JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.88 of 2015
National Highway Authority
Versus.
M/s China Petroleum Engineering Corporation

Date of Hearing:	**22.03.2016**
Appellant by:	**Mr. Zahid Idrees Mufti, Advocate**
Respondent by:	**Syed Ishtiaq Haider, Advocate**

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 39 of the Arbitration Act, 1940 ("the 1940 Act"), the appellant, National Highway Authority, impugns the judgment & decree dated 20.04.2015, passed by the Court of learned Civil Judge (West) Islamabad, dismissing the appellant's Objection Petition under Sections 30 and 33 of the 1940 Act against the arbitration award dated 25.06.2007, and making the said award a rule of Court.

2. The facts essential for the disposal of this appeal are that on 06.04.1993, the appellant and the respondent (M/s China Petroleum Engineering Corporation) entered into a contract for the construction of additional carriageway (Chablat - Nowshera, Section N-5) ("the Contract"). Under the terms of the said contract, M/s A.A. Associates, Planners and Consulting Engineers was appointed as the Engineer for the Project. Under the terms of the Contract, the respondent and the Engineer worked out a Job-Mix Formula ("JMF"). The contract provided for the use of an asphalt additive called Cellulose Fibers in the asphalt base course mix. Subsequently, after discussions between the appellant, the respondent and the Engineer, it was decided not to add Cellulose Fibers in the asphalt base course mix. Therefore, the JMF jointly worked out by respondent and the Engineer did not include the use of Cellulose Fibers.

3. Vide letter dated 11.06.2001, the appellant instructed its officers to recover an amount of Rs.31.200 Million from

the respondent for not using Cellulose Fibers in the asphalt base course mix in the road works. Aggrieved by the said instructions of the appellant, the respondent, in accordance with clause 67 of the contract, raised this dispute with the Engineer vide letters dated 11.08.2001, 30.08.2001 and 14.09.2001. The Engineer vide letter dated 02.10.2001 expressed its inability to give a decision on the matter. As the Engineer did not give any decision, the respondent, vide notice dated 16.01.2002, requested the appellant to have this matter resolved through arbitration in accordance with clause 67 of the Contract. The appellant was also requested to concur in the appointment of a sole arbitrator for this purpose. At this stage, it is pertinent to reproduce herein below the said clause 67 of the contract:-

> ***"67. Settlement of Disputes***
>
> ***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 give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant 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 after the 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 notification 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 a dispute has been given in accordance with Sub-Clause 67.1, arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifth-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, whether or not any 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, and 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 put 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 a 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-Clauses 67.1 and

67.2 shall not apply to any such reference." (emphasis added)

4. These were the circumstances in which the respondent filed W.P.No.2978/2001 before the Hon'ble Lahore High Court, Rawalpindi Bench, against the appellant's said notice dated 11.06.2001. The prayer-clause in the said writ petition is reproduced herein below:-

> "*It is, therefore, prayed that the impugned order dated 11.06.2001 be declared to be void, illegal, without lawful authority and consequently of no legal effect. It is further prayed that the respondent be restrained from making any recovery from the petitioner on the basis of the impugned order till final order on this petition."*

5. Vide order dated 24.09.2001, the Hon'ble High Court restrained recoveries from the respondent until the next date. This matter was adjourned on a number of occasions without specifically extending the operation of the said ad-interim relief. However, on 25.02.2004, it was ordered that the operation of the stay order will continue till the decision of the writ petition. Vide order dated 30.03.2004, the said writ petition was disposed of in the following terms:-

> *"Mian Saif-ur-Rehman, Advocate, learned counsel for the respondent- National Highway Authority states that the respondent National Highway authority will strictly follow the terms of the contract. Their right of deduction will be subjected to a decision by the arbitrator. Meanwhile, no recovery shall be effected from the petitioners. In case the matter is not referred to the arbitration the National Highway authority can proceed for the recovery, certainly, in accordance with the terms of the contract. Disposed of with agreement of the learned counsel for the parties."*

6. On 28.04.2004, the respondent filed an application under Section 8 of the 1940 Act before the Court of learned Civil Judge Islamabad, praying for the appointment of an arbitrator in accordance with the provisions of the 1940 Act as envisaged in the contract dated 06.04.1993. The dispute which the respondent wanted to be referred to arbitration was

whether Rs.31.200 Million or any lesser amount was recoverable by the appellant from the respondent on account of not using Cellulose Fibers in the asphalt base course mix in the road works. Vide order dated 22.04.2006, the learned Civil Court, appointed Brig. Safdar Hussain Awan as a sole arbitrator and referred the matters in dispute between the appellant and the respondent for his determination. The learned sole arbitrator is said to have received the said order of the learned civil court on 10.05.2006. Vide a detailed and well reasoned arbitration award dated 25.06.2007, the learned sole arbitrator decided the disputes referred to him in *inter alia* the following terms:-

> *"48. Having taken into consideration all the facts, evidence and arguments, I am firmly of the opinion that the claims of NHA against CPECC, HCL and SKB, respectively amounting to Rs.31.200 Million, Rs.206.632 Million and Rs.80.446 Million, are barred by time and hence not recoverable. None of the parties had claimed the costs, hence none is payable to any.*
> *49. .... NHA, at its end, may look into the circumstances under which it has suffered financial loss on account of inability to recover amount from the three concerned contractors for non use of Cellulose Fibre in the Asphaltic Base Course, and how did it fail to raise its claims even after 11 June 2001 when it eventually did become alive to its entitlement and when it would have been quite in time to do so. Factually, the recoveries on account of non use of Cellulose Fibre should have been affected right with effect from the time that the first running payment for laying of Asphaltic Base Course was made in case of each of the seven contracts, which was at a time around 1995."*

7. On 08.10.2007, the appellant filed an objection petition under Sections 30 and 33 of the 1940 Act before the learned civil court and prayed for the setting aside of the arbitration award dated 25.06.2007. Vide judgment & decree dated 20.04.2015, the learned civil court dismissed the said objection petition and made the arbitration award dated 25.06.2007 a rule of Court. Furthermore, it was held that Rs.31.200 Million or a lesser amount is not

recoverable by the appellant from the respondent on account of non-use of Cellulose Fibers in the asphalt base course mix. It is against the said judgment & decree dated 20.04.2015 that the appellant has preferred the instant appeal.

8. Learned counsel for the appellant submitted that the learned trial court erred by passing a judgment & decree in terms of the arbitration award dated 25.06.2007 and dismissing the appellant's objections under Sections 30 and 33 of the 1940 Act; that the learned arbitrator had erred by holding that the appellant's claim was barred by time; that the Hon'ble Lahore High Court had restrained the appellant from recovering Rs.31.200 Million from the respondent for not using Cellulose Fibers in the road works; that the period between 24.09.2001 (when the injunctive order was passed) and 30.03.2004 (when writ petition No.2978/2001 was disposed of) has to be discounted and excluded from the limitation period for instituting proceedings for the recovery of the said amount; that the learned trial court had erred by not giving the appellant the benefit of Section 15 of the Limitation Act, 1908; that the learned arbitrator did not decide the claim of the appellant on merits and unlawfully spurned it as barred by time; that even if the appellant had not sought the benefit of Section 15 of the Limitation Act, 1908, in the proceedings before the learned arbitrator and the learned Trial Court, the same should have been nonetheless extended to him; that even without an objection petition, it was obligatory upon the learned Trial Court to scrutinize the arbitration award to see that it does not suffer from any invalidity. In making these submissions, the learned counsel for the appellant placed reliance on the cases of A. Qutubuddin Khan Vs. Chec Millwala Dredging Co. (Pvt.) Ltd. Steel House, Karachi (PLJ 2014 SC 950), North-West

Frontier Province Government, Peshawar through Collector, Abbotabad and another Vs. Abdul Ghafoor Khan through Legal Heirs and two others (PLD 1993 SC 418), M/s. Awan Industries Ltd Vs. The Executive Engineer, Lined Channel Division and another (1992 SCMR 65), and Kashmir Corporation Ltd Vs. Pakistan International Airlines (PLD 1995 Karachi 301).

9. Learned counsel for the appellant further submitted that the appellant had filed an application under Section 12 (2) C.P.C. against the judgment and decree dated 20.04.2015 before the learned Trial Court; that a judgment and decree in terms of an arbitrator award can be challenged through an application under Section 12 (2) C.P.C., if the same was vitiated by fraud or misrepresentation; and that under the decision of the learned Trial Court on the said application, these proceedings should either be stayed or adjourned *sine die*. In making these submissions, the learned counsel for the appellant placed reliance on the cases titled as Happy Family Associate through Chief Executive Vs. Messrs Pakistan International Trading Company (PLD 2006 SC 226), Muhammad Yasin Vs. Sh. Hanif Ahmed and 14 others (1993 SCMR 437), Raja Wali Vs. Mansha Ahmed (PLD 1996 Lahore 354), and Mrs. Rukhsana Parveen Vs. Syed Shabahat Hussain Naqvi (2007 CLC 1247).

10. On the other hand learned counsel for the respondent submitted that as the appellant had filed an application under Section 12(2) C.P.C. before the learned Trial Court against the judgment and decree dated 20.04.2015, he was precluded from filing the instant appeal; that two remedies against the same judgment and decree could not have been availed by the appellant; that on this score alone, the appeal is liable to be dismissed; that the appeal is barred by time; that on 20.04.2015, the impugned judgment was

passed; that on 14.05.2015, the appellant applied for the certified copy of the said judgment; that the certified copy of the said judgment is prepared and delivered on 28.05.2015; that the appeal was filed on 11.07.2015; that an office objection was raised on 14.07.2015, and the appeal was returned, and was re-filed on 02.11.2015; and that Article 156 of the Limitation Act, 1908, provides for limitation period of ninety days for an appeal under Section 39 of the Arbitration Act. In making these submissions, the learned counsel for the respondent placed reliance on the cases titled as Tanveer Siddiqui and another Vs. Muhammad Rashid (2010 YLR 1851), Syed Jammat Ali Shah and others Vs. Investment Corporation of Pakistan Ltd, Karachi (1989 MLD 3931), Lahore Development Authority Vs. Muhammad Rashid (1997 SCMR 1224), Collector Land Acquisition Abbotabad and others Vs. Fazal-ur-Rehman and others (2009 SCMR 767), and Province of Punjab through Secretary, Local Government and Community Development, Lahore and three others (2014 CLC 417).

11. On the merits of the case, learned counsel for the respondent submitted that vide interim order dated 24.09.2001, passed in W.P.No.2978/2001, the Hon'ble Lahore High Court had restrained the appellant from making recoveries from the respondent, but had not restrained the appellant from instituting legal proceedings for the recovery of Rs.31.200 Million due to the Cellulose Fibers not being used by the respondent in the road works; that on 28.04.2004, it was the respondent who filed an application under Section 8 of the 1940 Act for the reference of the said dispute to arbitration; that the perusal of the arbitration award reveals that the learned arbitrator was cognizant of the said orders dated 24.09.2001 and 30.03.2004, passed by the

Hon'ble Lahore High Court in W.P.No.2987/2001; that the learned arbitrator had framed an issue on whether the NHA's claim is maintainable and time barred; that this issue was decided against the appellant and its claim was held to be time barred; that the arbitration award is detailed and well reasoned and called for no interference by the learned trial court; that as the learned arbitrator had not committed any misconduct in the arbitration proceedings, the learned trial court correctly dismissed the appellant's objections against the arbitration award dated 25.06.2007, by passing a judgment & decree in terms thereof. In making these submissions, the learned counsel for the respondent placed reliance on the cases of National Highway Authority Vs. Zarghoon Enterprises (Pvt.) Ltd (2015 MLD 746), Mian Corporation through Managing Partner Vs. Messrs Lever Brothers of Pakistan Ltd through General Sales Manager, Karachi (PLD 2006 SC 169), Muhammad Farooq Shah Vs. Shakirullah (2006 SCMR 1657), Pakistan Steel Mills Corporation, Karachi Vs. Messrs Mustafa Sons (Pvt.) Ltd, Karachi (PLD 2003 SC 301), and Federation of Pakistan through Secretary, Ministry of Food, Islamabad and others Vs. Messrs. Joint Venture Kocks K.G./RIst (PLD 2011 SC 506).

12. In rejoinder, the learned counsel for the appellant submitted that no notice had been issued by the office to the appellant or its counsel regarding the office objection; and that the office did not indicate a date by which the office objections were to be removed and the appeal re-filed. Learned counsel placed reliance on the cases of Province of Punjab through District Collector Lodhran and six others Vs. Muhammad Khalid Khan (2005 CLC 1083), and Mst. Sabiran Bi Vs. Ahmad Khan and another (2000 SCMR 847).

13. I have heard the arguments of the learned counsel for the parties and have perused the record with their able assistance.

14. I propose first to deal with the objection raised by the learned counsel for the respondent that the appeal filed by the appellant was barred by time. The learned counsel for the contesting parties were in agreement that the limitation period for an appeal under Section 39 of the 1940 Act is ninety days computed from the date of the order appealed from. The judgment and decree impugned in the appeal was passed on 20.04.2015. The record shows that the appellant applied for its certified copy on 14.05.2015. This copy was prepared and delivered to the appellant on 28.05.2015. The appeal was filed on 11.07.2015, and was returned with an office objection on 14.07.2015. This appeal was then re-filed on 02.11.2015. Now, if the period between 14.07.2015 (when the office objection was raised and the appeal returned) and 02.11.2015 (when the appeal was re-filed) is not excluded, the appeal would certainly be barred by time. Perusal of the office objection (Diary No.942/2015) dated 14.07.2015 issued by the Assistant Registrar and Deputy Registrar (Judicial) of this Court reveals that the office did not stipulate a period within which the office objections have to be removed. The period within which the office objections were required to be removed has been left blank. The office objections taken are (1) that page 7 of the petition has to be re-typed because it is not legible due to cutting and correction, (2) that the file is not arranged according to the index/rules and (3) that the attested power of attorney had not been filed. Now, it is not disputed that originally the appeal was filed within time. The above mentioned office objections are not such as would render the very appeal incompetent. In other words, as per these

office objections, the appeal did not suffer from any fatal defect. These objections were at best ministerial in nature. As the appeal was originally filed within time but was deficient in some respects, and these deficiencies were cleared by the appellant before re-filing the appeal, the appeal cannot be held to be time barred particularly when the office did not indicate a time within which the deficiencies had to be cleared. I feel that the appellant cannot be penalized for the inaction of the office by not fixing a period within which the office objections were required to be removed. The record is also silent as to any notice issued by the office to the appellant for the removal of the office objections.

15. In the case of Mst. Sabiran Bi Vs. Ahmad Khan and another (2000 SCMR 847), it has been held as follows:-

> ***"Thus, in view of above discussions we are inclined to hold that once a suit, appeal or revision has been presented before the authorized officer of the Court within the prescribed period of limitation, it cannot be treated barred by time for the reason that the office has noted defects in the proceedings which have not been removed by the concerned party or his Advocate, and in such-like situation the Presiding Officer of the Court at the best can consider the maintainability of proceedings in view of the provisions of Order VII, Rule II or identical provisions available in the Code of Civil Procedure or the law under which the proceedings were instituted. It is also important to note that parties/Advocates are also not absolved from their duty to remove the office objections within the stipulated period prescribed by the concerned authorized officer subject to the condition that specific notice has been served upon the party or Advocate to do the needful. Even if after notice the defect is not removed the case shall be listed for non-prosecution before the Presiding Officer who may in his discretion allow time to comply with objections of office."***

16. In the case of Farman Ali Vs. Muhammad Ishaq & others (PLD 2013 SC 392), it has been held as follows:-

> ***"6. The upshot of the above discussion is, that where a revision petition has been filed within time, but the office objection(s) points out certain***

deficiencies in respect of the institution, for all intents and purposes, it shall be deemed to have been instituted within the period of limitation and where the petitioner does not remove the office objections and make up the deficiencies in the time provided by the office, the matter shall be placed before the Court on the judicial side and the Court shall decide about the fate of the petition in accordance with law, and as per some of the guidelines provided in the preceding part of this judgment."

17. In the case of Muhammad Boota Vs. Basharat Ali (PLD 2014 Lahore 01), it has been held at paragraph 11 of the report as follows:-

"11. In view of above discussion, we are of the opinion, that the appeal is originally filed within prescribed limitation period but was returned due to office objections which could not be removed within given time and when the office objections finally removed the prescribed period of limitation for filing appeal elapsed, will not render the appeal barred by time. In the present case, as originally the appeal was filed on 20.04.2013, which was within the prescribed period of limitation of 90 days and only because office objection was removed on 02.05.2013, will not make the appeal barred by time, therefore, preliminary objection raised by the learned counsel for the respondent is over ruled."

18. It is only in cases where the delay in re-filing of an appeal, after an office objection, is far in excess of the period fixed by the office within which the appeal was to be re-filed after clearing the objection, that the courts refuse indulgence in entertaining such appeals. For instance, in the case of Commissioner of Income Tax / Wealth Tax, Companies Zone, Islamabad Vs. M/s Dreamland Motels (Pvt) Limited (2012 PTD 976), a delay of 2-1/2 years in re-filing the appeal was not condoned by the Division Bench of the Hon'ble Islamabad High Court, when the office had required the appellant to remove the office objection within a period of three days. Similarly, in the case of M/s Pervez & Company Vs. National Bank of Pakistan reported as 2015 CLD 972, the Division Bench of the Hon'ble Lahore High Court did not condone a delay of

more than three years in the re-filing of an appeal after removing the office objections.

19. In view of the above, the respondent's objection regarding maintainability of the appeal on the ground of limitation, is spurned.

20. As regards the contention of the learned counsel for the appellant that these proceedings should be stayed or adjourned *sine die* until the trial court adjudicates upon the appellant's application under Section 12(2) C.P.C. against the judgment and decree dated 20.04.2015, I cannot bring myself to agree with the learned counsel for the appellant for the simple reason that arbitration is essentially a time and expense saving device. Paragraph 3 of the First Schedule of the 1940 Act requires arbitrators to make their award within a period of four months after entering on the reference. The very purpose of resolution of disputes through a domestic tribunal would be defeated if the objections to an arbitration award or appeals from judgments and decrees in terms of the arbitration award are kept pending indefinitely. The Courts should make an earnest effort to decide such objections and appeals in a time frame lesser than the one given by law to the arbitrators to decide a dispute.

21. The learned counsel for the appellant placed reliance on the cases of Mrs. Rukhsana Parveen Vs. Syed Shabhat Hussain Naqvi reported as 2007 CLC 1241 and Muhammad Yasin Vs. Sh. Hanif Ahmed and four others reported as 1993 SCMR 437, in support of his contention that a decree passed on the basis of an award cannot be challenged under Sections 30 and 33 of the 1940 Act, and that there is no provision in the 1940 Act for challenging such a decree on the ground that the same had been obtained by fraud or misrepresentation. It was contended that the appellant could challenge the judgment and decree

dated 20.04.2015 in an application under Section 12(2) C.P.C. on the ground that it has been obtained by fraud or misrepresentation. Now, the question of the maintainability of the application under Section 12(2) C.P.C. filed by the appellant before the learned Trial Court, is not before this Court. The appellant may, should he so desire take these pleas before the learned Trial Court adjudicating upon his application under Section 12(2) C.P.C. It is not for this Court in these proceedings to comment on the maintainability of such an application lest it may prejudice the case of either party before the learned Trial Court.

22. Learned counsel for the appellant placed reliance on the case of Raja Wali Vs. Mansha Ahmad reported as PLD 1996 Lahore 354, in support of his contention that the mere fact that the appellant had filed an application under Section 12(2) C.P.C. against the judgment and decree dated 20.04.2015 does not preclude him from filing an appeal against the said decree. True, the mere filing of an application under Section 12(2) CPC against the said judgment & decree dated 20.04.2015 would not render the instant appeal incompetent but, for the reasons mentioned above, this appeal cannot be kept pending or adjourned *sine die* until the decision of the appellant's application under Section 12(2) C.P.C. by the Trial Court. An appeal is a continuation of the proceedings before the lower courts and should, in arbitration matters, be decided as expeditiously as possible.

23. Learned counsel for the appellant also placed reliance on the case of Happy Family Associate through Chief Executive Vs. Messrs Pakistan International Trading Company reported as PLD 2006 Supreme Court 226, to justify the filing of an application under Section 12(2) C.P.C. as well as an appeal against the judgment & decree dated

20.04.2015. In the said case, it was held that the application under Section 12(2) C.P.C. was no substitute to regular appeal or revision or review nor such provision could be construed as something over and above the normal modes of questioning a decree by way of an appeal, revision or review. I do not see how the said judgment comes to the aid of the appellant.

24. I now come to the appellant's central ground for assailing the judgment and decree dated 20.04.2015, viz that the learned arbitrator should have given the appellant the benefit of Section 15 of the Limitation Act, 1908, and excluded the period during which the injunctive order issued by the Hon'ble Lahore High Court remained in operation, in computing the period within which the appellant filed a claim for the recovery of Rs.31.200 Million against the respondent due to the non-use of Cellulose Fibers in the asphalt base course mix. For ease of reference Section 15 (1) of the Limitation Act, 1908, is reproduced herein below:-

> *"15. Exclusion of time during which proceedings are suspended. (1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded."*

25. The arbitration award dated 25.06.2007 reveals that in the arbitration proceedings, the respondent had raised the objection of limitation to the claim made for the recovery of money on account of the non-use of Cellulose Fibers. The first issue framed by the learned arbitrator was *"whether the claim of NHA raised after completion of project is maintainable or time barred?"*. The issues framed were said to have been accepted by the contesting parties and no objections were raised thereto. In view of the said

issue, the appellant ought to have sought the benefit of Section 15 of the Limitation Act, 1908, in the arbitration proceedings. This, the appellant did not do.

26. Perusal of the arbitration award dated 25.06.2007, and the appellant's objection petition under Sections 30 and 33 of the 1940 Act filed on 08.10.2007, reveal that the appellant had, neither before the learned arbitrator nor before the learned Trial Court, taken the plea of exclusion of the time during the subsistence of the injunctive order passed by the Hon'ble Lahore High Court from the limitation period, under Section 15 of the Limitation Act, 1908. The appellant must now thank himself for the unsavory consequences of this omission.

27. Even otherwise, the contention of the learned counsel for the appellant that the period during which the injunctive relief granted by the Hon'ble Lahore High Court to the respondent in W.P.No.2978/2001, subsisted, should be excluded from the limitation period within which the appellant could institute proceedings for the recovery of Rs.31.200 Million, has to be examined by reading the order dated 24.09.2001 as a whole. This Order is reproduced herein below:-

> *"Grievance of the petitioner is highlighted in paragraphs 10 & 11 of the writ petition which are reproduced below:*
>
> > *"In the case of the Project the Job Mix Formula jointly established by the petitioner and the Engineer/Consultant did not include the use of Cellulose Fibers. The petitioner proceeded to provide/use the asphalt concrete base course mixture for the road portion of the Project. It may be pertinently mentioned here that 66 km long portion of the road, which has been open to traffic during the last year, is in excellent condition and has not shown any bleeding/rutting tendencies whatsoever.*
> >
> > *By order dated 11.06.2001 the respondent has instructed its General Managers/others officers to recover specified amounts from the petitioner (and other contractors) for non use/non addition*

of Cellulose Fibers in the asphalt concrete base course mixture. The amount ordered to be recovered from the petitioner in the case of the Project is Rs.31.200 million."

2. It has been stated that after 8 year a dispute has been raised with respect to the use of Cellulose Fiber in asphalt along with the Job Mixer Formula. Whereas the roads already constructed did not suffer from any bleeding and there was no requirement for mixing Cellulose Fiber and that this was agreed by the Engineer who had to get the work executed along with the contractor. That withholding of Rs.31.200 million because of the impugned order dated 11.06.2001 was an illegal act. That even if the respondent had a case, it was referable to an arbitrator and the respondent could not arbitrarily order for recovery of the said amount from the petitioner and other contractors. That the petitioner is a company of renown working in Pakistan and is being subjected to harassment unnecessarily.

Notice to the respondent.

3. Incidentally Rana Muhammad Tariq, Adv. is present in Court. He accepts notice on behalf of the respondent. He is directed to file parawise comments within two weeks.

CM No.5617/2001

4. Notice. Recovery shall not be made from the petitioner until the next date.

*5. To come up on 9.10.2001." (*Emphasis added)

28. The first ground taken in W.P.No.2978/2001 reads *inter alia* as follows:-

"Each of the contracts has a settlement of disputes clause which inter alia lays down that a dispute between the petitioner and the respondent shall, in the first instance be referred to the Engineer/Consultant for his decision, and if either party is aggrieved by the decision of the Engineer/Consultant the said aggrieved party may ask for arbitration as specified in the said clause. "

29. Perusal of the grounds taken in the writ petition in conjunction with the order dated 24.09.2001 shows that the respondent's case before the Hon'ble Lahore High Court was that the dispute regarding the recovery of Rs.31.200 Million, was referable to an arbitrator and that the appellant could not arbitrarily order its recovery. Examining the case in this perspective, I am of the view that there was no impediment placed on the appellant by the said injunctive order to institute arbitration proceedings in

accordance with clause 67 of the contract between the appellant and the respondent for the recovery of the said amount. What was restrained by the Hon'ble Lahore High Court was the process for the recovery of the said amount initiated by the appellant through its letter dated 11.06.2001, which had been impugned in the said writ petition.

30. The Hon'ble Lahore High Court through its order dated 24.09.2001 had not restrained the appellant from instituting a suit or arbitration proceedings. Even after the injunctive order was vacated by the Hon'ble Lahore High Court on 30.03.2004, the appellant did not institute or initiate arbitration proceedings for the recovery of Rs.31.200 Million from the respondent for not using Cellulose Fibers in the asphalt base course mix. It was the respondent which, on 28.04.2004 filed an application for reference of the said dispute to arbitration. Hence, I do not find the appellant entitled to the benefit of Section 15 of the Limitation Act, 1908.

31. The learned arbitrator, through a detailed 23 page arbitration award, dealt with the respective claims of the contesting parties. The claim of the appellant on account of the non-use of the Cellulose Fibers in the asphalt base course mix, was dealt with by the learned arbitrator in the following terms:-

> *"43. During execution of the work, however, Cellulose Fiber was not used at all in any of the projects, in Asphaltic Base Course or Asphaltic Wearing Course. The individual projects were completed in respective time, the last being completed during June, 2002, and final bills paid. No recoveries were to be made on account of non use of Cellulose Fiber in case of Asphaltic Wearing Course, since payment of Cellulose Fiber had to be based on its quantity, in KG, used. However, recovery on account of non use of Cellulose Fiber in Asphaltic Base Course was justifiable. NHA, during June 2001, initiated recoveries through its internal letter (Exhibit-1) from the three contractors, among others, based on non use of Cellulose Fiber in the Asphaltic Base Course, and hence this Arbitration."*

> *"46. ..... However, NHA all along, never initiated a recovery notice to any of the affected contractors nor ever raised its claim against any of them, which is extremely strange and unexpected. The first time ever that NHA raised claims against the three contractors (CPECC, HCL & SKB) was on 11 June 2006, that too as fulfillment of obligation of this Arbitration. NHA, for unknown reasons, allowed well over three years to elapse after completion of each of the seven contracts and did not raise any claim, thereby depriving itself of the right to affect recovery. Thus, as established by the Counsel for HCL & SKB, under Article 115 of the Limitation Act, since more than three years had passed since completion of projects, through the cause of action had arisen years earlier than completion when Cellulose Fiber's non use had been first known, the claim of NHA had become time barred....."*

32. The learned counsel for the contesting parties read over most of the arbitration award during the hearing of the appeal. I was not able to find any infirmity or invalidity in the same. There is nothing apparent on the surface of the record to indicate any misconduct on the part of the learned arbitrator. It is settled law that a court while examining the validity of an award does not sit as a court of appeal. It cannot undertake reappraisal of evidence. For a court to interfere in an arbitration award, there has to be an error on the face of it and discoverable by reading the award itself. The learned Trial Court has been mindful not to scrutinize the arbitration award dated 25.06.2007 by applying the yardstick of an appeal.

33. In the cases of Kashmir Corporation Limited Vs. Pakistan International Airlines reported as (PLD 1995 Karachi 301), and Messrs Awan Industrial Ltd Vs. Executive Engineer Lined Channel Division, (1992 SCMR 65), it has been held that it was obligatory for the arbitrator to determine whether the claim of a party before it was barred by time, and that an arbitration award which does not take into account the fact that their claim was barred by limitation, could not be made a rule of court. The learned arbitrator, in the instant case, has in accordance with

the law laid down in the said judgments correctly held that the appellant's claim of 31.200 Million against the respondent for not using Rs.31.200 Million from the respondent for not using Cellulose Fibers in the asphalt base course mix, was barred by time.

34. By reason of the aforementioned, I find the judgment and decree dated 20.04.2015, passed by the learned Civil Court to be strictly in accordance with the law. Hence, this appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

(JUDGE)

Qamar Khan*