JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.116/2016
Pak Gulf Construction Private Limited and another
Versus
Abdul Hamid Baig and another

Date of Hearing: 14.12.2018
Appellants by: Barrister Talha Ilyas Sheikh,
Respondents by: Barrister Junaid Zamurrad Khan

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellants, Pak Gulf Construction (Pvt.) Ltd. etc., impugn the judgment and decree dated 05.10.2016, passed by the Court of the learned Civil Judge, Islamabad, whereby respondent No.1's application under sections 14 and 17 of the Arbitration Act, 1940 ("the 1940 Act") was allowed and the arbitration award dated 30.07.2015 was made a rule of Court.

2. The facts leading to the filing of the instant appeal are that on 07.07.2008, appellant No.1 and respondent No.1 entered into an agreement **("First Agreement")**, whereby the former agreed to sell Unit No.306 on the third floor of Centaurus Residencia-B, having an approximate size of 2019 square feet, to the latter for a total sale consideration of Rs.2,26,55,528/-. Respondent No.1 had paid an amount of Rs.46,71,106/- as down payment.

3. The salient features of the said agreement were that respondent No.1 was under an obligation to pay the remaining sale consideration in accordance with the payment schedule annexed to the said agreement. Failure on respondent No.1's part to pay the installments in accordance with the said payment schedule gave appellant No.1 the right to terminate the agreement after a grace period of six weeks from the date on which the payment of the installment was due. This is provided in clause 15.1 of the said agreement. Clause 16.1 provided that should an event of *force majeure* occur that will delay the completion date, appellant No.1 shall promptly notify respondent No.1 of such an event and give a new completion date. Clause 16.2 provided that respondent No.1

shall not stop paying the installments of the sale price under any circumstances.

4. The completion date of the building in which Unit No.306 is located was agreed to be 31.12.2010. Clause 7.1 of the said agreement provided that appellant No.1 had the right to extend the completion date by a maximum of six months under intimation to respondent No.1 prior to 31.12.2010. Clause 7.2 of the said agreement provided *inter-alia* that in the event appellant No.1 is unable to hand over possession of Unit No.306 to respondent No.1 by the completion date or the extended date in terms of clause 7.1 *ibid*, appellant No.1 shall pay to respondent No.1 0.3% of the received amount per month until the completion of the building and the transfer of possession of the said Unit to respondent No.1. Since the genesis of the dispute between appellant No.1 and respondent No.1 is clause 7.2 of the said agreement, the same is reproduced herein below for the purpose of clarity:-

> ***"Subject to the terms of this Agreement, in the event PGCL is unable to complete the Centaurus and handover possession of the Unit to the Purchaser by the Completion Date (or as extended per Article 7.1 hereinabove), PGCL shall pay to the Purchaser (as the Purchaser's exclusive remedy for delay in completion) 0.3% of the received amount to date, per month to the Purchaser until the completion of the Centaurus and the transfer of possession of the Unit to the Purchaser".***

5. On 15.07.2008, appellant No.1 and respondent No.1 are said to have entered into another agreement ("Second Agreement") for the sale of Unit No.306. In this agreement, the price of the said unit was stated to be Rs.1,79,84,422/-. This agreement does not contain a schedule of payment and does not make any reference to the First Agreement for Unit No.306. A unique feature of this agreement was that Clause 2.2 thereof provided that the purchaser was entitled to a discount of 20% in the sale price if the payment of the sale price was made in full in a single installment. It was also clarified that this discount would reduce to sale price to Rs.1,79,84,422/-.

6. On 15.07.2008, appellantNo.1 and respondent No.1 entered into yet another agreement ("Third Agreement") whereby the former agreed to sell Unit No.101 on the sixth floor of Centaurus Residencia-B having an approximate size of 1147 square feet to the

latter for a total sale consideration of Rs.1,35,58,904/-. Respondent No.1 had paid an amount of Rs.54,00,000/- (i.e. 38.4% of the sale price) as the down payment. Unlike the Second Agreement, this agreement provided for a payment schedule requiring respondent No.1 to pay the balance amount to be paid in two installments of Rs.43,29,452/- each by 01.01.2009 and 01.07.2009.

7. Other than the variations mentioned above, the remaining terms and conditions of the three agreements were almost the same. All the said three agreements contained arbitration clauses providing for the disputes between appellant No.1 and respondent No.1 to be settled in accordance with the provisions of the 1940 Act. It was also agreed that the award of the Arbitrator would be final and binding.

8. Vide letter dated 09.09.2013, appellant No.1 terminated the First Agreement. The position taken by appellant No.1 in the said letter was that respondent No.1 had failed to pay the outstanding sale consideration. Appellant No.1 deducted 25% of the amount paid by respondent No.1 and asked him to collect the remaining Rs.80,03,330/-.

9. On 10.09.2017, respondent No.1 filed an application under section 20 of the 1940 Act before the learned Civil Court praying for the disputes arising from and related to the Second and Third Agreements to be referred to arbitration. Respondent No.1's stance was that the Second Agreement had superseded the First Agreement. Vide order dated 12.06.2014, the learned Civil Court called upon the contesting parties to suggest names for the appointment of an Arbitrator. Since the contesting parties were not able to arrive at a consensus, the learned Civil Court, vide order dated 22.07.2014, appointed Ch. Qaiser Nazeer Sipra, Advocate, as the sole Arbitrator. On 30.07.2015, the learned sole Arbitrator rendered the arbitration award. The learned sole Arbitrator granted all the claims made by respondent No.1 against appellant No.1.

10. On 02.09.2015, the learned sole Arbitrator filed the said arbitration award in the Court. Vide order dated 02.09.2015, the learned Civil Court directed notices to be issued to the parties. The order sheet of the learned Civil Court reveals that on 19.09.2015, the

clerks of the learned counsel for the contesting parties tendered appearance before the Court. On the said date, the matter was adjourned due to a strike being observed by the lawyers. On 14.10.2015, the learned counsel for the contesting parties tendered appearance before the learned Civil Court. On the said date, the matter was adjourned to 19.10.2015 for further proceedings. On 16.10.2015, appellant No.1 filed its objections to the said award.

11. Vide impugned judgment and decree dated 05.10.2016, the learned Civil Court allowed respondent No.1's application under sections 14 and 17 of the 1940 Act and dismissed appellant No.1's objections to the said award. Consequently, the learned Civil Court passed a judgment and decree in terms of the said award. The said judgment and decree has been assailed by the appellants in the instant appeal.

12. Learned counsel for the appellants submitted that respondent No.1 did not make payment for Units No.306 and 101 in accordance with the payment schedule annexed to the First and the Third Agreement; that appellant No.1 had issued notices to respondent No.1 calling upon the latter to make payments in accordance with the agreed schedule; that as regards Unit No.306, the payment of the first installment was delayed by one year, the second installment by 490 days and the third installment by 1120 days; that appellant No.1 had called upon respondent No.1 to make timely payments through notice dated 08.08.2013; that appellant No.1 had terminated the First Agreement strictly in accordance with clause 15.4 thereof; that the learned sole Arbitrator as well as the learned Civil Court erred by not appreciating that the delay in the completion of the building entitled respondent No.1 only to payment in terms of clause 7.2 of the said agreement provided respondent No.2 made the payments in accordance with the agreed payment schedule; that the completion date could have been extended by appellant No.1 due to *force majeure*; that the learned sole Arbitrator by allowing respondent No.1's entire claim acted beyond his mandate as well as the terms and conditions of the three agreements; and that the said award is devoid of reasons, and therefore, invalid. Learned counsel

prayed for the appeal to be allowed and for the impugned judgment and decree dated 05.10.2016 to be set-aside.

13. On the other hand, learned counsel for the respondents submitted that the impugned judgment and decree does not suffer from any illegality; that after the First Agreement was executed, appellant No.1 made an offer to respondent No.1 that if he purchased a second apartment, he would be given a discount on the price of Unit No.306; that consequently, appellant No.1 and respondent No.1 entered into the Third Agreement for the purchase of Unit No.101 for an amount of Rs.13.5 million; that the Second Agreement was executed between appellant No.1 and respondent No.1 on 15.07.2008, whereby the sale price of Unit No.306 was reduced to Rs.17.98 million; that for all intents and purposes, the First Agreement was superseded by the Second Agreement; that both Units No.306 and 101 were to be handed over to respondent No.1 by 31.12.2010; that the said deadline had not been extended at any material stage; that failure on appellant No.1's part to hand over the said Units by the said date entitled respondent No.1 for payment of compensation in terms of clause 7.2 of the said agreements; that for Unit No.306, respondent No.1 had paid an amount of Rs.10.6 million up to 01.08.2012 and for Unit No.101, Rs.10.2 million had been paid up to 27.05.2011; that vide letter dated 02.05.2012 (Exh.P/8), respondent No.1 had called upon appellant No.1 to adjust the remaining sale price of the said Units against the compensation payable to respondent No.1 in terms of clause 7.2 of the said agreements; that respondent No.1 had stopped making the remaining payment since the price of the said Units had been increased; that respondent No.1 had refused to receive bank draft dated 24.07.2013 for Rs.3 million for Unit No.306 and bank draft dated 24.07.2013 of Rs.3,00,000/- for Unit No.101; that on 21.08.2013, a legal notice was sent on respondent No.1's behalf to appellant No.1 requiring the payment of compensation for the delay in the handing over of the said Units; that although default notices had been sent by appellant No.1 to respondent No.1, the former had received payments from the latter even after the issuance of such

notices; and that the termination of the First Agreement by respondent No.1 on 09.09.2013 was wholly unlawful.

14. Learned counsel for the respondents further submitted that the objections to the award were filed by appellant No.1 beyond the limitation period of 30 days prescribed in Article 158 of the Schedule to the Limitation Act, 1908; that the Court had given notice of the filing of the award on 02.09.2015, whereas the objections to the award were filed on 16.10.2015, i.e. with a delay of 14 days; and that appellant No.1 had not bothered to file an application for condonation of delay along with its time barred objections. Learned counsel for the respondents prayed for the appeal to be dismissed.

15. Learned counsel for the appellants rejoined with a well prepared brief on the case and submitted that the appellants had made no offer to respondent No.1 that if the latter purchased a second unit in the building, the price of Unit No.306 would be reduced; that the appellants also denied the execution of the Second Agreement with respondent No.1; that the Second Agreement produced as **Exh.P/2** was materially different from the First and the Third Agreements for Units No.306 and 101, respectively; that the Second Agreement does not bear any date or the names of any witnesses; that although the Third Agreement for Unit No.101 was executed on the very same date on which the Second Agreement is alleged to have been executed between appellant No.1 and respondent No.1, yet appellant No.1's stamps and signatories on the said agreements are different; and that Second Agreement is a forgery and could not have formed the basis of the arbitration award in respondent No.1's favour.

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

17. The facts leading to the filing of the instant writ petition are set out in sufficient detail in paragraphs 2 to 11 above and need not be recapitulated.

18. The learned Arbitrator held that respondent No.1 had failed to comply with its obligations under the agreements. Respondent No.1 was held to be entitled *"to get back the money already deposited*

along with interest at the rate of 23% per annum from January 2011 till the final settlement." **Furthermore, respondent No.1 was held to be entitled to loss of rent amounting to Rs.83,53,800/-; damages amounting to Rs.20,00,000/-; and litigation costs amounting to Rs.10,00,000/-.**

19. The vital questions that need to be determined are whether, after the execution of the First Agreement for the purchase of Unit No.306, the parties to the said agreement had agreed that if respondent No.1 purchased a second unit, the price of Unit No.306 would be reduced from Rs.2,26,55,528/- to Rs.1,79,84,422/-, and in pursuance of this agreement, the Second Agreement for Unit No.306 with the reduced value and the Third Agreement for the purchase of Unit No.101 were executed between appellant No.1 and respondent No.1; and whether on account of appellant No.1's inability to hand over possession of Units No.306 and 101 by 31.12.2010, respondent No.1 was entitled to seek an adjustment in the remaining sale price of the said Units against the compensation payable by appellant No.1 to respondent No.1 in terms of clause 7.2 of the said agreements.

20. Before answering the said questions, I deem it appropriate to deal with the contentions of the learned counsel for the respondents that appellant No.1's objections to the award dated 16.10.2015 were time barred.

21. Section 14(1) of the 1940 Act provides *inter-alia* that when an Arbitrator has made his award, he shall sign it and give notice in writing to the parties of the making and signing thereof. Section 14(2) of the 1940 Act requires an Arbitrator to file the award along with any depositions and documents in the Court at the request of any party to the arbitration agreement or if so directed by the Court. Furthermore, the said section obligates the Court to give notice to the parties of the filing of the award. The objects of section 14(1) and (2) of the 1940 Act have been well explained by the Hon'ble Mr. Justice B.Z. Kaikaus (as he then was) in the case of *Mahboob Alam Vs. Mumtaz Ahmad (PLD 1960 Lahore 601),* in the following terms:-

> ***"The object of the provision relating to notice of the making of the award is only to inform the parties that the award has been made so that they may file an application for the filing of the award. Such an***

application has to be filed within ninety days of the service of notice of the making of the award under Article 178 of the Limitation Act. Similarly, the object of giving notice of the filing of the award is to enable the parties to file an application for the setting aside of the award. Such an application has under Article 158 to be filed within thirty days of the service of the notice of the award."

22. For an application to set-aside an award or to get an award remitted for reconsideration, Article 158 of the First Schedule to the Limitation Act, 1908, provides a limitation period of 30 days from the date of the service of the notice of the filing of the award. The short period of limitation fixed for filing objections indicates the legislature's intention to fix a definite time-limit for challenging the validity of the award and for providing an expeditious method of the award being translated into a judgment. Although section 14(1) of the 1940 Act requires the Arbitrator to give a *"notice in writing"* of the making of the award to the parties, section 14(2) of the said Act requires the Court to *"give notice"* to the parties of the filing of the award. It is my view that if an award is filed in the Court in the presence of the parties or their counsel or representatives, they would be deemed to have been given notice of the filing of the award. The purpose of giving notice as to the filing of the award is to ensure that the parties have knowledge as to its filing and that the objections if any to the award are to be filed within a period of 30 days of such knowledge. A party in whose presence the award was filed in the Court would obviously have knowledge as to its filing. For the Court to issue a notice to such a party as to the filing of the award would be a futile exercise. Such a party cannot claim that the limitation period for filing of objections to the award had not commenced, because the Court had not issued a notice under section 14(2) of the 1940 Act regardless of the fact that he was well aware of the filing of the award. For such a party (i.e. a party in whose presence the award was filed in the Court), the limitation period for filing objections to the award would commence from the date when the award was filed in the Court. This would also be true where the award is filed in the Court in the presence of a party's counsel or representatives. In holding so, I derive guidance from the law laid down in the following judgment:-

(i) In the case of Ashfaq Ali Qureshi Vs. Municipal Corporation, Multan (1985 SCMR 597), it has been held as follows:-

> ***"9. Apparently, the prevalent view is that as the provision of the law is meant to enable the parties to know that the award has been filed in Court so that they may file their objections, if any, within the time prescribed, a formal compliance in strict conformity with the relevant provision of law is not to be insisted upon when substantial compliance has been made of it. In keeping with this view where the fact of filing of the award by the Arbitrator had already been in the knowledge of the parties and their counsel had in response to notice issued by the Court appeared and taken time to file their objections, as is in the present case, an insistence on a formal service of notice under Order XXIX would be a mere technicality."***

(ii) In the case of Abdul Waris Vs. Javed Hanif (1983 SCMR 716), the provisions of section 14(2) of the 1940 Act were interpreted with reference to the period of limitation prescribed for filing of objections to the award under Article 158 of the Limitation Act. In the said case, the award was filed in Court on 31.03.1981 in the presence of the petitioner's counsel and the matter was adjourned to 05.05.1981 for filing objections to the award. As no objections were filed to the award, it was made a rule of Court. The period of 30 days prescribed for filing of the award in that case was held to be applicable from the date when the award was filed in Court in the presence of the counsel for the petitioner.

(iii) In the case of Mian Asmat Shah Vs. Mian Faiq Shah (PLD 2012 Peshawar 181), it was held inter alia as follows:-

> ***"12. As per order sheets of the trial Court, when the award was filed in Court, the parties were present in Court but the respondents waited for a compromise and when the matter of compromise could not reach to its logic, then they filed objection applications beyond the prescribed period of 30 days. The respondents were in the knowledge of the decision made by arbitrators and they were required to have filed the objection applications within time. The question that no notice under section 14(2) of Arbitration Act was served on them is merely a technical ground, having no force in the circumstances of instant case. ... The learned appellate Court again has fallen into error to reverse the findings of the trial Court on the ground that no notice was given to the parties about filing of award. As stated above, when both the parties were present at the time of filing of the award, then there was no need of issuing a notice to the respondents."***

(iv) In the case of *"Parveen Vs. Jehana" (2007 CLC 1877),* it was held that according to Article 158 of the First Schedule to the

Limitation Act, 1908, an applicant was bound to file objections to an arbitration award within a period of 30 days from the date of service of notice of filing of the award, or at least from the date of having notice that the award had been filed.

23. In the event the award is filed in the Court in the absence of the parties or their counsel or representatives, the limitation period for filing objections to the award under section 30 of the 1940 Act would commence from the date of the service of such a notice from the Court under section 14(2) of the said Act. As regards the case at hand, the order sheet of the learned Civil Court reveals that on 02.09.2015, the award was filed in the Court by the learned Arbitrator. On the said date, the Court directed notices to be issued for the intimation of the parties. For the purpose of clarity, the said order dated 02.09.2015 is reproduced herein below:-

> ***"Award received. Arbitrator in person. Notice be issued for the intimation of parties. Now to come up on 12.09.15."***

24. The said order shows that the award was not filed in the presence of the parties or their counsel. Since the parties were not present when the award was filed, the Court issued a notice to the parties for their intimation. In these circumstances, the limitation period for filing objections to the award would commence from the date on which appellant No.1 received notice from the Court as to the filing of the award. There is nothing on the record to show as to when notice regarding the filing of the award was received by appellant No.1. Appellant No.1's objections to the arbitration award are also silent as to the date on which notice with regard to the filing of the award had been received. Nevertheless, on 12.09.2015, since the learned Judge / Presiding Officer was on leave, the matter was adjourned to 19.09.2015. On 19.09.2015, although the lawyers were on strike, appearance was tendered before the Court by the clerks of learned counsel for the contesting parties. If this date (i.e. 19.09.2015) is considered to be the date on which appellant No.1 gained knowledge as to the filing of the arbitration award, the limitation period of 30 days for filing objections to the award would be considered to have commenced from the said date. Since the objections to the award were filed by appellant No.1 on 16.10.2015,

the learned Civil Court was not correct in holding that appellant No.1's objections were time barred. The bare perusal of the said order dated 02.09.2015 shows that learned Civil Court was also not correct in holding that *"the award was submitted before Court on 02.09.2015 in the presence of the respondents"*. As mentioned above, when the learned Arbitrator filed the award, the parties were not present in the Court. Therefore, it is safe to hold that appellant No.1's objections to the award were not time barred.

25. As regards the merits of the case, respondent No.1, in his statement of claim, filed before the learned Arbitrator clearly pleaded the factum as to the execution of the Second Agreement whereby the sale consideration for Unit No.306 was said to have been reduced from Rs.2,26,55,528/- to Rs.1,79,84,422/-. Appellant No.1, in its written reply, did not deny the execution of the said agreement. The position taken by appellant No.1 regarding the execution of the Second Agreement (Exh.P/2) was in the following terms:-

> ***"2. Para No.2 is incorrect as stated, false frivolous hence vehemently denied. In fact after signing the first agreement the claimant/Petitioner started to develop relations with the employees of the Respondent's company in order to get undue benefit. The petitioner succeeded in his illegal design and prepared subsequent illegal agreement in connivance with said employee clandestinely without the approval and knowledge of Board of Directors of the company, therefore, the said subsequent Agreement is void, ab-initio and ineffective upon the rights of the Respondents Company since its inception."***

26. The said written reply was filed by appellant No.1 before the learned Arbitrator in February 2014. If the Second Agreement had been executed unauthorizedly, it does not appeal to reason as to why till date, appellant No.1 has not instituted a suit for the cancellation of the same. Therefore, I cannot bring myself to disagree with the learned Arbitrator in not holding that the said agreement was executed as a result of connivance between respondent No.1 and an employee of appellant No.1, let alone holding that the learned Arbitrator had misconduct himself by returning a finding on the said issue in respondent No.1's favour.

27. As regards the question as to whether respondent No.1 was entitled to be compensated in terms of clause 7.2 of the agreements

dated 07.07.2008 and 15.07.2008, it is an admitted position that appellant No.1 was unable to hand over possession of Units No.306 and 101 to respondent No.1 by the agreed completion date of 31.12.2010. It is also an admitted position that at no material stage, was the said completion date extended by a maximum period of six months under intimation to respondent No.1 in terms of clause 7.1 of the said agreements. In no uncertain terms, had appellant No.1 bound itself by clause 7.2 of the said agreements to pay 0.3% per month of the amount received from respondent No.1 in the event appellant No.1 is unable to hand over possession of the purchased Units to respondent No.1 by the completion date. Such payment was to continue until the transfer of possession of the purchased Units to respondent No.1. Appellant No.1 wants to avoid this obligation by taking the position that respondent No.1 had not paid the sale price for the said Units in accordance with the agreed payment schedule; and that appellant No.1 was entitled to extend the completion date as provided in the agreement due to *force majeure*. At no material stage, did respondent No.1 declare or notify respondent No.1 that the completion date would be delayed or extended due to *force majeure.*

28. It is an admitted position that when the disputes and differences developed between the parties to the three agreements, respondent No.1 had not made payment for Unit No.101 in accordance with the payment schedule annexed to the Third Agreement. As regards the Second Agreement for Unit No.306, if respondent No.1's plea that this agreement had superseded the First Agreement is to be accepted, then it must be appreciated that the Second Agreement did not provide for making payments in installments. As mentioned above, Clause 2.2 of the Second Agreement provided that the purchaser was entitled to a discount of 20% in the sale price if the payment of the sale price was made in full in a single installment. It was also clarified that this discount would reduce to sale price to Rs.1,79,84,422/-. Now, in the Second Agreement, the sale price as well as the discounted price of Unit No.306 is stated to be Rs.1,79,84,422/-. If this was a mistake, respondent No.1 could have sought its rectification under the

principles enshrined in Section 31 of the Specific Relief Act, 1877. There is no evidence on the record to indicate that the payment schedule which was a part of the First Agreement had also been made applicable to the Second Agreement. This was not a practical possibility, because the payment schedule under the First Agreement was with respect to the sale price of Rs.2,26,55,528/- for Unit No.306, whereas the sale price for the said unit under the Second Agreement was Rs.1,79,84,422/-. There is also no evidence on the record to reflect an agreement between appellant No.1 and respondent No.1 that if respondent No.1 decided to purchase a second unit from appellant No.1, the price of Unit No.306 would be reduced from Rs.2,26,55,528/- to Rs.1,79,84,422/-. Be that as it may, it is an admitted position that respondent No.1 had not paid the reduced price of Unit No.306 either in lump sum or in installments by the agreed completion date of 31.12.2010.

29. Respondent No.1's stance was that since appellant No.1 was bound to compensate respondent No.1 in terms of clause 7.2 of the said agreements, the remaining amount of the sale price for the said units payable by respondent No.1 should have been adjusted against the compensation payable by appellant No.1. Now, none of the agreements have any provision allowing such an adjustment. On the contrary, clause 16.2 of the agreements provides that the purchaser shall not stop paying installments of the sale price under any circumstances. Respondent No.1 unilaterally stopped paying the installments in the hope that the amount payable by him would be adjusted against the amount payable by appellant No.1 in terms of clause 7.2 of the said agreements. A purchaser cannot stop making payments in accordance with the agreed schedule for payments and expect a developer/seller to complete the construction and hand over possession of the purchased units by an agreed date. A developer/seller's obligation to hand over possession of the completed Units by an agreed date is pre-conditioned on timely payments of the sale price being made by the purchaser.

30. I am of the view that respondent No.1 could have claimed compensation from appellant No.1 in terms of clause 7.2 of the said

agreements provided he strictly adhered to the agreed payment schedule. Respondent No.1 would have been well within his rights to have claimed compensation from appellant No.1 due to the latter's failure to have completed and handed over possession of Units No.306 and 101 to respondent No.1 by the agreed completion date of 31.12.2010 provided respondent No.1 had committed no default in making timely payments of the sale price in accordance with the agreed schedule. Failure on respondent No.1's part in adhering to the agreed payment schedule, in my view, disentitled him from claiming compensation due to the delay on appellant No.1's part in completing the said units by the agreed completion date, i.e. 31.12.2010.

31. Having stopped the payment of the sale price for the said Units in accordance with the agreed payment schedule, respondent No.1 exposed himself to the risk of the termination of the agreement in accordance with clause 15 of the said agreements. As mentioned above, clause 15.1 of the said agreements provided that if the purchaser does not pay any installment of the sale price on or before the due date specified in the schedule to the agreements, appellant No.1 would have the right to terminate the agreement after giving a grace period of six weeks. Under clause 15.2 of the said agreements, appellant No.1 is required to issue three notices to the purchaser before terminating the agreements in accordance with clause 15.1. There is no denying the fact that vide notices dated 22.12.2009, 13.04.2010, 23.08.2013 and final notice dated 03.09.2013, appellant No.1 called upon respondent No.1 to pay the outstanding amount for Unit No.306. As per the final notice dated 03.09.2013, the overdue amount against Unit No.306 came to Rs.1,19,83,755/-. Since the said amount was not paid by respondent No.1, on 10.09.2013 appellant No.1 terminated the agreement dated 07.07.2008 regarding Unit No.306 and forfeited 25% of the amount received from respondent No.1. During the course of the hearing, learned counsel for the appellants submitted that he was under instructions to state as a gesture of pure goodwill that the appellants were willing to return the entire amount paid by respondent No.1 for Unit No.306 without any deduction.

32. In order to determine whether there was an error which is apparent on the face of the award, it has to be appreciated that respondent No.1, in its statement of claim, had prayed for the award of Rs.61.1 Million as damages and compensation against appellant No.1. This amount included Rs.20,871,106/- paid in installments for the two units; interest amounting to Rs.47,771,173/- on the amount paid by respondent No.1 for the two units; loss of rent for both the units for a period of four years with a 10% increase; Rs.10,00,000/- as legal and other expenses; and Rs.40,00,000/- for the mental torture, agony, humiliation and stress suffered by respondent No.1. As against respondent No.1's claim, the learned arbitrator in his award held that respondent No.1 was entitled to the return of the amount paid by him for the two units along with interest at the rate of 23% per annum since January, 2011. Furthermore, respondent No.1 was held to be entitled to Rs.83,53,800/- as loss of rent; Rs.2 million as damages; and Rs.1 million as litigation fee.

33. Since respondent No.1 had not paid the sale price for Unit No.101 in accordance with the payment schedule annexed to the Third agreement, and for unit No.306 in accordance with the terms of the Second Agreement, he is not entitled to the return of the partial payment made by him for the said units without any deduction, along with interest or loss of rent, etc. Nevertheless, learned counsel for the appellants had submitted that as a gesture of pure goodwill, the appellants were ready to return the said amount without any deduction. On account of the said default on respondent No.1's part, he was also not entitled to compensation under clause 7.2 of the Second or Third Agreements. Even if it is assumed that bank draft dated 24.07.2013 for Rs.3 million for Unit No.306 and bank draft dated 24.07.2013 of Rs.300,000/- for Unit No.101 had been accepted by appellant No.1, this would also not remedy respondent No.1's default in paying the sale price for the said units by the agreed completion date. The mere fact that appellant No.1 had accepted payments of installments beyond the completion date would not have the consequence of entitling respondent No.1 to the payment of compensation in terms of clause

7.2 of the agreements or the refund of the partial payment along with interest and loss of rent.

34. The glaring error on the face of the award is that the learned arbitrator simply ignored clause 16.2 of the agreements which provided that the purchaser shall not stop paying installments of the sale price under any circumstances. By not appreciating that respondent No.1 had not made payments for Units No.306 and 101 in accordance with the terms of the Second and Third Agreements, respectively, the learned arbitrator committed "misconduct" (as understood in arbitration parlance) by holding that respondent No.1 was entitled to the return of the partial payments made for the said units along with interest and loss of rent, etc. This error on the face of the award has rendered the said award as not sustainable. Consequently, the instant appeal is allowed with no order as to costs; appellant No.1's objections under Section 30 of the 1940 Act are allowed; and the impugned judgment and decree dated 05.10.2016 passed by the learned Civil Court is set-aside.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**