JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.81 of 2018
National Highway Authority
Versus
Lilley International (Private) Limited and another

Date of Hearing:	29.10.2019
Appellant by:	Mr. Ali Nawaz Kharal, Advocate
Respondents by:	Mr. Babar Ali Khan, Advocate for respondent No.1

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellant, National Highway Authority, impugns the order dated 10.04.2018 passed by the Court of the learned Civil Judge (West), Islamabad, whereby the award dated 08.09.2017 was made a Rule of Court and a decree in terms thereof was passed.

2. The record shows that on 13.08.2004, an agreement for the Rehabilitation Works of National Highway N-5 existing carriageway from Hyderabad-Hala Section (48 KM) contract package-I was executed between the appellant and respondent No.1 (Lilley International (Pvt.) Limited). The documents which were to constitute part of the contract were listed in clause-2 of the said agreement. The contract price was Rs.7,72,957,568/-. As per clause-14 of Appendix-A to bid (Conditions of Contract Clauses), the contract period was 24 months from the date of the notice to commence the work. Since the notice to commence the work was issued on 12.10.2004, the contract completion date came to be 11.10.2006. M/s SMEC International (Pty.) Ltd. was appointed by the appellant as the Engineer.

3. It is not disputed that the Engineer, with the approval of the appellant, had granted an extension of time for the completion of the works of 110 days. With this extension, the contract completion date came to be 29.01.2007. The extension of the time certificate issued by the Engineer on 27.02.2007 had not been assailed by the appellant. The works under the contract were completed on 25.07.2006.

4. Clause-47.4 of the contract provided *inter-alia* that if the Contractor achieved completion of the work or, if applicable, any section thereof prior to the relevant time prescribed by clause-43.1, the employer may pay to the Contractor a sum as bonus at the rate of 0.025% of the contract price for each day of early completion to a maximum of 5% of the contract price.

5. After considering respondent No.1's claim under clause-47.4 of the contract for an early completion bonus, the Engineer, on 02.06.2008 recommended payment of Rs.36,328,932/- for the appellant's approval. As per the Engineer's determination, respondent No.1 had completed the work earlier than the scheduled completion date by 188 days.

6. At page 452 of C.M.No.283/2019 is the appellant's letter dated 22.10.2008 informing the Chief Resident Engineer that the competent authority had approved in principle the recommendation regarding bonus for early completion resulting in an increase in the contract price by Rs.36,328,932/-. Apparently, the appellant refused to pay the said amount to respondent No.1.

7. Clause-67.1 of the contract provides *inter-alia* that if any dispute arises between the employer and the Contractor in connection with, or arising out of the contract or the execution of the work, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation by the Engineer, the matter in dispute shall, in the first place, be referred to the Dispute Review Expert ("D.R.E.").

8. The refusal on the part of the appellant to make payment of Rs.36,328,932/- to respondent No.1 prompted the latter to approach the D.R.E. under clause-67.1 of the contract. On 06.01.2009, the D.R.E. endorsed the Engineer's determination dated 15.10.2008 and recommended that an early completion bonus of Rs.36,328,932/- be paid to respondent No.1. The D.R.E. also observed that respondent No.1 be compensated for the delay in the payment of such bonus.

9. Prior to the said recommendation of the D.R.E., the Engineer, on the instructions of the appellant, revised his earlier recommendation regarding the payment of the early completion

bonus and re-determined respondent No.1's claim dated 18.09.2008 for such bonus. After re-determining respondent No.1's said claim, the Engineer, on 12.11.2008, recommended the payment of Rs.15,072,642/- to respondent No.1 by holding that respondent No.1 had completed the works 78 days prior to the contract completion date. It is pertinent to mention that the appellant did not challenge the said recommendation of the Engineer before the D.R.E.

10. Under clauses-67.2 to 67.4 of the contract, the recommendations of the D.R.E. could be challenged by the party aggrieved by such recommendations in arbitration under the provisions of the Arbitration Act, 1940 ("the 1940 Act").

11. The D.R.E.'s recommendations dated 06.01.2009 were challenged by the appellant in arbitration without the intervention of the Court. General (Retd.) Shahid Niaz was appointed as the sole Arbitrator. The arbitration proceedings culminated in the award dated 08.09.2017 whereby respondent No.1 was held to be entitled to an early completion bonus for the amount of Rs.15,072,642/- based on an early completion of the works 78 days prior to the contract completion date. The learned sole Arbitrator set-aside the D.R.E.'s recommendation for the payment of compensation for the delay in the payment of the early completion bonus.

12. On 17.10.2017, respondent No.1 filed an application under Sections 14 and 17 of the 1940 Act praying for the said arbitration award to be made a Rule of Court. On 21.11.2017, the appellant filed its objections under Sections 30 and 33 of the 1940 Act praying for the award to be set-aside and to remit the dispute to the Arbitrator for a decision afresh. Vide impugned order dated 10.04.2018, the learned Civil Court allowed respondent No.1's application, and as a result dismissed the appellant's objections and made the award a Rule of Court by passing a decree in terms thereof. The said order and decree has been assailed by the appellant in the instant appeal.

13. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that respondent No.1 was not entitled to the grant of an extension in the

contract completion date by 110 days; that even though the Engineer's determination dated 27.02.2007 for the grant of an extension in time was not challenged by the appellant, nevertheless the same was erroneous; that respondent No.1 could not have been granted such an extension due to acute shortage of grade 40-50 Bitumen, the late handing over of the Matiari bypass site and non-availability of PMB Bitumen; that respondent No.1 was under an obligation to complete all the works under the contract by 11.10.2006, i.e. the original contract completion date; that respondent No.1's claim dated 18.09.2008 for early completion bonus on the basis of having completed the contract 188 days before 29.01.2007 (i.e. the extended/revised contract completion date) was unjustified; that the Engineer's recommendation dated 02.06.2008 that respondent No.1 be paid an amount of Rs.36,328,932/- as early completion bonus for having completed the works 188 days prior to the extended/revised completion date was equally unjustified; that the D.R.E.'s decision to endorse the Engineer's said recommendation dated 02.06.2008 and also to recommend payment of compensation to respondent No.1 for delay in making payment of bonus was erroneous inasmuch as the Engineer's revised recommendation dated 12.11.2008 had not been taken into consideration by the D.R.E.; that the learned Arbitrator's interpretation of clauses-44.1, 47.4 and 48 of the contract was absurd; that respondent No.1 would have been entitled to the early completion bonus if the works under all the segments of the contract were completed in every respect prior to the original contract completion date; that the contract between the parties did not specify different completion dates for the different segments of the contract; that the learned Arbitrator erred by holding that the project was divided into sections and that the last section of the contract was completed on 25.07.2006; that the date of completion of the last part of the contract was in July 2006; that the learned Arbitrator erred by not appreciating that under clause-62.2 of the contract, the contract is considered as completed when the defects liability certificate is issued by the Engineer; that the taking over certificates had been issued with

respect to parts of the contract after respondent No.1 gave an undertaking that it would complete the outstanding work during the defects liability period; that in fact respondent No.1 had not completed the balance work even after four years of the expiration of the defects liability period; that the award in question is unreasoned and therefore does not fulfill the requirements of Section 26-A of the 1940 Act; and that clause-47.4 of the contract does not in any manner obligate the appellant to pay an early completion bonus. Learned counsel for the appellant prayed for the order and decree dated 10.04.2018 as well as the award dated 08.09.2017 to be set-aside.

14. On the other hand, learned counsel for respondent No.1 submitted that the award as well as the impugned order and decree dated 10.04.2018 are strictly in accordance with the law; that the Engineer's determination dated 27.02.2007 whereby the contract completion date was extended by 110 days (i.e. up to 29.01.2007) was not questioned by the appellant in accordance with the terms of the contract; that respondent No.1 had applied to the Engineer for the contract completion date to be extended by 190 days; that since the reasons for which respondent No.1 had applied for the extension in the contract completion date were not attributable to respondent No.1, the Engineer's decision to grant 110 days extension in the contract completion date was just and reasonable; that after the said extension had been granted, respondent No.1 applied for the payment of the early completion bonus in accordance with clause-47.4 of the contract; that respondent No.1's said claim was based on the work under the contract having been completed 188 days prior to the revised/extended completion date; that the Engineer's decision to recommend payment of Rs.36,328,932/- as the early completion bonus had also been endorsed by the D.R.E.; that the Engineer had re-determined respondent No.1's claim for the early completion bonus by treating 11.10.2006 as the applicable completion date for determining respondent No.1's entitlement to the early completion bonus; that the Engineer on 12.11.2008 revised its earlier decision by recommending that Rs.15,072,642/- be paid to respondent No.1;

and that the Engineer's recommendation was based on the work under the contract having been completed 78 days prior to the original contract completion date.

15. Learned counsel for respondent No.1 further submitted that the Arbitrator's decision to award Rs.15,072,642/- as an early completion bonus to respondent No.1 is in conformity to the Engineer's revised determination dated 12.11.2008, which had not been challenged by the appellant; that the appellant, in its objections to the award, had candidly pleaded that the date of completion of the last part of the contract was in July 2006; that the learned Arbitrator has also held respondent No.1 entitled to the early completion bonus after holding that the contract was completed on 25.07.2006; that the Engineer in his abovementioned determination dated 12.11.2008 had also found that on 25.07.2006, the works under the contract were substantially completed in accordance with clause-48 of the contract; and that the learned Arbitrator has neither misconducted himself nor is there any error apparent on the face of the award. Learned counsel for respondent No.1 prayed for the appeal to be dismissed. In making his submissions, learned counsel for respondent No.1 placed reliance on the judgments reported as *2017 CLC Note 44, 2013 CLD 1483, 2005 YLR 2709, 2004 SCMR 590, PLD 2003 SC 301, PLD 1996 SC 108, 1994 MLD 2348, 1987 CLC 383* and *PLD 1982 Karachi 260*.

16. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 12 above, and need not be recapitulated.

17. As mentioned above, the original contract completion date was 11.10.2006. As against respondent No.1's request for an extension in the contract completion date by 190 days, the Engineer on 27.02.2007 extended the contract completion date by 110 days, i.e. up to 29.01.2007. After considering respondent No.1's claim dated 18.09.2008 for an amount of Rs.34,330,910/- under clause-47.4 of the contract, the Engineer, on 02.06.2008, recommended that an amount of Rs.36,328,932/- be paid to

respondent No.1 as the early completion bonus. Subsequently, the appellant informed the Engineer that in the Executive Pre-Board Meeting dated 21.10.2008, it had been decided that *"the contractor will not be entitled for bonus for early completion if the Project is not completed in its original time period."* This caused the Engineer to re-determine respondent No.1's claim for the early completion bonus. The Engineer revised its earlier determination and on 12.11.2008 recommended that Rs.15,072,642/- be paid as early completion bonus to respondent No.1.

18. In making the revised determination, the Engineer held that respondent No.1 had completed the works under the contract on 25.07.2006, i.e. 78 days prior to the original contract completion date, i.e. 11.10.2006. At no material stage did the appellant challenge the said determination of the Engineer by invoking the provisions of clause-67.1 of the contract. Therefore, for all intents and purposes, the Engineer's revised determination dated 12.11.2008 entitling respondent No.1 to an early completion bonus of Rs.15,072,642/- attained finality.

19. Since the appellant did not make payment of Rs.36,328,932/- in accordance with the Engineer's earlier determination dated 02.06.2008, respondent No.1 had invoked the jurisdiction of the D.R.E. under clause-67.1 of the contract. The D.R.E., in its decision dated 06.01.2009, endorsed the Engineer's said determination dated 02.06.2008. It is the D.R.E.'s said decision which was challenged by the appellant in the arbitration proceedings.

20. The learned Arbitrator, in his award dated 08.09.2017, held that the Engineer's determination dated 02.06.2008 as well as the D.R.E.'s decision dated 06.01.2009 were unjustified. Furthermore, the Engineer's revised determination dated 12.11.2008 found favour with the learned Arbitrator. Accordingly, the learned Arbitrator held that respondent No.1 was entitled to the early completion bonus for an amount of Rs.15,072,642/- as per the Engineer's revised determination dated 12.11.2008, which was based on the contract having been completed 78 days prior to the original contract completion date.

21. Even though the learned Arbitrator had reduced respondent No.1's claim for an early completion bonus from Rs.36,328,932/- to Rs.15,072,642/-, respondent No.1 did not file any objections to the award. The mere fact that respondent No.1 filed an application under Sections 14 and 17 of the 1940 Act implies that it accepted the award. Therefore, the issue regarding respondent No.1's claim for an early completion bonus on the basis of having completed the works 188 days prior to the revised/extended contract completion date becomes immaterial.

22. It is the appellant who filed objections to the award dated 08.09.2017, even though it had not challenged the Engineer's determination dated 12.11.2008, whereby respondent No.1 was held entitled to an early completion bonus for the amount of Rs.15,072,642/-. The appellant could have challenged the Engineer's said determination under clause-67.1 of the contract, but it did not do so. Having not challenged the said determination, it is our view that the appellant is estopped from objecting to the award which is absolutely in conformity with the Engineer's said determination dated 12.11.2008. In the relief clause of the award, the learned Arbitrator has observed that the amount of Rs.15,072,642/- is *"as per revised Engineer's report on evaluation of bonus for early completion based on 78 days early completion."*

23. Be that as it may, we now proceed to decide as to whether the learned Arbitrator was justified in awarding Rs.15,072,642/- as early completion bonus to respondent No.1 by holding that the contract had been completed 78 days prior to the original contract completion date.

24. The contract does not provide different completion dates for different segments of the contract. It is not disputed that given the contract period of 24 months from the date of the notice to commence works (issued on 12.10.2004), the contract completion date was 11.10.2006. Clause-43.1 of the contract provides *inter-alia* that the whole of the work and if applicable any section required to be completed within a particular time as stated in the Appendix to tender, shall be completed in accordance with the provisions of clause-48 within the time stated in the Appendix to

tender for the whole of the work or the section (as the case may be) calculated from the commencement date. Since the commencement date was 12.10.2004 and since the contract was to be completed within 24 months, the contract completion date was 11.10.2006.

25. The Engineer, in his determination dated 12.11.2008, recorded that the works were completed in parts and taken over by the appellant between 30.11.2005 and 25.07.2006. The Engineer also held that the works were substantially completed as they were in such a condition that they were occupied and used by the appellant for the purpose for which they were intended and the prescribed tests with respect to such works had been satisfactorily passed. Accordingly, it was recorded that the works were completed in accordance with clause-48.1 of the contract. It was also recorded that with the completion of the last section on 25.07.2006, the works under the contract were substantially completed in accordance with the provisions of clause-48 of the contract. The 78 days between 25.07.2006 (when the works under the contract were substantially completed and taken over) and 11.10.2006 (the original contract completion date) is the period for which the Engineer had held respondent No.1 entitled to the payment of the early completion bonus in accordance with clause-47.4 of the contract. As mentioned above, the appellant did not challenge the said determination of the Engineer. Therefore, the appellant is in no position to dispute the contents of the said determination at this appellate stage.

26. We have examined this case in considerable detail even though it is well settled that objections to an award, and moreso an appeal against an order to make an award a Rule of Court, cannot be heard like an appeal from an award. Reference in this regard may be made to the following case laws:-

i) In the case of Federation of Pakistan Vs. Joint Venture Kocks K.G./RIST (PLD 2011 SC 506), it was held as follows:-

> ***"While considering the objections under sections 30 and 33 of the Arbitration Act, 1940 the court is not supposed to sit as a court of appeal and fish for the latent errors in the arbitration proceedings or the award. The arbitration is a forum of the parties' own choice and is competent to resolve***

the issues of law and the fact between them, which opinion/decision should not be lightly interfered by the court while deciding the objection thereto, until a clear and definite case within the purview of the section noted above is made out, inasmuch as the error of law or fact in relation to the proceedings or the award is floating on the surface, which cannot be ignored and if left outstanding shall cause grave injustice or violate any express provision of law or the law laid down by the superior courts, or that the arbitrator has misconducted thereof. Obviously if there is a blatant and grave error of fact such as misreading and non-reading or clear violation of law, the interference may be justified by the courts. But for the appraisal and appreciation of the evidence the courts should not indulge into roving probe to dig out an error and interfere in the award on the reasoning that a different conclusion of fact could possibly be drawn."

ii) In the case of M/s Joint Venture KG/RIST Vs. Federation of Pakistan (PLD 1996 SC 108), it has been held as follows:-

"We may mention here that the Court while examining the validity of an award does not act as a Court of appeal. Therefore, a Court hearing the objection to the award cannot undertake reappraisal of evidence recorded by the arbitrator in order to discover the error or infirmity in the award. The error or infirmity in the award which rendered the award invalid must appear on the face of the award and should be discoverable by reading the award itself. Where reasons recorded by the arbitrator are challenged as perverse, the perversity in the reasoning has to be established with reference to the material considered by the arbitrator in the award."

iii) In the case of Ashfaq Ali Qureshi Vs. Municipal Corporation, Multan (1984 SCMR 597), it was held as follows:-

"It is a well-established rule of law that where a dispute is referred to an arbitrator of the choice of the parties and he makes an award, it becomes the duty of the Court to give every reasonable intendment in favour of the award and lean towards upholding it rather than vitiating it."

Furthermore, it was held as follows:-

"The arbitrator is the judge of all matters arising in the dispute whether of fact or of law and the Court is not to act as a Court of appeal sitting in judgment over the award. Nor is it proper for the Court to proceed to scrutinize the award in order only to discover an error for the purpose of setting it aside. The error must be apparent on the face of the award and not latent such as can be discovered only after a scrutiny of the material beyond the award."

27. Since we have been given no reason to interfere with the impugned order and decree dated 10.04.2018 as well as award

dated 08.09.2017, the instant appeal is dismissed with costs throughout.

28. While dismissing this appeal with costs, we are mindful of Section 35-C C.P.C. as amended by the Costs of Litigation Act, 2017 which provides that the Government shall not be liable to costs under Sections 35, 35-A and 35-B C.P.C. Although by virtue of Rule 3(3) of the Rules of Business, 1973 read with item No.3 in paragraph 6 of Schedule-II thereof, the Communications Division has the administrative control over the National Highway Authority and by virtue of Rule 4(4) read with item No.16 of Schedule-II of the said Rules, the *"National Highways and Pakistan Motorways Police Department"* is an attached department of the Communications Division, this does not make the National Highway Authority an adjunct or alter ego of the said Division and/or the Government. The term "Government" has not been defined in the Civil Procedure Code, 1908. "Government" has been defined in Section 3(21) of the General Clause Act, 1897 to include both the Federal Government and any Provincial Government. The National Highway Authority, being a statutory body, cannot be termed as the "Government". Since the appellant is a statutory body established under the provisions of the National Highway Act, 1991 and therefore does not fall within the meaning of "Government" it cannot be insulated from the imposition of costs under Section 35 C.P.C.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(CHIEF JUSTICE) **(JUDGE)**

APPROVED FOR REPORTING

*Qamar Khan**