JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Arbitration Petition No.24 of 2016

Pak. U.K. Association (Pvt.) Ltd.
Versus
The Hashemite Kingdom of Jordan

Date of Hearing:	16.06.2016
Applicant by:	Sardar Arshad Mehmood Khan, Advocate
Respondent by:	M/s Tahir Mehmood Abbasi & Raza Ullah Khan Niazi, Advocates.

MIANGUL HASSAN AURANGZEB, J:- On 16.03.2016, M/s Pakistan U.K. Associate Private Limited ("applicant") filed an application under Section 20 of the Arbitration Act, 1940 ("the 1940 Act") praying for the arbitration agreement between the applicant and the Hashemite Kingdom of Jordan ("respondent"), to be filed in the court and the matters in dispute between the said parties referred to arbitration.

2. On 24.03.2016, this Court issued a notice in terms of Section 20(4) of the 1940 Act, to the respondent to show cause as to why the arbitration agreement between the said parties should not be filed in the court, and the dispute between the parties not referred to arbitration. The respondent, instead of filing a reply to the said notice, filed an application under Order VII, Rule 11 of the Code of Civil Procedure, 1908 ("C.P.C.") praying for the applicant's application under Section 20 of the Arbitration Act to be rejected on the ground that the applicant had not exhausted the precondition of referring the contractual disputes to the Engineer in terms of clause 67.1 of the contract between the parties, before filing the application under Section 20 of the 1940 Act.

3. Through this common judgment, I propose to dispose of the applicant's application under Section 20 of the 1940 Act, and the respondent's application under Order VII, Rule 11 C.P.C.

4. The record shows that on 16.06.2010, a contract was entered into between the applicant and the respondent for certain works to be executed by the applicant at Jordanian Embassy and

the Jordanian Ambassador's residence in the Diplomatic Enclave, Islamabad. The applicant was awarded this contract as a consequence of a tender bidding process.

5. The respondent appointed M/s Design Advisor as the "Engineer" for the project. Clause 2.6 of the Instruction to Tenderers and Conditions of Contract – Part-I (General Conditions) requires the Engineer to act impartially in the exercise of his discretion in giving his decisions, opinions or consents, or expressing his satisfaction or approval, or in determining value. On 24.06.2010, the Engineer issued a 'notice to commence' construction in accordance with the terms of the said contract. This notice *inter-alia* provided for the works to be completed within 455 days/15 months; the date for commencement was to be reckoned with effect from 08.07.2010; the maintenance period was to be 365 days for civil works, and 730 days for electromechanical works from the date of the issuance of the final certificate for completion.

6. The disputes and differences between the applicant and the respondent in connection with, or arising out of the contract were to be resolved in accordance with clauses 67.1 to 67.4 of the contract, which is reproduced herein below:-

> ***67.1 "Engineer's Decision***
> ***If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall given notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuance to this Clause.***
>
> ***Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.***
>
> ***If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of***

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

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

67.2 Amicable Settlement

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

67.3 Arbitration

Any dispute in respect of which:-
(a) the decision, if any of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and
(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2,
Shall be finally settled, unless otherwise specified in the Contract under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.
Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments but before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as to witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.
Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

67.4 Failure to Comply with Engineer's Decision

Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has

become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3 the provisions of Sub-Clause 67.1 and 67.2 shall not apply to any such reference."

7. Clause 67.3 of the Clause 2.6 of the Instruction to Tenderers and Conditions of Contract – Part-II (Particular Conditions of Contract) amends Clause 67.3 of the Instruction to Tenderers and Conditions of Contract – Part-I (General Conditions) only to the extent of requiring the disputes to be settled under the provisions of the 1940 Act instead of the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

8. I do not feel the need to go into the details of the correspondence between the parties and the Engineer, but suffice it to say that disputes and differences developed between the parties in connection with or arising out of the contract. These disputes and differences developed primarily on account of the delay in the execution of the construction work. The applicant and the respondent made allegations and counter allegations against each other regarding the cause for the delay. The applicant had *inter-alia* alleged that the provision of the complete structural and construction designs were delayed by the Engineer, who had been appointed by the respondent; and that the drawings provided by the respondent did not match the actual position on the spot due to seepage of water. On the other hand, the respondent had taken the position that the applicant's excuses for not performing its contractual obligations were lame, and that after the execution of the Memorandum of Understanding dated 03.07.2013, there was no reason for any complaint by the applicant.

9. The applicant seems to have lost faith in the decisions made by the Engineer. The applicant, in its letter dated 19.08.2013, made reference to 23 letters addressed by the applicant, and complained that the Engineer was not performing its duties under the terms of the contract, and had unduly delayed the decisions which he was supposed to take regarding the provision of approved construction drawings, and the payment against Interim

Payment Certificate ("IPC") No.12, dated 19.08.2013. It is pertinent to reproduce herein below the last three paragraphs of the said letter dated 19.08.2013:-

> *"We would bring in your kind notice that we are unable to fulfill the irrelevant demand of the Engineer as such he has been received han[d]som[e] amount illegally however; he is further blackmailing us for the fulfillment of the either demands for which our pending payments are not being process.*
> *After going through the above your good self would realize that in the prevailing situation, when work completion target has been fixed and work activities are in progress in full swing, we are unable to account for the Engineer irrelevant demand and it seems the Engineer has been controversial and in their presence work would not be completed in given time frame.*
> *You are therefore requested to please intervene and an emergency meeting may be called so that we may be able to prove our stance and an appropriate action towards the Engineer may be initiated under the provision COC so that we may get out our self in the unpleasant situation and project may be completed as soon as possible."* (Emphasis added)

10. Earlier, vide letter dated 06.08.2013, the applicant had complained against the "negative attitude" of the Engineer towards the timely completion of the works. The applicant was of the view that the Engineer had delayed payment against IPC No.12 for more than 45 days. Furthermore, in the said letter, the applicant took the following position:-

> "*Please note that we are unable to fulfill your unfair demands for which you have been delayed our IPC-12 for more than 45 days and subsequently, bill was returned due to non-compliance of your unfair demands."* (Emphasis added)

11. On 20.09.2013, the applicant instituted a civil suit (C.S. No.67/2013) before this Court seeking the specific performance of the contract dated 16.06.2010; cancellation of the Memorandum of Understanding dated 03.07.2013; declaration and mandatory injunction, against the respondent. On 09.10.2013, this Court on the applicant's application directed *status quo* to be maintained. On 09.10.2013, the respondent filed an application under Section 34 of the 1940 Act praying for the proceedings in the civil suit to be stayed and the matters in dispute to be decided in accordance with the arbitration clause contained in clause 67 of the contract. This application was contested by the applicant, who took the position that the respondent had not shown his willingness and readiness to settle the contractual disputes through arbitration.

Vide order dated 13.11.2013, the learned Single Judge-in-Chambers allowed the respondent's application under Section 34 of the 1940 Act, and dismissed the suit. Thereafter, the applicant, on 28.11.2013, issued a notice to commence arbitration to the respondent. The applicant did not, however, refer the contractual disputes for the decision of the Engineer under clause 67.1 of the contract. The applicant, in the said notice dated 28.11.2013, stated that *"the engineer has proved himself as bias and controversial"*. The applicant requested the respondent for an amicable settlement of the contractual disputes in terms of clause 67.2 of the contract, before the said disputes could be referred to arbitration.

12. In addition to issuing a notice to commence arbitration, the applicant impugned the said order dated 13.11.2013, passed by the learned Single Bench in Regular First Appeal No.164/2013, which was allowed, vide order dated 02.02.2016, passed by the learned Division Bench of this Court. The said order dated 13.11.2013, was set aside and the matter was remanded to the learned Single Bench of this Court. The said appellate order dated 02.02.2016, is reproduced herein below:-

> *"After hearing the learned counsel for the parties, this proposition of law urged through consensus that suit of the appellant could not have been dismissed rather proceedings in the suit are required to be stayed.*
> *2. In this view of the matter, we accept the instant appeal, set aside the impugned order dated 13.11.2013 passed by learned Single Judge, and remand the case back to learned Single Judge for decision with regard to appointment of Arbitrator or sending the matter to the Arbitrator as per agreement. The parties are directed to put appearance before learned Single Judge on 25.02.2016."*

13. After the remand of the case, this Court vide order dated 04.05.2016, stayed the proceedings in the suit under Section 34 of the 1940 Act. This order was passed with the consent of the learned counsel for the contesting parties. The applicant had agreed to the proceedings in the suit to be stayed because it had, on 17.03.2016, already filed an application under Section 20 of the 1940 Act, before this Court.

14. On 16.05.2016, the respondent filed an application under Order VII, Rule 11 C.P.C., for the dismissal of the applicant's

application under Section 20 of the 1940 Act, *inter alia* on the ground that the applicant had not, prior to filing the application under Section 20 of the 1940 Act, referred the matters in dispute between the parties to the Engineer in accordance with clause 67.1 of the contract. This application was contested by the applicant by filing a written reply. In Paragraph 4 of the applicant's reply to the respondent's application under Order VII, Rule 11 C.P.C., it has been *inter alia* pleaded as follows:-

> *"4. ... That dispute cannot be resolved through clause 67-1, and 67-2 of the agreement because the so-called engineer proved himself as bias and controversial because he claimed a heavy amount from the plaintiff's company as Bribe for the clearance of the outstanding bills, therefore the plaintiff's company not satisfy with the determination, evaluation and decision of the engineer therefore both the clauses cannot be invoked. Letter dated 18.11.2013 is attached at page No.112 of the with the main suit."*

15. As mentioned above, through the instant judgment, I propose to dispose of the applicant's application under Section 20 of the 1940 Act, as well as the respondent's application under Order VII, Rule 11, C.P.C.

16. Learned counsel for the applicant submitted that the contract dated 16.06.2010 between the applicant and the respondent contains an arbitration clause providing for the settlement of the contractual disputes between the said parties to be resolved through arbitration under the provisions of the 1940 Act; that the documents on the record show that there are several dispute and differences between the parties arising out and in connection with the terms of the said contract; that this Court has the jurisdiction to refer the contractual disputes between the parties to arbitration and appoint an arbitrator; that the arbitration agreement between the parties was executed prior to the filing of the application under Section 20 the 1940 Act; that the applicant had been languishing in the courts since the past three years seeking an adjudication of its disputes with the respondent; that the disputes between the parties could not be referred to the Engineer, because the applicant had no faith in his wisdom and had raised allegations of bias against the Engineer in letters, which were a part of the record; that if the claims raised by the

applicant were not valid, they could be spurned by the arbitrator; that the applicant had already made an effort for the amicable settlement of disputes with the respondent through its letter dated 28.11.2013. In conclusion, the learned counsel for the applicant prayed for the respondent's application under Order VII, Rule 11 C.P.C to be dismissed, and the applicant's application under Section 20 of the 1940 Act to be allowed. In making his submission, the learned counsel for the applicant placed reliance on the case of Pakistan Development Corporation (Pvt.) Ltd. Vs. Ministry of Defence, Government of Pakistan (PLD 1995 Karachi 286).

17. On the other hand, learned counsel for the respondent submitted that clause 67 of the contract required the parties to refer disputes, in the first instance, to the Engineer, and only after the Engineer gives his decision, or does not give his decision within eighty-four days; that the disputes can be referred to arbitration under the provisions of the 1940 Act; that without satisfying the essential precondition of a reference to the Engineer contemplated by clause 67.1 of the contract, the applicant could not jump-the-gun and directly file an application under Section 20 of the 1940 Act; that the Engineer had not been disassociated from the project, and could adjudicate upon the disputes referred to him by either party; and that the allegations of bias hurled by the applicant against the Engineer are baseless and frivolous. In making his submissions, the learned counsel for the respondent placed reliance on the law laid down in the cases of Board of Intermediate and Secondary Education Vs. Fine Start & Company (1993 SCMR 530), Karachi Dock Labour Board Vs. Quality Builders Ltd. (PLS 2016 SC 121), Hanover Contractors Vs. Pakistan Defence Officers Housing Society (2002 CLC 1880), Sanad Associates Vs. General Manager Telephone & Telegraph (1989 CLC 386), Ayaz Builders Vs. Board of Trustees of the Karachi Port Trust and another (2008 CLC 726), and WAPDA Vs. S. H. Haq Noor & Co. (2008 MLD 1606).

18. I have heard the arguments 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 application under Section 20 of the 1940 Act, and the application under Order VII, Rule 11 C.P.C, have been set out in sufficient detail in paragraphs 4 to 14 above, and need not be recapitulated.

19. I do not intend to go into the merits of the contractual disputes between the parties. At this stage all that this Court has to determine is whether the applicant could have filed an application under Section 20 of the 1940 Act, without exhausting the pre-condition of referring the contractual disputes to the Engineer for his decision under clause 67.1 of the contract; and if the answer to the said question is that the applicant could have filed such an application, whether the matters in dispute between the applicant and the respondent could be referred to arbitration.

20. There is no denying the fact that clause 67.1 of the contract requires disputes of any kind whatsoever arising between the Employer (respondent) and the Contractor (applicant) in connection with or arising out of the contract to be referred, in the first place, to the Engineer for his decision. If the Engineer does not give his decision within eighty-four days, the matters in dispute between the parties can be referred to arbitration under clause 67.3 of the contract, after an attempt to resolve the disputes amicably in terms of clause 67.2 of the contract. If the Engineer does give his decision within eighty-four days, the aggrieved party can assail the same in arbitration proceedings, after trying to resolve the matters amicably.

21. It appears that the applicant was aware of the requirement to refer contractual disputes, in the first instance, to the Engineer in terms of clause 67.1 of the contract. The applicant did not refer the contractual disputes for the decision of the Engineer under clause 67.1 of the contract, because as mentioned in the notice dated 28.11.2013, the applicant took the position that *"the engineer has proved himself as bias and controversial"*. It was also complained that the Engineer had failed to fulfill his contractual obligations, and that the applicant was not satisfied with the determinations, evaluations and decisions of the Engineer. The applicant put the cart before the horse by

requesting the respondent for an amicable settlement of the contractual disputes in terms of clause 67.2 of the contract, before the said disputes could be referred to arbitration.

22. Now the vital question that needs to be answered is whether the applicant could be relieved from his obligation of referring disputes to the Engineer in terms of clause 67.1 of the contract before the filing of an application under Section 20 of the 1940 Act. At this stage, a reference to the following case law on the subject would be apposite:-

(i) In the case of Board of Intermediate and Secondary Education Vs. Fine Start & Company (1993 SCMR 530), an application under Section 20 the 1940 Act before the trial court seeking a direction for the filing of the arbitration agreement in the court and for the appointment of a sole arbitrator was dismissed on the ground that before moving the said application, the applicant had not approached the Chairman of the Board of Intermediate and Secondary Education for his decision in accordance with the arbitration clause in the agreement. The arbitration clause in the agreement provided that in the event of any disagreement arising out of the contract, it was to be referred in the first instance to the Chairman of the Board who was required to give his decision within three months or within such period as might be allowed by the court. Furthermore, it was provided that in case the Chairman failed to give his decision within the said period or the extended period or if a party was not satisfied with his decision, the dispute was to be referred to a sole arbitrator to be appointed by the Board. It was held that since the applicant had not fulfilled the requirement of the arbitration clause by not approaching the Chairman of the Board before filing the application under Section 20 of the 1940 Act, the said application was correctly dismissed.

(ii) In the case of Karachi Dock Labour Board Vs. Quality Builders Ltd. (PLS 2016 SC 121), it has *inter alia* been held as follows:-

"It is a settled principle that where the law requires an act to be done in a particular manner it has to be done in that manner and not otherwise and this rule shall be stringently applicable when it comes to the question of appointment of arbitrators; as the conferment of jurisdiction upon the arbitrator should be strictly in line with the letter and spirit of the agreement between the parties and the express provisions of law. Obviously, any award passed by such an arbitrator who is not appointed in the above manner shall also be invalid, having been passed by an arbitrator without jurisdiction." (Emphasis added)

(iii) In the case of Hanover Contractors Vs. Pakistan Defence Officers Housing Society (2002 CLC 1880), it was *inter-alia* held by the Hon'ble High Court of Sindh as follows:-

"It has already been settled that precondition contained in the arbitration clause are binding upon the parties. The documents were prepared by the defendants and they themselves incorporated that condition of prior reference of the claim to the consultant and attached the element of finality to the decision in case it was not challenged within a period of 28 days. They cannot now be allowed to turn around and disown the conditions laid down by them which has been relied and acted upon by the plaintiff on the basis of the documents provided by them to the contractor.

In view of the above I am of the opinion that the arbitration clause cannot be restored to by the defendant at this stage accordingly C.M.A. 6203 of 2001 is dismissed and C.M.A. 7592 of 2001 is allowed."

(iv) In the case of Sanad Associates Vs. General Manager Telephone & Telegraph (1989 CLC 386), it has *inter alia* been held as follows:-

"As I have analysed the facts of the case from the conduct of the plaintiff, it has been demonstrated clearly it has no intention to refer the disputes to the consultant in the first place and then to go to arbitration. Apart from the said facts the plaintiff himself alleged bias and unsuitability of the consultant/arbitrator appointed under the arbitration clause and therefore, asking for variation of the arbitration agreement under section 20 of the Act and in para. 12 of the plaint makes the said intention of the plaintiff to vary the arbitration agreement by changing the consultant/arbitration unilaterally by the Court in favour of making an order for filing the arbitration agreement as the arbitration agreement as stands now, is not asked for by the plaintiff to be filed but the plaintiff asking for a different arbitration agreement by changing the name of the arbitrator to be filed which the Court has no power to do so.

In the result, there will not be an order under section 20 of the Arbitration Act to refer the disputes to the arbitrator and the application is dismissed with no order as costs."

(v) In the case of Ayaz Builders Vs. Board of Trustees of the Karachi Port Trust and another (2008 CLC 726), it was *inter-alia* held by the Hon'ble High Court of Sindh as follows:-

> *"....the parties have agreed to a mechanism or resolution of their dispute and they cannot bypass the same by initiating legal proceedings. Furthermore, the plaintiff after referring the matter to the Engineer has not waited for his decision and has filed this suit, due to which the Engineer cannot take decision. The plaintiff cannot take advantage of its own deeds and cannot avoid proceedings in terms of the contract.*
> *The suit filed by the plaintiff under section 20 of the Arbitration Act appears to be premature. The defendant No.1 has at no stage disputes the arbitration clause in the contract and has also not disputed the authority of the Engineer to take decision and has agreed to join the proceedings pending before the Engineer, therefore, the suit at this stage is not maintainable. The plaintiff may avail remedy available to him under the contract after the decision of the Engineer."*

(vi) In the case of WAPDA Vs. S. H. Haq Noor & Co. (2008 MLD 1606), the arbitration clause in the agreement was similar to the one in the case at hand. The aggrieved party had referred contractual disputes to the Engineer under clause 67.1 of the contract, and without waiting for the Engineer's decision, filed an application under Section 20 of the 1940 Act before the Court. The Hon'ble Lahore High Court held that a specific procedure had been laid down for dispute resolution between the contracting parties which had to be resorted to before approaching the Court under Section 20 of the 1940 Act. Furthermore, it was held that no plausible and cogent justification had been made out for prematurely approaching the Civil Court without fulfilling the prerequisite for resorting to arbitration proceedings. The application under Section 20 of the 1940 Act was held to have been correctly dismissed.

(vii) Conditions precedent for the operation of the arbitration clause my take different forms. In the case of Smith Vs. Martin ([1925] 1 K.B. 745), an arbitration clause in a works contract provided that the "reference shall not be opened until after the completion of the works." It was held that the arbitrators had no jurisdiction to determine whether the works had been completed; that the works had in fact not been completed and, therefore, an award by the arbitrator was invalid.

23. It is well settled that certain conditions precedent to the operation of an arbitration clause step in to prevent its operation. For instance, in the case at hand, the dispute resolution clause in the agreement, in effect provides that a dispute between the parties has to be referred, in the first instance, to the Engineer, who is supposed to give his decision within a stipulated period; and that only where the Engineer gives his decision or does not give his decision within such a period, can the aggrieved party refer the matters in dispute to arbitration. Thus, the right of an aggrieved party to refer contractual disputes to arbitration is pre-conditioned with a reference of such disputes to the Engineer. An application under Section 20 of the 1940 Act, without the fulfillment of the pre-condition of a reference of the disputes for the decision of the Engineer in terms of clause 67.1 of the contract, is liable to be dismissed as premature.

24. The Court cannot rewrite the agreement between the parties or to exempt a party from complying with its contractual obligation of referring the disputes to the Engineer under clause 67.1 of the contract before initiating arbitration under clause 67.3 of the contract. It is in situations where a reference to the Engineer cannot be made because he has resigned or refuses to entertain the dispute or has been disengaged by the employer, can the disputes be referred to arbitration without a reference to the Engineer. On a Court query, the learned counsel for the applicant submitted that the Engineer is still performing his functions under the contract and that the Employer/Respondent has not disengaged his services.

25. Now, it needs to be determined whether allegations of bias against an Engineer, not substantiated by any cogent evidence, could relieve a party from the requirement of referring disputes to the Engineer under clause 67.1 of the contract. Since the requirement of a reference of disputes to an Engineer is an integral part of the dispute resolution mechanism enshrined in the contract, a party cannot by-pass the requirement of a reference of disputes to an Engineer (named in the agreement by designation/position or otherwise) on the ground of bias, unless

the Court hearing an application under Section 20 of the 1940 Act, is satisfied that substantial miscarriage of justice will take place, if such an application is dismissed as premature on account of no reference having been made to the Engineer in first instance. However, as mentioned above, the Court must not lightly relieve the parties from their bargain. Discretion has to be exercised cautiously, and the parties should not be relieved from a forum (i.e. the Engineer) they have chosen because they fear that the Engineer's decision may go against them. I am of the view that in exercising its discretion whether to exempt a party from referring the disputes for the Engineer's decision, the Court has to apply the test for revoking the authority of an arbitrator (under Section 5 of the 1940 Act) or removing an arbitrator (under Section 11 of the 1940 Act).

26. Section 5 of the 1940 Act provides that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. Additionally, Section 11 of the 1940 Act, empowers the Court to remove an arbitrator in certain circumstances. Bias of an arbitrator is one of the recognized grounds on which an arbitrator can be removed or his authority be revoked. It has been consistently held that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person.

27. Now, can a simple allegation of possible or probable bias be a ground for the removal of the Engineer, who is supposed to adjudicate upon contractual disputes between contracting parties, or to nullify a term of a contract which requires a party to a contract to refer such disputes to the Engineer before initiating arbitration proceedings. I think not, in view of the following case law:-

(i) In the case of The President Vs. Mr. Justice Shaukat Ali (PLD 1971 SC 585), it has been held that *'mere assertion of a bias*

can never be sufficient to disqualify a Judge in hearing a cause or matter.'

(ii) In the case of Azhar Ali Vs. Punjab Public Service Commission (PLD 2004 SC 4), it has been held that mere allegations of bias are not sustained in the absence of any tangible evidence in support thereof.

(iii) In the case of Sain Rakhio Vs. Abdul Ghaffar (2011 CLC 1160), it has been held as follows:-

> *"9. Apprehension of bias, in my humble view, cannot be extended to judicial bias, on the ground that since a Judge while deciding a similar matter has already expressed an adverse opinion, therefore, the other case of similar nature might have the same fate. Reference in this regard can be made to a Full-Bench judgment of this Court in the case of Syed Tahir Hussain Mahmoodi and others v. Tayyab and others PLD 2009 Karachi 176."*

(iv) In the case of International Airport Authority of India Vs. K. D. Bali (AIR 1988 SC 1099), it has been held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Furthermore, it has been held as follows:-

> *"Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Govt. to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator. Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator."*

(v) In the case of Bristol Corporation Vs. John Aird & Co. (1913 AC 241) Lord Atkinson has observed:-

> *"...But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those preformed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the*

> ***ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of Law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them…"***

28. The allegations of bias and mala fide had to be established by cogent and clear evidence. It is well settled that "bias" stands included in the attributes of the word "malice". In the case of Lanvin Traders Vs. Presiding Officer, Banking Court (2013 SCMR 1419), it has been held that an elementary principle of pleadings was that where allegations of fraud misrepresentation, collusion or mala fide were attributed, necessary particulars and details in such context were to be unfolded in the application/pleadings, and any bald or vague statement to such effect was of no legal consequence. It is my view that allegations of bias and bribery stand on the same footing and unless full particulars with respect to the same are given in the pleadings, they are to be discarded.

29. The allegations of bias made by the applicant against the Engineer in letters dated 19.08.2013 and 06.08.2013, and in paragraph 4 of the reply to the respondent's application under Order VII, Rule 11 C.P.C., are, in my view, bare allegations with no particularities or specificities. No material was placed on the record to indicate that the decision/judgment of the Engineer would be coloured, let alone be affected by any bias. Credence must not be given to bald allegations of bias against a person designated to carry out adjudication. As regards the offence of bribery allegedly committed by the Engineer, the applicant chose neither to file a criminal complaint, nor an application before the Pakistan Engineering Council. Clause 2.2 of the Instruction to Tenderers and Conditions of Contract – Part-II (Particular Conditions of the Contract), requires the Respondent/ Employer to ensure that the Engineer's Representative is a professional engineer as defined in the Pakistan Engineering Council Act, 1975.

30. It must be borne in mind that in this case the matters in

dispute between the applicant and the respondent have not been referred for the Engineer's decision under Clause 67.1 of the contact. There is only an apprehension of bias lurking in the mind of the applicant. The question, whether the named or selected Engineer is likely to act in a biased or unfair manner is always a question of fact which must be answered with reference to the facts and circumstances of each case. In this case, the allegations made by the applicant against the Engineer are not, in my view, sufficient to relieve the parties from their bargain and nullify Clause 67.1 of the contract.

31. FIDIC stands for *Federation Internationale Des Ingenieurs-Conseils*, which is an association of national associations of Consulting Engineers. FIDIC have produced standard forms of contracts for civil engineering projects. The contract dated 16.06.2010 between the applicant and the respondent is one such contract. "The Engineer" plays a significant role in the execution of such a contract. The Engineer is intended to act both as agent of the Employer in the process of obtaining for the Employer the project required, and as an independent person for the administration of the contract and for the settlement of disputes. The Engineer is required to make certifications and other determinations independently of the Employer and impartially as between the parties. Clause 2.6 of the contract places an express obligation upon the Engineer to act impartially as between the parties. The Engineer performs the functions of a designer, quality controller, valuer and certifier, and that of an adjudicator under clause 67.1 of the contract. The Engineer is required to consult with the parties under several clauses prior to granting extensions of time, fixing rates, or making an award of costs.

32. More often then not, the Engineer's certifications, valuations, determinations and decisions are subjected to challenge under Clause 67.1 of the contract. The Engineer is, therefore, called upon to judge whether his own actions were correct or not. The mere fact that the Engineer has taken a certain position on a certain matter does not disqualify him from sitting in an adjudicating capacity over that matter under clause 67.1 of the

contract. In exercise of his adjudicatory powers, the Engineer can review, modify, uphold or reverse his certifications, valuations, determinations or decisions which have been subjected to challenge under clause 67.1 of the contract. The Engineer sits in a different capacity when settling disputes as an independent adjudicator.

33. In the case of Muhammad Ishaque Qureshi Vs. Azad J.& K. Government (PLD 1962 Azad J & K 1), it has been held by the Hon'ble Supreme Court of Azad Jammu & Kashmir as follows:-

> ***"I am of the opinion that where the parties have entered into an agreement with their eyes open knowing fully well that the Arbitrator agreed upon is an employee of one party and that as executive head of the department he is likely to make certain orders they cannot be allowed to resile from this agreement simply on the suspicion that the said officer would stick to his decisions taken or opinion formed while acting as such executive officer. When a party accepts an employee of the other party as an Arbitrator he accepts him as a gentleman who has an open mind and also a judicious mind.***

34. The mere fact that the Engineer had, in the past, given decisions against the applicant or had expressed a view/opinion adverse to the applicant regarding his performance as contractor, cannot be made a ground for avoiding the contractual obligation of referring disputes to the Engineer in terms of clause 67.1 of the contract.

35. The contention of the learned counsel for the applicant that the conduct of the respondent (by filing an application under Order VII, Rule 11, C.P.C. for the dismissal of the applicant's application under Section 20 of the 1940 Act) indicates that the respondent was not ready and willing to refer the matters in dispute to arbitration at any stage and its intention was to avoid adjudication of the contractual disputes, is in my view, misconceived. It is the respondent's right to insist that the disputes between the applicant and the respondent are resolved in accordance with the procedure provided in clause 67 of the contract. The learned counsel for the respondent submitted that the respondent was ready, willing and able to have the disputes resolved in the manner as expressly agreed between the parties; and that as it was the applicant, who was agitating the disputes, to

have the matters in dispute referred to the Engineer in accordance with clause 67.1 of the contract.

36. In view of the above, the respondent's application under Order VII, Rule 11 C.P.C. is allowed and, consequently, the applicant's application under Section 20 of the 1940 Act is dismissed as premature. Since there is no express time limit in clause 67.1 of the contract for a reference to the Engineer, the applicant may, subject to law, refer the contractual disputes to the Engineer in terms of clause 67.1 of the contract for his decision. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*