded the contract and filed application under Section 20 of Arbitration Act, 1940, for referring the disputes to arbitration in accordance with the arbitration clause and during this period, the

respondent on 10th February 2005, submitted Final Bill to the appellant and requested for its payment.

4. On 16th August 2006, the appellant and respondent No.1 held meeting wherein it was mutually decided to refer the disputes as mentioned in Final Bill to the Sole Arbitrator, to be nominated by Chairman/CEO OGDCL, who subsequently vide letter dated 31st August 2006, requested Mr. Karmat Ullah Chaudhry to act as Arbitrator.

5. Pursuant to arbitration agreement dated 16th August 2006, respondent No.1 filed claim before the Sole Arbitrator asserting that the contract was frustrated due to change of circumstances and it was rescinded due to various reasons, attributed to the appellant. Compensation for various factors and costs of the arbitration were sought. The claim of the respondent No.1 was resisted by the appellant. On the pleadings of the parties, the learned Sole Arbitrator on 20th April 2007, framed as many as 76 issues, and thereafter, exhibited documents [Exh.No.1 to Exh.468] tendered by both the sides and after procuring written arguments, announced Award on 29th August 2007, which was filed in the Court of learned Senior Civil Judge, Islamabad, on 4th September 2007, for making the same as Rule of the Court in terms of Section 14 read with Section 17 of the Arbitration Act, 1940.

6. The appellant filed three applications, one under Section 30 of the Arbitration Act, 1940, the other under Section 33 of the Arbitration Act, 1940 and the third one under Section 16 of the Arbitration Act, 1940. During the pendency of these applications, the appellant also filed another application for framing of issues and yet another application under Order VI Rule 17 CPC for amendment of the application under Section 30 of the Arbitration Act, 1940.

7. The learned Civil Judge, dismissed the application under Order VI Rule 17 CPC, vide order dated 20th January 2010, and vide order dated 3rd March 2010, dismissed application under Section 33 of the Arbitration Act, 1940, against which, the appellant filed F.A.O. No. 83 of 2010 in Hon'ble Lahore High Court, Lahore, which was subsequently got withdrawn on 8th June 2010.

8. The learned Civil Judge, vide order dated 22nd March 2010, dismissed the other applications of appellant including objection petition filed under Section 30 of the Arbitration Act, 1940 and the Award filed by the Sole Arbitrator dated 29.8.2007 was made rule of the Court.

9. Initially, the appellant filed the instant appeal against the orders dated 3rd March 2010 and 22nd March 2010, in the Hon'ble Lahore High Court, Rawalpindi Bench, Rawalpindi, which was subsequently transferred to this Court due to having jurisdiction. Earlier, the respondent No.1 filed Civil Revision No. 631 of 2010, against order dated 22nd March 2010, whereby respondent No.1 was ordered to pay Stamp Duty on the Award. This revision petition of respondent No.1 was accepted and judgment and decree dated 22nd March, 2010 was modified by the learned Division Bench of Lahore High Court, Rawalpindi Bench, Rawalpindi

vide order dated 21st July 2010 and in pursuance to Division Bench Judgment, decree was passed by the Hon'ble Lahore High Court, Rawalpindi Bench, Rawalpindi.

10. The appellant by way of this appeal, seeks setting-aside of Judgment & Decree dated 22nd March 2010, inter-alia, on the following grounds:

(a) That the Learned Arbitrator while rendering the decision on Issues No. 1,2,3 & 4 concluded and held that the contract between the parties stood frustrated under section 56 of the Contract Act, 1870, as such the claimant company was not bound to execute work. This was a patent error of law leading to judicial misconduct.

(b) That the finding of the Learned Arbitrator relating to frustration of contract is patently erroneous and apparent on the face of record when he stated that due to changed circumstances, the work was converted from cold job to hot job and referred to circumstances that in-close proximity the pipe lines of live gas in existence. Mere fact that according to learned Arbitrator, the work was converted into hot job would not render the contract frustrated. This error apparent on the record was not considered by the Learned Civil Judge and the objection of the appellant were erroneously rejected.

(c) That the Learned Arbitrator committed a legal misconduct in holding the contract frustrated on the ground that operational dehydration plant, separator were to work in close proximity of live gas pine lines in that the Learned Arbitrator was not pleased to look into the main contract particularly the scope of work given in Appendix-B of the contract, wherein it was clearly stated that LPG Plant will be dismantled, transported, installed and hooked- up with dehydration plant, and other facilities already installed by OGDCL at the Chanda Gas Field. The learned Civil Judge was also not pleased consider the submission of the appellant.

(d) That the Learned Arbitrator was biased against the appellant and with the intention to give undue benefit to respondent wrongly held the contract frustrated and issued an Award of Rs.49,636,064/- in favour of the respondent No.1 and without considering loss of the appellant amounting to Rs. 772.0974 Millions, which the appellant had to spent in getting the contract completed through different contractors. All this money had to be spent out of public exchequer. The learned Civil Judge, was not pleased to consider this aspect of the case, while deciding the objection petition of the appellant.

(e) That the learned Arbitrator, while concluding the frustration of the contract completely mis-read and ignored the evidence on record and failed to appreciate that the contract was of dismantling of LPG Plant from Fimkasr Gas Field and reinstalling the same at Chanda Gas filed which was already operative and by reinstalling the LPG Plant its facilities and working had to be enhanced. The respondent before submission of its tender had inspected the site and was well aware of the scope of work as is apparent from the main contract. As such, all grounds stated by the

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learned Arbitrator were patently against the contract. This lead to judicial misconduct, vitiating the Award. The learned Civil Judge, did not consider all the submissions of the appellant and erroneously rejected the objection petition.

(f) That the learned Arbitrator even did not consider the statement of the main witnesses of the respondent No.1, who stated that dehydration unit, flare stack and crude oil storage tank were already erected by the OGDCL and these were to be mechanically integrated with Fimkasar Plant items instead the learned Arbitrator without any evidence on record held that there were change circumstances, which lead to frustration of contract. The observations of the learned Arbitrator were completely out of record and it vitiated the Award, but the learned Civil Judge, was not pleased to consider this aspect of the case. The case of the respondent-company was that there was an abnormal increase in the prices, but the OGDCL committed breach of the contract when they refused to revise the contract as is explicit from Para 28 of affidavit of main witnesses of the respondent No.1. It was not the case of the respondent that the contract was frustrated nor they stated so in their claims or evidence, but the learned Arbitrator was bent upon to issue Award in their favour for a huge amount, thus committed judicial mis-conduct in holding that the contract was frustrated because of the circumstances, mentioned in the Award. This was not the case of the respondent No.1. The learned Civil Judge, did not consider this aspect of the case, while rejecting the objection petition.

g. That the impugned judgment of the trail Court dated 22-03-2010, offended the principle of natural justice as the learned Civil Judge did not frame issue, nor afforded opportunity of evidence to the appellant for substantiating the objections. It was mentioned in record that the respondent No.1 did not execute the work Awarded to them and rescinded it and therefore no payment could be claimed. The Award was self-assumptive, based on imaginations and was whimsical. It was maintained that the evidence and law were completely overlooked by the Arbitrator, who rendered the Award without any basis and Awarded huge amount to the respondent No.1 without any supporting evidence.

h. That the order sheet clearly reveals that the learned Civil Judge never framed issue on the objections nor allowed opportunity of producing evidence in support of objection petition. The appellant filed an application for framing of issues and evidence has to be produced to prove the misconduct of the Arbitrator. It is settled principle of law that question of misconduct, could not be resolved without evidence. It is submitted that issues No. 1, 2, 3 & 4 decided in the Award dated 29-8-2007 were without any evidence, arbitrary, whimsical, biased and based on mere speculations. It was the respondent No.1, who has rescinded the contract, failed to complete the work on the target and recession of the contract by the respondent No.1 was without any legal and factual justification. These objections could be decided after requisitioning the record of the Arbitrator and allowing the appellant/OGDCL with opportunity of producing evidence.

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The misconduct of Arbitrator being a mixed question of law and facts can be decided completely and effectively, if the parties are permitted to produce their respective evidence. By failing to frame issues and denying opportunity of producing evidence to appellant, the learned Civil Judge fell in error and committed material irregularity.

i. That the Arbitrator has Awarded amounts against certain heads of claim, without stating any reasons in respect of his conclusion that whether after the withdrawal of claims by respondent No.1, it rescind the contract on 22-12-2004 and as such the respondent No.1 under the Arbitration Clause 78 of the conditions of contract is liable to continue the contract till the decision by the appellant under the said Arbitration Clause 78 of the Conditions of Contract, as such the Award dated 29-08-2007 is a non speaking Award and is violative of Section 26-A of the Arbitration Act, 1940. According to this Section, the Arbitrator must give reasons in sufficient with details, which he failed and as such Award dated 29-08-2007 is liable to be set aside as being invalid and not maintainable.

j. That the contract was lump sum contract, whereby the respondent No. 1 undertake to execute the contract with specification divided into different parts with a price affixed to each. The contract remained incomplete and neither in the law nor in equity could the respondent No. 1 submit a final bill after the recession of the contract by the respondent No.1. As such the respondent No.1 is held liable for damages to the appellant/OGDCL and the respondent No.1 would be entitled to recover nothing since the contract was rescinded by the respondent No. 1 and it was left incomplete by the respondent No. 1.

k. That the respondent No.1 failed to complete the contract within the prescribed period of the contract when time was essence of the contract and would not operate as waiver of essential conditions as to time.

l. That the respondent No.1 failed to produce any Director for evidence in support of their claim to prove the same and in these circumstances the claim of the respondent No. 1 is not proved. The witness appeared before the Arbitrator did not appear before the Oath Commissioner or before any body for statement on oath made the affidavit inadmissible in evidence as affidavit was not attested in a proper way. The person, who has sworn affidavit in proof has neither stated in the affidavit that the statement of account or for that matter, any document was prepared by him. The deponent did not affirm on Oath that the entries made in the statement or true and correct. As such, the affidavit filed by the respondent No.1 before the Arbitrator could not be relied upon.

m. That the respondent No.1 aware of schedule of rates prevalent on date of contract and any change in schedule of rate brought about subsequently would not be applicable in respect of contract already executed.

n. That the respondent No.1 filed an application U/S 20 of the Arbitration Act, 1940. After registering the application as suit, a notice was issued to the appellant/OGDCL, who on the other hand, filed the reply of the said suit and the said suit was pending in the Court, whereas Section 20 (1)gives

an option to a party either to proceed under Chapter-II or apply to Court that the agreement be filed in Court. Both these proceedings cannot be taken simultaneously. The rules states of the Arbitration Act 1940, that application under chapter IV of the Act shall be instituted as a suit or matter in which order or reference is made. The application under Section 20 of the Arbitration Act, 1940 of the respondent No. 1 falls within the ambit of reference where upon no order was passed under Chapter IV of the Arbitration Act, 1940, therefore, the Award dated 29-08-2007 was barred under Chapter IV read with Rules of the Arbitration Act, 1940. This aspect of the case was not considered by the learned Civil Judge, while passing the order dated 22-3-2010.

o. That it is an admitted fact that the agreement contained an arbitration clause, the Work could not be completed within the stipulated time, the period of contract was extended, while the work was in progress, the respondent No. 1 was required to complete the contract upon fixed price as mentioned in the contract, but he failed to complete the contract and rescinded the contract. The respondent No I issued the notices under the Arbitration Clause to the appellant/OGDCL and the respondent No.1 did not allow the appellant/OGDCL to decide the dispute within the prescribed period as mentioned in the Arbitration Clause 78 of the Conditions of Contract. The Arbitrator mis-conducted himself in allowing claim without deciding the objection of the appellant/OGDCL in view of specific clause in the contract the respondent No. 1 was not legally entitled for any claim.

p. That the rates claimed by the respondent No.1 due to subsequent price escalation were irrelevant as respondent No. 1 was not entitled to claim any escalation in the price, but the learned Arbitrator has judicially mis-conducted by allowing the escalation price to the respondent No: 1.

q. That the impugned orders of the trial Court are against the law and facts and are liable to be set aside. That the impugned orders of the trial Court are based upon surmises and conjectures and are not decided by the trail Court justly, fairly and the same are decided arbitrarily.

r. That if the impugned order is not set aside, the appellant shall suffer an irreparable loss.

s. That the grounds taken in the application U/S 30, 33 of the Arbitration Act 1940, may also be read as ground of appeals to this appeal.

t. That the learned Trial Court failed to perform its duties in terms of Section 17 of the Arbitration Act, 1940 as it did not take notice of the fact that there was no proper Award before the Court and that the Award was not stamped which is in admissible in law and also till such time the deficiency made up the Court could not proceed to pass decree in terms thereof. The Trial Court did not consider this aspect that the Arbitrator Awarded more than 200% amount of damages over the amounts of claims, which were also in the nature of damages. Such aspect of the Award could be taken into consideration by the Court under S. 17 of the Arbitration Act, 1940 before making the Award as Rule of the Court. Therefore, the order dated

22-3-2010, 3-3-2010 and the Award dated 29-8-2007 are liable to be set aside.

u. That the arbitration clause was not changed by any written agreement, whereas the Award in terms of Section 78 of Conditions of Contract has to be given by two Arbitrators and if two Arbitrators are not agreed then an empire has to be appointed by the Arbitrators under the said arbitration clause. The Award dated 29-08-2007 was not given in terms of the arbitration clause. The respondent No. 1 failed to perform the contract dated 29-6-2004, the arbitration agreement for rendering an Award by Sole Arbitrator does not exist in the Award dated 29-08- 2007, the same was not exhibited in the Award nor any amendment in the contract dated 29-06-2004 took place through written agreement, as such Award dated 29-08-2007 is invalid due to non-existence of Sole Arbitrator and the same cannot be substituted after the breach of the contract by the respondent No.1.

v. That respondent No. 2 filed an application under Order 1 Rule 10 CPC in the proceedings U/S 20 of the Arbitration Act, 1940. This application of the respondent No. 2 was dismissed on 11th Feb. 2009. The respondent No. 2 moved an application for its restoration and as such no separate order for restoration of the application of the respondent No. 2 exist in the order sheet of the Trial Court, whereas the learned Trial Court passed the decree in his favour on 22-3-2010 without looking into the record that the application of the respondent No.2 was dismissed then how an order in favour of the respondent No.2 could be passed when they were not made party to the suit. Hence, the learned Trial Court, while passing the Judgment & Decree dated 22-3-2010 has exceeded its jurisdiction and further the respondent No. 2 was not party in the Award, as such the respondent No. 2 could not be made party in the Judgment & Decree dated 22-3-2010.

11. In rebuttal, the arguments advanced by learned counsel for respondent No.1 are condensed to the following points:-

a) a Court hearing the objection to the Award cannot undertake reappraisal of evidence recorded by the Arbitrator in order to discover the error or infirmity in the Award. The error or infirmity in the Award, which rendered the Award invalid must appear on the face of the Award and should be discoverable by reading the Award itself. Where reasons recorded by the Arbitrator are challenged as perverse, the perversity in the reasoning has to be established with reference to the material considered by the Arbitrator in the Award;

b) that the word "misconduct" with reference to arbitration proceedings, is interpreted in the sense in which it is used in English Law and it did not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator;

c) the effect of frustration of contract was immediate and automatic as it guillotines the contract without the action of either party;

d) where the Arbitrator is appointed by the Department or Statutory Body then the Award given by the Arbitrator, must be accepted;

e) that the Arbitrator is not bound to record evidence. On the factual side, the Sole Arbitrator recorded the evidence of the parties through audio cassette and later on got prepared transcriptions of the same and sent the for verification to both the parties. The said transcripts were checked by both the parties and their witnesses and after necessary corrections, counsel for the parties signed in token of its correctness;

f) an Award in which each and every issue has been discussed separately and in sufficient detail, the requirements of Section 26-A of the Arbitration Act, 1940, are fulfilled. Admittedly, Award published by the Sole Arbitrator fulfills the requirements of Section 26-A of the Arbitration Act, 1940;

g) an Award cannot be set-aside on the ground that the Arbitrator has not discussed the evidence produced by any party;

h) The instant appeal is not maintainable, in terms of Section 17 of the Arbitration Act, which envisages that no appeal shall lie against the decree of the Court when the decree is in accordance with the Award;

i) the appeal is also hit by the principle of constructive res-judicata as enshrined in Section 11 of the Code of Civil Procedure, 1908;

j) The Hon'ble Division Bench of Lahore High Court, Rawalpindi Bench, vide its judgment & decree dated 21st July,, 2010, has modified the judgment & decree dated 22nd March, 2010, in Civil Revision No. 631 of 2010, which resulted merger of judgment & decree dated 22nd March 2010 with judgment & decree of Hon'ble Lahore High Court, Rawalpindi Bench, dated 21st July,, 2010. As such, the principle of constructive res- judicata as enshrined in Section 11 of the Code of Civil Procedure, 1908 is applicable;

k) in case of delay in execution of the works, which is attributable to the employer, the Contractor is entitled to losses, which it had incurred due to delay;

l) the loss of profits, which the contractor could reasonably have been expected to earn, be treated as fair measure of the compensation for the breach; and

m) It is established principle of law that the omission of oath is merely an irregularity and on this irregularity, the proceedings and evidence cannot be invalidated.

12. Learned counsel for the respondent No.1 in support of above submissions, referred various case law reported as 1985 SCMR 597, 1996 PLD Supreme Court 108, 2002 SCMR 1662, 2003 PLD Supreme Court 301, 2004 SCMR 590, 2006 PLD Supreme Court 169, 2003 PLD Supreme Court 301, 2004 SCMR 590, 1980 PLD Supreme Court 122, 1984 SCMR 77, 1983 SCMR 718, 2006 PLD Lah 314, 1998 PLD Lah 132, 2004 YLR 274, 2006 SCMR 614, 1981 CLC 311, 1992 PLD

SC 479, 1973 SCMR 555, 1973 PLD SC 311, 1991 PLD Federal Shariat Court 1, 1992 SCMR 408, 1997 PLD Supreme Court 559 and 2001 YLR 2604.

13. Heard & record perused.

14. In order to see as to whether the Award passed by the learned Sole Arbitrator and the decision thereupon by the learned Civil Judge, while making the Award as Rule of the Court deserve any interference in this appeal, we have also gone through the exhaustive findings rendered by the Sole Arbitrator and the decision thereupon by the learned Civil Judge, whereby Award was made as Rule of the Court.

15. The grounds agitated in the appeal pertain to frustration, framing of issues, recording of evidence, recession of contract, condition precedent, non-examination of witnesses, escalation in prices, pendency of application under Section 20 and change of Arbitration Clause. It is the contention of the learned counsel that while rendering decision, the learned Sole Arbitrator mis-conducted in holding that the contract was frustrated because of the circumstances, mentioned in the Award and the learned Civil Judge also did not consider this aspect of the case while rejecting the objection petition. These objections were exhaustively answered by the learned Sole Arbitrator. For convenience findings to this effect are reproduced hereunder:-

> "19. After going through the pleadings of the parties and evidence of witnesses, I found that OGDCL after issuance of Letter of Intent [Exhibit-2], prioritized works which were included in Phase-I. This was done by OGDCL for the purposes of sale of dehydrated gas to SNGPL, which became necessary earlier than the scheduled completion of the Works. I also conclude that prioritization works (Phase 0), which were envisaged by OGDCL, was not indicated in Tender Documents of claimant-company [Exhibit-91/I and Exhibit No: 91/II]. It is also admitted fact that OGDCL on 19th May 2004, gave unrealistic target of completion Phase-0 within 11 days when important drawings and designs such as P&IDs and Civil Works were still awaited, as indicated vide Items No: 4 and 5 of Exhibit-59. It is also on record that OGDCL installed and commissioned separators, dehydration plant and laid live gas pipelines on grounds for the purposes of supply of gas to SNGPL. It is an admitted fact that OGDCL changed the site circumstances from the initial plant, by way of installation and commissioning of separators, dehydration plant, laying of live gas pipelines above ground level for production. As a result of changed circumstances, the works was converted from normal to hazardous job. Due to this very reason, M/s Adam Jee Insurance Company vide their letter dated 14th December 2004 [Exhibit-436A] withdrew their insurance policies.
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> 20. I examined the contract and the circumstances under which it was made. Admittedly, in the contract which was reached between OGDCL and claimant-company, there was no stipulation of operational dehydration

plant, separators and working in close proximity of above ground gas pipelines. I have also gone through the other contracts which was entered into between OGDCL and M/s Siemens Pakistan Engineering Co. Ltd., [Exhibit No:463] in which it was specifically written that the contractor were required to execute the balance works in close proximity of operational dehydration plant, separators etc. Due to these changed circumstances, the works were converted from cold job to hot job. This fact was also admitted by Mr. Zahid Bukhtiar during the course of his cross examination. From the reasons as mentioned above, **I hold that due to changed circumstances introduced by OGDCL by way of operation of dehydration plant, separator etc., which are so fundamental in nature so as to be regarded as striking the very basis of contract as a whole and destroyed altogether character of contract. Since parties have never contemplated possibility of such intervening circumstances, as such in my opinion, due to these happened circumstances, contract had frustrated** [emphasis provided]. It is settled law that if and when there is frustration, the dissolution of contract occurs automatically. It does not depend, as does rescission of contract, on the ground of repudiation or breach, or on the choice or election of either party.

21. **Accordingly, I hold that contract which reached between OGDCL and claimant-company stood frustrated under Section 56 of Contract Act, 1870 and as such claimant-company was not contractually bound to execute works** [emphasis provided]."

16. The learned Civil Judge vide judgment dated 22nd March, 2010, also discussed these objections and observed as under:-

"(xvii) OGDCL has further raised objection that the learned Arbitrator did not apply principle of frustration in accordance with law and wrongly applied this principle in favour of MCCL in order to accommodate it and due to wrong application of principle of frustration, the Arbitrator announced the Award against OGDCL. The doctrine of frustration is explained in 1978 PLD Karachi 585, 1980 CLC 339, 1994 SCMR 77, 1999 MLD 2750 and 2001 YLR 2240. The learned Arbitrator discussed this aspect in issues No.1, 2, 3 & 4. Paragraphs No.19, 20 and 21 of the Award. The learned Arbitrator has given cogent reasons regarding application of doctrine of frustration."

17. As far as the contention of the learned counsel that the learned Civil Judge was required to frame issues and after recording evidence, had to decide the objections but he fell in error and committed material irregularity which renders the Award in effective due to non-fulfillment of legal requirement, is concerned, the same is devoid of force for the reason that the learned Arbitrator had framed all the necessary issues on every aspect of the case, therefore, such exercise again by the learned Civil Judge is not mandatory. Under the Arbitration Act, the Court may exercise discretion vested under Section 33 of the Act, for setting down the petition

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for hearing on other evidence also and that too, when the Court considers it just and expedient. In the case in hand, the learned Sole Arbitrator framed seventy six issues and 468 documents were exhibited and besides this learned Sole Arbitrator recorded the evidence of the parties through audio cassettes and subsequently the said evidence was transcribed and was sent for verification to both the parties. The said transcripts were checked by both the parties and their witnesses and after necessary corrections counsel for the parties signed it as a token of acceptance, therefore, the ground urged by the learned counsel for the appellant is not considerable as it was already discussed by the learned Trial Court. This objection is, therefore, also devoid of any force.

18. The next objection was that the learned Arbitrator had awarded amounts against certain heads of claim without stating any reason in respect of his conclusion as to whether after the claim of the respondent No.1 it rescind the contract on 22.12.2004 and as such the respondent No.1 under Clause 17 of the contract was liable to continue the contract till the decision by the appellant and as such the Award dated 29.8.2007 is a non speaking Award.

19. The learned Sole Arbitrator rendered exhaustive findings on the points of recession of contract contained in paras 22-37 of the Award. The same are reproduced hereunder for ready reference:-

> "22. Claimant-company claimed that in addition to frustration of contract, they due to breaches committed by OGDCL/ENAR, rescinded the contract vide their letter bearing No: MCCL/OGDCL/1169/04 dated 22nd December 2004 [Exhibit-446].
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> 23. Claimant-company claimed that OGDCL/ENAR had framed unrealistic BOQs, due to which project could not have been completed within stipulated time of 4 months. On the other hand, OGDCL claimed that works were delayed due to claimant-company's poor performance and lack of professionalism.
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> 24. On the application of claimant-company OGDCL/ENAR submitted documentary evidences pertaining to execution and completion of left over works. From these documents, it came to light that OGDCL had sub divided left over works, in different parts. OGDCL procured materials required for Plants through different vendors. From these documents it is also evident that OGDCL got refurbished plants through different contractors [Exhibit No: 464]. It also came to light that after completion of procurement of materials and refurbishment, they Awarded Mechanical Works, Electrical Works, and Instrumentation Works, through three independent contracts to M/s Siemens Pakistan Engineering Co, Ltd [Exhibit No: 462 & Exhibit No: 463]. It is a matter of record that even after supply and refurbishment of plant, M/s Siemens could not complete the works within stipulated time of 5 months. During the arbitration proceedings, it has came to light that when the committee inspected Chanda Site on 16th May 2007, then M/s Siemens were still working at Plant.

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25. From these admitted facts, I had no hesitation in holding that OGDCL/ENAR had formed unrealistic BOQs and unrealistically fixed targets for completion of project and as such claimant-company could not have been blamed for slow progress of the works as the works were of such character and nature which could not be completed in due course of time.[emphasis provided]

26. Claimant-company claimed that OGDCL, issued construction drawings in piecemeal for different structures, which had an adverse impact on planning and related activities. The last installment of 36 revised drawings were issued on 28th September 2004 while piping drawings were issued on 1st October 2004. Claimant-company claimed that due to drastic changes in designs, drawings, and specifications, they were required to execute tendered items far in excess of the tendered quantities on which its tender was based. Claimant-company provided details of revisions.

27. Claimant-company claimed that due to changes in designs of different structures, quantities required for completion of different structures (civil works) showed abnormal increase ranging from 25% to 350%., provided data for civil works, which showed 25% or more increase/decrease, from original quantities.

28. Claimant-company claimed that quantities required for completion of different mechanical works showed abnormal increase/decrease ranging from 25% to 1500%. Claimant-company submitted details of different items which showed 25% increase/decrease of Original Quantities of Mechanical Works.

29. It was further claimed that since scope of work was increased as such rates were to be revised. Claimant-company requested OGDCL/ENAR to revise the rates of different items of works, which showed abnormal increase, but OGDCL committed breach of contract, when they refused to revise rates for items which have showed more than 25% increase/decrease of Original Quantities of works.

30. On the other hand, OGDCL replied that claimant-company has wrongly pleaded that there is an abnormal increase in quantities since 42.7% of the mechanical items have decreased and only 16.5% have increased. It was further replied that claimant-company has included variation of individual items. It was further responded that equipment and material as specified in Bill of Quantity were estimated and subject to variation and the claimant-company was to be paid at contract price/rates, as such claimant-company is not legally justified to claim revision of rates. OGDCL/ENAR claimed that in terms of clause 34.0 of conditions of contract they have the power to do so.

31. For deciding this, I had to decide which of the interpretation adopted by the parties pertaining to clause 34.0 of Conditions of Contract would be applicable. Clause 34 of Conditions of Contract has two portions; one relates to "contract value" which is the value of each item and in that paragraph individual items have been specifically mentioned. It is provided in first paragraph that OGDCL has the right to order 25% more or less

BOQ quantities. Second paragraph pertains to "Estimated Contract Price", which is sum total of contract values.

32. It is settled principle of law that where a word, phrase or expression used in an instrument is capable of two interpretations, then dispute is to be resolved against the party that had drawn the instrument or the party that had dominating and imposing position (commonly known as principle of contra preferendum). Since the documents have been framed by OGDCL/ENAR as such this ambiguity had to be resolved against OGDCL/ENAR. After going through these two paragraphs, **I conclude that by virtue of first paragraph of clause 34 of Conditions of Contract, OGDCL has right to order 25% of each item of contract quantity @ contract value but for quantities which exceeded more than 25% then claimant-company is not bound to execute at contract rates.** [emphasis provided]

33. **I conclude that interpretation adopted by OGDCL for rejecting the request of claimant-company is without any logical basis and as such claimant-company cannot be forced to execute or procure quantities which have increased or decreased from the quantities as indicated in tender.** [emphasis provided]

33. Another important aspect is that OGDCL claimed that claimant-company was bound to procure items required for completion of mechanical works (Piping Works) but failed to procure these. During the course of cross examination of Mr. Zahid Bukhtiar it has been brought out that OGDCL, in terms of Clause 13(d) of Conditions of Contract, had to facilitate claimant-company for procurement of those items which required import authorizations. As items which were mentioned by OGDCL had to be procured by availing concessionary duties, which required inputs and efforts by OGDCL. It is admitted by Mr. Zahid Bukhitar that they have never applied for issuance of NOC from relevant government authorities as such claimant-company cannot be blamed for non procurement of these items.

34. **I accordingly, hold that OGDCL committed breach of contract in ordering and coercing claimant-company to execute or procure items which have exceeded quantities as mentioned in BOQ. [emphasis provided]**

35. Claimant-company claimed that they were aware of contractual position contained in Clause 4.0 of contract and clause 26 of Conditions of Contract [Appendix: A to the Contract] to the effect that quoted rates would not be subject to escalation during contract period. The said clauses in contract, pertains to usual and normal incidence of escalation which is reasonably foreseeable / predictable but these provisions would have no application where it can be shown that escalation had been extra ordinary and unprecedented for the period of say three to five years prior to the date of submission of bid. It was further claimed that Pakistan Steel Mills, which is controlled and managed by the Government of Pakistan raised prices of steel and steel related products which were unprecedented. Rate of "Steel Billet Grade 60" was Rs.18,150 per Metric Ton which increased

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to Rs.29,750 per Metric Ton, due to which contract rates of majority items of Works, were hugely effected. In order to resolve the problems faced by contractors, President of Pakistan issued directions to ECC to evolve a methodology for relieving contractors from this unprecedented hardship. Keeping in view this material development, before signing of contract on 2nd June 2004, claimant-company raised concerns regarding accrual of losses and compensation thereto on account of unprecedented and steep rise in prices of steel and steel related products. Claimant-company vide its letter dated 29th May 2004 [Appendix: J] which was addressed to OGDCL, showed its concern regarding escalation in prices of steel and steel related products. It was further claimed by claimant-company vide notification dated 11th June 2004 [Exhibit-108A], the Government of Pakistan has incorporated "escalation clause" in all fixed rate contracts and as such claimant-company is entitled for payment on account of escalation in prices of steel and steel related products. As a matter of fact, OGDCL committed breach of contract, when they have refused to allow compensation on account of escalation in prices of steel and steel related products in terms of notification dated 11th June 2004 [Exhibit-108A].

36. OGDCL responded that as per clause 4.0 of conditions of contract, item-wise price/unit rate was not subjected to escalation throughout duration of contract. It was further responded that steel prices increased from 10th October 2003 to 4th March 2004, which was before issuance of letter of intent as well as signing of contract and as such claimant-company should have raised this issue at that time or refused to accept LOI and signing of contract but none of these actions were taken by claimant-company, as such claims of claimant-company, for increase in prices of steel and steel related produced for civil and mechanical works are not entertain-able.

37. I have found that OGDCL/ENAR has committed illegality by not implementing the decisions of the Government of Pakistan and by adopting such methodologies they have caused financial hardships for claimant-company. **I conclude that by means of this methodology, the whole foundations of the contract were destroyed and I had to declare that claimant-company had rightly rescinded the contract."** [emphasis provided]

20. The findings of the learned Civil Judge on the recession of contract are well justified and do not call for any interference.

21. It is an admitted position that the parties agreed for the appointment of Sole Arbitrator for the resolution of their disputes, therefore, there arises no question that Condition Precedent mentioned in the arbitration clause was never taken into consideration. The findings of the learned Civil Judge, on this point as well as on the points of recording of statement of Wali Muhammad witness on oath and escalation in steel prices are also well justified and in accordance with law. After framing the proper issues, the learned Arbitrator advanced his findings which cannot be interfered with while exercising appellate jurisdiction. It is admitted

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position that with the consent of both the parties, the matter was referred to the learned Sole Arbitrator by the Chairman of the appellant vide letter dated 31.8.06. The appellant fully participated in the proceedings, produced evidence on each and every issue and thereafter the learned Sole Arbitrator [Mr. Karamat Ullah Ch.] announced the Award, which was made rule of the court by the learned Civil Judge. In case, reported 1983 SCMR 718 and 2006 PLD Lahore 314, it is held that where the Arbitrator is appointed by the statutory body, then the Award given by the Arbitrator is accepted. In this case, the Sole Arbitrator was appointed by the CEO of the appellant.

22. The facts brought on record would reveal that the findings of the learned Sole Arbitrator on each and every issue were in accordance with the evidence and learned Arbitrator had given due deliberations to the objections raised by the appellant and also conferred objective findings thereupon. The grounds of misreading and non-reading of evidence by the sole arbitrator are devoid of force.

23. The law on the subject is very specific. In case 2002 SCMR 1662, it has been held that while entertaining an appeal against the order making Award, delivered under Arbitration Act, 1940, the Rule of the Court, appellate court could not sit as a Court of Appeal against the judgment and decree passed in the suit, therefore, re-appraisal of evidence forming another opinion contrary to the material placed on record before the Arbitrator is not permissible. It is clear that none of the grounds urged in appeal had any factual or legal basis which could justify interference in the judgment making the Award Rule of the Court. When parties had opted for resolution of their dispute through Arbitration and Arbitrator had delivered his Award, then the Courts has to proceed with the presumption of correctness attached to said Award. Award could not be disturbed merely on technical reasons, not affecting merits or the Award or at the whims of some party aggrieved by the terms of such Award.

24. In view of above, we don't find any force in this appeal, which is hereby dismissed with no order as to costs.

(CHIEF JUSTICE)

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

M.Suhail*
27.5.2013

Announced in open Court on 27th day of May, 2013.

(CHIEF JUSTICE)

(JUDGE)

Approved for reporting.