FORM NO.HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JUDICIAL DEPARTMENT

I.C.A. No. 433 of 2014

Defence Housing Authority, Islamabad.	**Versus**	**Multi-National Venture Development Pvt. Ltd.**

Date of hearing:	***20.11.2014.***
Appellant by:	***Mr Rashid Mahmood Sindhu, Advocate for the appellant.***
Respondent by:-	***Mr Babar Sattar, Advocates for the respondent.***

Athar Minallah, J:- This order will decide I.C.A. No. 433 of 2014.

2. Through the instant Intra Court Appeal, the appellant has assailed the judgment dated 12-06-2014, passed by the learned Single Judge in Chambers.

3. The admitted facts are that the appellant and the respondent entered into a "*Joint Venture Agreement"* on 09-12-2006 (*hereinafter referred to as the "JV Agreement"*), for the purposes of marketing, designing, financing, construction, commissioning, management, operation and maintenance of DHA-1 Phase-II Extension Overseas Sector (*hereinafter referred to as the "Project"*). The *JV Agreement* was terminated on 27-03-2008. The termination was with the consent of the parties and pursuant thereto a joint agreement was executed on 06-06-2008, to market, pre-sell, design, construct, commission and finance a project comprising commercial shops and offices (*hereinafter referred to as the "Agreement"*).

4. Disputes arose between the parties relating to, and in connection with, the Agreement. Pursuant to *clause 22.1* of the Agreement, the respondent served a notice on the appellant, dated 24-02-2011. The appellant vide letter dated 08-04-2011, responded to the notice of default. The respondent, vide letter dated 15-04-2011, sought resolution of the disputes. The appellant appointed *Col. (Retd.) Ijaz Hussain, Director Project, DHA-1*, as its representative under *clause 22.1* of the Agreement. The respective representatives appointed by the parties, pursuant to clause 22.1, held several meetings but failed to amicably resolve the disputes. After failure of the proceedings under clause 22.1, the respondent, vide notice dated 01-06-2012, appointed its arbitrator and invited the respondent to appoint its arbitrator within fifteen days of commencement of the notice. Instead of appointing an arbitrator, as required under *clause 22.2* of the agreement, the appellant is alleged to have sent a threatening letter dated 18-06-2012. The appellant failed to appoint an arbitrator and thereafter, the respondent filed an application under *Section 20 of the Arbitration Act, 1940 (hereinafter referred to as the "Act of 1940"*).

5. The application was heard by a *Single Judge in Chambers*, and the appellant intimated the name of *Col. Retd. Ijaz Hussain*, an employee who had represented it during the conciliatory proceedings under clause 22.1, as its arbitrator. The respondent raised an objection on the ground that the said person had represented the appellant for amicable resolution of the disputes under *clause 22.1* of the agreement, besides being an employee. The learned *Single Judge in Chambers* gave the appellant reasonable time to nominate some other person, but the appellant remained adamant and refused to nominate a person other than its employee. In the circumstances, particularly in the light of the stand taken

by the appellant, the learned *Single Judge in Chambers*, appointed Justice (*Retd) Munir A. Sheikh, former Judge of the Supreme Court*, as a sole arbitrator.

6. The learned counsel for the appellant contends that: the leaned *Single Judge in Chambers* fell in error by refusing to accept the person nominated as its arbitrator; the Court cannot interfere with, alter or vary the terms of the Agreement and, therefore, could not have appointed a sole arbitrator; it is lawful to nominate an employee by a party as an arbitrator and no objection can be raised. It is within the excusive power of a party to the Agreement to appoint any person, even its employee, as an arbitrator. The learned counsel has placed reliance on the cases titled as *PROVINCE OF PUNJAB VERSUS SUFI ABDUL HAMEED* (*2003 CLC 355), ABDUL HAKIM K. KHAN VERSUS BEGUM KHANUM JAN (1989 MLD 1304), WASEEM CONSTRUCTION CO. VERSUS PROVINCE OF SIND* (*1983 CLC 3273) and PRESIDENT OF INDIA…VS…KESAR SINGH (AIR 1966 J&K 113).*

7. The learned counsel for the respondent contends that; the appellant could not have appointed an employee as its arbitrator; the person nominated had already represented the appellant in the proceedings under *clause 22.1* of the Agreement; appointing an employee, as an arbitrator, is contrary to the well settled principle that no one can be judge of his own cause and in support has relied on the cases titled as *CRESCENT STEEL AND ALLIED PRODUCTS LIMITED versus SUI NORTHERN GAS PIPELINE LIMITED (2013 CLD 1110), Messrs SARWAT ALI & SONS versus GENERAL MANAGER T&T, W.T.R. QUETTA (2007 CLC 1499), FEDERATION OF PAKISTAN versus MUHAMMAD AKRAM SHEIKH (PLD 1989 S.C. 689);* the arbitrator has to be an independent, neutral and impartial person and in

support has relied on the case titled as *MUHAMMAD FAROOQ SHAH versus SHAKIRULLAH (2006 SCMR 1657);* the nomination made by the appellant defeats the purpose of the forum of dispute resolution known as arbitration, and in support has relied on the cases titled as *Syed FAQIR SHAH versus Haji INAYATULLAH KHAN AND ANOTHER (2013 MLD 689), MESSRS BATA SHOE CO. (PAKISTAN) LTD., KARACHI versus THE GOVERNMENT OF PAKISTAN (PLD 1970 Karachi 784), NIHAL CHAND AND ANOTHER…VS…SHANTI LAL (AIR 1935 Oudh 349) and GHULAM MAHOMED KHAN…VS…GOPALDAS LALSING (AIR 1933 Sindh 68);* bias of an arbitrator is a ground for misconduct and, therefore, the appointment of an employee from the very inception would create a disqualification, in support relied on the cases titled as *Syed FAQIR SHAH versus Haji INAYATULLAH KHAN (2013 MLD 689), FAUJI FOUNDATION through General Manager (Engineering) versus CHANAN DIN AND SONS through Attorney (2013 CLD 2167), OIL & GAS DEVELOPMENT COMPANY LIMITED versus MARATHON CONSTRUCTION COMPANY (2013 CLD 1483), MUHAMMAD FAROOQ SHAH versus SHAKIRULLAH (2006 SCMR 1657) and ARDESHAR IRANI…VS…THE STATE OF M.P. (AIR 1974 Madhya Pradesh 199).* In the circumstances, the Court rightly appointed a sole arbitrator in accordance with the powers vested under *Section 9 of the Act of 1940,* read with other enabling provisions and in support reliance has placed on the cases titled as *SADAT BUSINESS GROUP LTD. versus FEDERATION OF PAKISTAN through Secretary (2013 CLD 1451), GHULAM ISHAQ KHAN INSTITUTE OF ENGINEERING, SCIENCE AND TECHNOLOGY versus HASSAN CONSTRUCTION CO. (PVT.) LTD. ENGINEER AND CONSULTANTS (1998 CLC 485), PROVINCE OF PUNJAB versus RANA & SONS* (1*996 CLC 69) and DESIGN GROUP OF PAKISTAN versus CLIFTON CANTONMENT BOARD (1990 MLD 2010).*

8. After hearing the learned counsels at length and perusing the record with their able assistance, we observe and hold as follows.

9. The object of arbitration is indeed to obtain a fair resolution of disputes. Arbitration is that category of dispute resolution process where the parties make a voluntary choice to take their disputes for resolution to an arbitrator. It is submission of a dispute to be decided by a third party. The mechanism for selection of the arbitrator is invariably mentioned in the arbitration clause. Either the parties agree to nominate and appoint an arbitrator, or the arbitrator is named in the agreement. Black's Law Dictionary, Eight Edition, describes an "Arbitrator" as 'a neutral person who resolves disputes between parties, especially by means of formal arbitration'. Advance Law Lexicon, 4th Edition defines an arbitrator as 'the person to whose attention the matters in dispute are submitted-a judge of the parties own choosing, whose functions are judicial and whose duties are not those of mere partisan agent, but of an impartial judge, to dispose equal justice to all parties, and to decide the law and facts involved in the matters submitted, with a view to determining and finally ending the controversy. Similarly, a passage has been quoted in the *Lexicon from Russell on Arbitration, 20th Edition, pages 104-105 explaining the attributes and status of an Arbitrator as, " An Arbitrator is neither more or less than a private judge of a private Court (called an arbitral tribunal) who gives a private judgment (called an award) He is a judge in that a dispute is submitted to him; he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions; he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and the rules of natural justice."*. An arbitrator is, therefore, not a mere conciliator as observed by the *Supreme Court of India in (2001)5 SCC 629*. The Arbitrator is a Judge of the parties and the concept is based on the premise

that he or she shall be a third party, seen as non partisan arbiter and referee. An arbitrator cannot be seen as biased, interested, colored or prejudiced.

10. It is, therefore, noted that in order to achieve the object of arbitration, an arbitrator necessarily has to be a person who is independent, impartial, neutral and non partisan. As a general rule Courts do not interfere in the matters relating to arbitration or its proceedings, except within the limited scope provided under the *Act of 1940*. Arbitration has emerged as an effective and efficient form of dispute resolution, particularly when the parties are in a commercial relationship. The parties, by agreeing to arbitration clauses in the agreement, accept that disputes would be resolved by an impartial and neutral arbitrator without unnecessary delay or expense. Like any other contractual arrangement, the parties to an arbitration agreement are expected to uphold the sanctity of their contractual commitments and undertakings, particularly in ensuring that their conduct remains in consonance with the spirit and object of agreeing to resolve their disputes through a privately appointed judge. It places a higher duty on the Courts to enforce the contractual commitments when one of the parties is owned or controlled by the State or as a statutory organization or entity is in a position where the scales of bargaining powers are not equally balanced. We, therefore, hold that a party cannot appoint itself or its employee as an arbitrator, except when the other party has explicitly consented, or the conduct of the other party during the course of the proceedings, implies consent. Moreover, a party nominating itself or its employee as an arbitrator, particularly when the other party raises an objection, can by no stretch of the imagination be termed as nominating or appointing an arbitrator. Such an appointment or nomination is a nullity and will be deemed as failure to appoint an arbitrator for the purposes of the *Act of 1940*. In an appropriate case, depending on the facts, a named arbitrator in the agreement can also be

substituted, as illustrated in the case of *STATE OF ANDHRA PRADESH…VS…I. CHANDRASEKHARA REDDY AND OTHERS* (*AIR 1998 SC 3311).*

11. Now we turn to the facts and circumstances in the instant appeal. The arbitration clauses in the Agreement and referring disputes to the arbitrators to be appointed under *clause 22.2*, are admitted. The only dispute relates to the insistence on the part of the appellant to appoint one of its employees, who also represented the appellant during the conciliatory proceedings under *clause 22.1*, as its arbitrator. This stance of the appellant is based on its interpretation of *clause 22.2* of the Agreement. It is the case of the appellant that it is entitled to nominate any person, including its employee and the respondent cannot demure or raise an objection. Pursuant to this interpretation of *clause 22.2* of the Agreement, the appellant contends that the learned *Single Judge in Chambers* could not have altered the terms of the agreement by appointing a sole arbitrator.

12. In the light of the divergent arguments, we have to answer two questions, firstly whether the language of the Agreement supports the contention of the appellant that it is entitled to appoint its employee as one of the arbitrators and secondly, whether the *Hon'ble Judge in Chambers* has erred in appointing a sole arbitrator, and was not vested with such power or jurisdiction?

13. As has been noted above, arbitration is a form of dispute resolution, based on the premise and assumption that disputes can only be resolved by independent, impartial and neutral persons, unless otherwise indented by the parties. The intentions of the parties can be gathered from

the Agreement, particularly *clauses 22.1 and 22.2*, which are reproduced as follows:-

> ***22.1*** *If any dispute or difference arises between the Parties in connection with this agreement or the transactions contemplated herein, the Parties undertake to use all reasonable endeavors, in good faith, to settle the dispute or difference by negotiation. Any dispute between the Parties relating to this agreement will first be submitted in writing to a panel of two persons, one representative each from DHA1 and MVD who shall promptly meet and confer in an effort to resolve such dispute. Each party's representative shall be identified by notice to the other Party, and may be changed at any time thereafter by notice to the other Party. Any agreed decisions of the representatives shall be final and binding on the Parties. In the event that the representatives are unable to resolve any dispute within thirty (30) days after submission of the same to them, either Party may then refer such dispute to arbitration.*
>
> ***22.2*** *If no settlement can be reached between the parties, then*

> *the dispute shall be submitted for arbitration by an arbitration panel composed of three (3) arbitrators. Each of the Parties may appoint an arbitrator and such appointed arbitrators shall jointly nominate their umpire. Such arbitration shall be conducted under the Arbitration Act, 1940, in English language, at Islamabad. Each Party shall pay its own legal expenses. The award of the arbitration panel shall be final and binding upon the Parties.*

14. It is obvious from the above two clauses that they are distinct and separate, providing for a mechanism of settlement of a dispute in two stages. In the first stage, the parties intended to resolve the disputes amicably through a panel consisting of their respective representatives. *Col. (Retd). Ijaz Hussain* was admittedly nominated by the appellant under *clause 22.1*. It is further admitted that the said person is an employee of the appellant. His nomination for the purposes of *clause 22.1,* was neither objected to, nor could any objection be raised, because the parties had intended that the amicable resolution shall be sought through a panel of respective representatives. In case the amicable resolution failed then in such an event *clause 22.2,* was to be invoked. By inserting the two clauses, the parties undoubtedly had made their intentions clear. The arbitrator to be nominated under *clause 22.2,* was not only to be an independent, impartial and neutral person but ought have been seen as such. In case the argument of the learned counsel for the appellant was to be accepted, then *clause 22.2,* would become redundant. Moreover, if it was intended by the parties that the arbitrators nominated would also

include persons in the respective employment of the parties, then there was no need to insert separate and distinct clauses i.e. *clause 22.1 and 22.2*. A plain reading of the two clauses together leaves no doubt whatsoever that the arbitrator appointed could not have been an employee of either the appellant or the respondent. Even otherwise, when parties voluntarily agree that disputes are to be resolved through arbitration, it is presumed that the person appointed as an arbitrator would be a non partisan third party. The forum of dispute resolution would become notional, illusory and a sham if the parties were to agree that they themselves would act as the arbitrators, or if one of the parties would insist to appoint its employee as an arbiter. This would obviously defeat the legislative intent of the *Act of 1940* and the object of resolving the disputes through arbitration. The case law relied upon by the learned counsel for the appellant is distinguishable and not relevant in the facts and circumstances of the instant appeal. We have not been able to persuade ourselves that the appellant is entitled to appoint one of its employees as an arbitrator. This further gains support from the fact that the bias of an arbitrator is a ground for setting aside of an award and thus becomes a reason for invalidating an award as misconduct of the arbitrator. The same principle would apply while appointing an arbitrator, so as to avoid frustrating the process of dispute resolution and the object of arbitration. We, therefore, agree with the learned counsel for the respondent that an appointment of an arbitrator, unless explicitly consented by the other party, cannot be of a person whose appointment would be seen as if the appointing party is becoming a judge in his or her own cause. As a corollary, the first question is answered in the negative i.e. the appellant cannot appoint one of its employees as its arbitrator. By purportedly appointing its employee who had represented it in the proceedings under clause 22.1, the appellant had failed to appoint an arbitrator for the purposes of the Act of 1940.

15. Next, whether the learned *Single Judge in Chambers*, had the power to appoint a sole arbitrator in the circumstances? We have already noted above that the Courts cannot interfere in the arbitration proceedings, except as provided by the *Act of 1940*. What if there is a dispute and an arbitration clause in the agreement, but one party either refuses to appoint its arbitrator or creates a situation which has a similar effect, which is also reflected from the case before us. What if one of the parties, in order to defeat the intent to refer disputes to an arbitrator, nominates itself or acts in any other manner knowing that the other party will object, thus giving rise to a stalemate? What are the powers vested in a Court to salvage such a situation and give effect to the intention of the parties to resolve disputes through the process of arbitration. The provisions of the *Act of 1940* provides for the scope of interference by a Court in such circumstances by appointing an arbitrator. *Sections 8 and 9* vests powers in a Court to interfere under specific circumstances as enumerated therein. *Section 8* deals with three situations in which a Court may appoint an arbitrator or arbitrators or an umpire i.e. (i) when an arbitration agreement provides that arbitrators are to be appointed with consent of the parties and all of them do not concur in the appointments, (ii) if an appointed arbitrator neglects, refuses to act or dies and the vacancy is not supplied, and, (iii) where the parties or the arbitrators are required to appoint an umpire and do not appoint him/her. The three situations enumerated in section 8 are, therefore, not relevant in the present case.

16. *Section 9* is attracted in the case before us and, therefore, it is necessary to summarize its scope and ingredients as follows;

i. The section will apply when an arbitration agreement provides the reference made to two arbitrators, one to be appointed by each

party. This is what is provided in clause 22.2 of the Agreement.

ii. Clause (a) empowers the party which has originally appointed an arbitrator to appoint another person if the earlier appointed arbitrator neglects, refuses to act, or is incapable of acting or dies. In the present case this is not relevant.

iii. Clause (b) envisages a situation where one party fails to appoint an arbitrator, either originally or by way of substitution. For such an event to happen the other party is required to serve a notice in writing requiring the party to make an appointment and if the latter fails to do so "for fifteen clear days" then in such an event there may be two courses to pursue. Firstly, the party which has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator, or secondly, the Court may set aside such a sole arbitrator, and either give sufficient time to the defaulting party to appoint an arbitrator "or pass such order as it thinks fit".

17. *Sections 8 and 9*, as discussed above, vests ample powers in a Court to interfere and appoint an arbitrator in situations as mentioned therein. In the present case, provisions of *section 9 and clause (b)* thereof

are attracted. The appellant failed to appoint its arbitrator, the respondent served a notice in writing and appointed, vide notice dated 01-06-2012, its arbitrator namely, *Lt. General (Rtd) Syed Abdul Ahad Najmi*. The notice is not denied or disputed and the appellant failed to appoint its arbitrator within the time stipulated under *Section 9 (b)* of the *Ac of 1940*. The respondent, therefore, had become entitled to appoint its arbitrator as a sole arbitrator and his award would have been binding as if he was appointed with the consent of the other party.

18. The purported belated appointment by the appellant, of its employee, who had represented it on the panel constituted under clause 22.1, was a nullity and certainly not the appointment of an arbitrator as intended under *clause 22.2*. The *Single Judge in Chambers* allowed sufficient time to the appellant to appoint an arbitrator but its insistence on having its employee appointed as a purported arbitrator was rightly rejected. The employee, particularly because he had represented the appellant during proceedings under *clause 22.1*, could neither be treated nor considered an arbitrator, as such a purported appointment was void and a nullity. The learned *Single Judge*, in such circumstances, pursuant to powers vested under the proviso to *section 9 of the Act of 1940*, appointed *Mr Justice (rtd) Munir A. Sheikh, retired judge of the Supreme Court*, as the sole arbitrator. In the light of the unreasonable and inflexible stance taken by the appellant, the course adopted by the learned *Single Judge* was fair, just and in accordance with the powers vested under the *Act of 1940*. The second question is, therefore, answered in the affirmative that the ingredients of *clause (b)* having been fulfilled, the Court had the powers under *section 9* to appoint a sole arbitrator and, thereby, give effect to the intention of the parties to settle and decide disputes through the process of arbitration. We also gave another opportunity to the appellant to appoint its arbitrator but despite affording sufficient time the learned counsel informed us that he has been instructed

to insist that its arbitrator would be *Col. Retd. Ijaz Hussain*, an employee who had represented the appellant in proceedings under *clause 22.1* and which had admittedly failed. As noted above, this purported appointment was as if no appointment was made, being void and a nullity. The inflexible stance of the appellant, besides being unreasonable, thwarts the unambiguous intention of the parties gathered from the plain reading of *clauses 22.1 and 22.2* of the agreement. This is an infringement of the Agreement and defeats the purpose and object of arbitration.

19. In the light of what has been discussed above, no legal infirmity has been pointed out to warrant interference with the impugned order, which is fair, just and in accordance with the jurisdiction and powers vested in the Court under the provisions of the *Act of 1940*. The instant appeal is without merit and, therefore, dismissed.

20. Lastly, we would like to observe that the tendency by statutory authorities and government departments to create impediments, either inadvertently or knowingly, in giving effect to arbitration clauses has been consistently deprecated and taken unfavorably by superior courts. The conduct of the appellant in the present case is an illustration. It would be apt to quote the observations made by the august Supreme Court in the case titled as *LAHORE DEVELOPMENT AUTHORITY versus KHALID JAVED CO.* (*1983 SCMR 718),* as follows:-

> *"It is high time that Government Departments should accept more gracefully the awards made by forums selected by themselves and manned by their own officers. They*

would be well advised if they took greater pains and more care than they are doing at present in preparing and prosecuting their case before the Arbitrators rather than in subsequently expending their time, energy and efforts on fruitless objections and appeals against the awards made against by, them, for which they are mostly themselves to blame".

21. The above observations apply in the present case as well. We expect that both the appellant and the respondent will uphold the sanctity of their commitments and undertakings, particularly appointing persons as arbitrators who are independent, neutral and impartial rather than making the proceedings a sham. We further expect the parties to gracefully resolve their disputes without further delay.

(Noor ul Haq N. Qureshi)
Judge

(Athar Minallah)
Judge

Announced in the open Court on _____.

Judge. **Judge.**

Approved for reporting.

Asad K/*