JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. No.30 of 2016

National Highway Authority
Versus
Lilley International (Pvt.) Ltd. and another

F.A.O.No.31 of 2016

National Highway Authority
Versus
Lilley International (Pvt.) Ltd. and another

Date of Hearings: 29.11.2016 and 02.12.2016.
Appellant by: Mr. Bilal Akbar Tarar, Advocate.
Respondent No.1 by: Mr. Tasaddaq Hanif, Advocate.

MIANGUL HASSAN AURANGZEB J:- These two appeals involve similar facts and points of law, and are, therefore, being disposed of through a single judgment. Through the above captioned appeals, under Section 39 of the Arbitration Act, 1940 ("the 1940 Act"), the appellant, National Highway Authority, impugns the judgment and decree dated 06.02.2016, passed by the Court of the learned Civil Judge 1st Class (West), Islamabad, whereby, the appellant's objections against the arbitration award dated 23.09.2015, were dismissed, and the said award was made a rule of Court, by passing a judgment and decree in terms thereof.

2. The facts culled out from the voluminous record are that on 13.08.2004, a contract for the rehabilitation of works on the National Highway (N-5) Existing Carriageway, Hyderabad – Hala, 14 Km ("the Contract") was entered into between the appellant and respondent No.1 (Lilley International (Pvt.) Ltd.). The disputes and differences arising from and relating to the Contract were agreed to be resolved in accordance with the dispute resolution mechanism contained in clause 67 of the Contract. Such disputes and differences were required to be referred to the Dispute Review Expert ("D.R.E."), in the first instance, and if after the decision of the D.R.E. these disputes

persisted, they would required to be referred to arbitration under the provisions of the 1940 Act.

3. Initially when the Contract was entered into, it did not contain a price adjustment clause. However, through amendment No.4, dated 20.02.2006, the Contract was amended so as to make it subject to variable price adjustment. By virtue of the said amendment, the formula and indices for the price adjustment of various items including fuel, cement, steel, bitumen and labour were included in the Contract. After the incorporation of the price adjustment clause in the Contract, amendment No.4 to the Contract was sent by the appellant to respondent No.1, vide letter dated 01.03.2006. Under the said amendment, the price variable portion was 40%. In other words, if the price of an item increased by 100%, respondent No.1 could only get the benefit of 40% of the increase by virtue of the said amendment.

4. Additionally, through amendment No.6 dated 27.05.2008, the Contract was again amended by revising the indices and increasing the price variable portion from 40% to 55%. Respondent No.1 claimed the benefit of price escalation in terms of the said amendments by submitting Interim Payment Certificate ("I.P.C.") No.19 and I.P.C. No.20. These I.P.Cs were duly approved by the Engineer for payment. The appellant made partial payments against the said I.P.Cs. The appellant took the position that respondent No.1 was not entitled to be paid escalation for the period prior to 01.01.2006 – the date fixed by the appellant's Executive Board as the effective date of the said amendments.

5. Disputes and differences developed between the appellant and respondent No.1 on the question whether the benefit of amendments No.4 and 6 to the Contract could be derived by respondent No.1 from 13.08.2004 (i.e. the date of the initial execution of the Contract) or from 01.01.2006 (i.e. the date fixed by the appellant's Executive Board, as effective date of the said amendments). This matter was referred to the D.R.E. who gave two separate decisions (i.e. decision dated 06.01.2009, regarding I.P.Cs No.19, and decision dated 14.07.2009,

regarding I.P.C. No.20) in respondent No.1's favour. Consequently, the appellant was directed to pay Rs.1,50,74,284/- and Rs.1,67,07,865/- along with interest with respect to I.P.C. No.19 and I.P.C. No.20, respectively. These disputes and differences were the subject matter of the reference before the learned Sole Arbitrator, namely, the Honourable Mr. Justice (Retd.) Sardar Muhammad Aslam.

6. The appellant was the claimant in the arbitration proceedings. The learned Sole Arbitrator, after obtaining the appellant's statement of claim, and respondent No.1's statement of defence framed issues from the divergent positions taken by the contesting parties. After recording the evidence of the parties' witnesses, the learned Sole Arbitrator gave issue-wise findings. Vide detailed arbitration award dated 23.09.2015, the learned Sole Arbitrator held respondent No.1 entitled to the entire payment against I.P.Cs Nos.19 and 20 as certified by the Engineer and upheld by the D.R.E.

7. The said arbitration award dated 23.09.2015, was subjected to challenge by the appellant, who filed objections thereto under Sections 30 and 33 read with Section 16 of the 1940 Act, before the Court of the learned Civil Judge, Islamabad. Respondent No.1 on the other hand, filed an application under Sections 14 and 17 of the 1940 Act, praying for *inter alia* the said arbitration award dated 23.09.2015, to be made a rule of Court. Vide judgment and decree dated 06.02.2016, the learned Civil Court spurned the appellant's objections to the said arbitration award, which was made a rule of Court. The said judgment and decree has been challenged by the appellant in these appeals (i.e. F.A.O Nos.30 and 31/2016) under Section 39 of the 1940 Act.

8. Learned counsel for the appellant submitted that amendments No.4 and 6 to the Contract were void for want of consideration; that the rehabilitation of various highways in Pakistan were funded by the World Bank which did not permit the incorporation of price adjustment clauses in all the contracts executed by the appellant; that indeed after 2005, there was a huge inflation in the prices of construction material; that works under the Contract were substantially completed in the year

2006, when amendment No.4 was executed; that the appellant obtained no reciprocal benefit in return for the incorporation of price adjustment clause in the Contract; that the learned Sole Arbitrator erred by holding that the amendments to the Contract were to be given retrospective effect; that for a condition to be implied in a contract, there had to be a common intention of the parties, which was lacking in this case; that the execution of amendments No.4 and 6 to the Contract was not a voluntary act of the appellant; and that the said amendments were not enforceable under Section 25 of the Contract Act, 1872. Learned counsel for the appellant prayed for the appeals to be allowed and for the impugned judgment and decree dated 06.02.2016 to be set aside.

9. On the other hand, learned counsel for respondent No.1 submitted that the learned Sole Arbitrator had not committed any misconduct in rendering the award; that the award has been properly procured and is not in any manner invalid; that amendments No.4 and 6 to the Contract were duly executed by the parties with mutual consent; that on the basis of the said amendments, respondent No.1 had raised I.P.Cs Nos. 19 and 20, which were duly certified by the Engineer; that after the Engineer's certification, there was no reason for the appellant not to make full payment against the said IPCs; that since partial payments against the said I.P.Cs had been made by the appellant to respondent No.1, the appellant could not assert that the amendments were void for want of consideration; that the D.R.E. had also recommended that the amount withheld by the appellant from the I.P.Cs should be released to respondent No.1 along with interest; that amendments No.4 and 6 to the Contract were not contingent on the approval of the World Bank; that the terms and conditions of the Contract (including the amendments thereto) governed the contractual relationship between the appellant and respondent No.1; that there was no privity of Contract between respondent No.1 and the World Bank; that a contract cannot be avoided by one party simply on the basis of a unilateral mistake; that the amendments to the Contract were brought about to compensate respondent No.1 for the escalation

in the prices of the items listed in the said amendments, since 2004; and that the purpose of introducing the price adjustment formula in the Contract was to assist in mitigating the effects of the increase in the cost of the basic construction materials that had occurred since the commencement of the project. Learned counsel for respondent No.1 prayed for the appeals to be dismissed with costs.

10. I have heard the arguments of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of these appeals have been set out in sufficient detail in paragraphs 02 to 07 above, and need not be recapitulated.

11. When the Contract was entered into, it did not contain an escalation clause. It was not disputed that through amendment No.4, the parties amended the Contract so as to introduce a price adjustment formula in the Contract to cater for the price hike of fuel, bitumen, labour, cement and steel. Through amendment No.6, the permissible price adjustment due to escalation was enhanced from 40% to 55%.

12. Respondent No.1 raised invoice No.19 to gain the benefit under the amendments, which invoice was certified by the Engineer for Rs.3,02,83,250/-, and IPC No.19 was issued on 04.07.2008. However, the appellant only paid Rs.1,52,08,963/- to respondent No.1 and withheld the remaining amount of Rs.1,50,74,284/- on the ground that the Executive Board of the appellant in its meeting dated 07.08.2008, had decided that the benefit of price adjustment to the extent of 55% was to be effective from 01.01.2006. The D.R.E.'s view was that the appellant could not thrust its Executive Board's decision on respondent No.1 by making it a part of the Contract. Accordingly, the D.R.E. recommended that the appellant should pay Rs.1,50,74,284/- withheld by the appellant from the payment against I.P.C. No.19 to respondent No.1. Furthermore, interest on delayed payment was also recommended to be paid in accordance with clause 60 of the Contract. Similarly, I.P.C No.20 dated 04.09.2006, was certified by the Engineer for an amount of Rs.5,94,95,491/-. However, the appellant paid Rs.4,27,87,626/-

against the said I.P.C. and withheld the remaining amount of Rs.1,67,07,865/-. The D.R.E. also recommended interest on delayed payment to be paid to respondent No.1.

13. The appellant's witnesses before the learned Sole Arbitrator, admitted that during the pendency of the Contract, a substantial rise in the cost of construction material was witnessed. The learned Sole Arbitrator was cognizant of the fact that amendment No.4 dated 20.02.2006, and amendment No.6 dated 27.05.2008 were executed between the appellant and respondent No.1 voluntarily. He was of the view that the appellant could not wriggle out of its obligations under the said amendments to the Contract. These amendments, which were in clear and unambiguous language, were not stated to be subject to the approval of the World Bank. The learned Sole Arbitrator was of the view that there was nothing stopping the appellant to expressly mention in the said amendments, the dates on which such amendments were to take effect. The learned Sole Arbitrator took into consideration the fact that amendment No.4 was stated to be retrospective, whereas amendment No.6 was in continuation of amendment No.4 save the replacement of table-A thereto. These amendments were made an integral part of the Contract. Therefore, the learned Sole Arbitrator held that the amendments were to be deemed to be part of the Contract from its very inception. The learned Sole Arbitrator did not find anything wrong in the D.R.E's view that a unilateral decision taken by the appellant's Executive Board could not have been imposed on respondent No.1, whose relationship with the appellant was to be governed by the terms and conditions of the Contract. The learned Sole Arbitrator did not find any reason to declare the amendments in the Contract as void. As it is these amendments were partially given effect to by the appellant.

14. The appellant's objections to the said arbitration award appear to be vague and bereft of particularities. The appellant has generally pleaded that the learned Sole Arbitrator had ignored important evidence; misapplied the law relating to contracts; left matters undetermined; and misconducted the proceedings by interpreting contractual provisions contrary to

the law. The appellant did not identify the matters that had been left undecided by the learned Sole Arbitrator. The appellant did not even specify the document or piece of evidence that would have caused the learned Sole Arbitrator to come to a different conclusion.

15. Perusal of the impugned judgment and decree dated 06.02.2016, shows that the learned Civil Court applied its mind to the objections raised by the appellant to the arbitration award. The learned Civil Court appears to have been conscious of the scope of the powers of the learned Civil Court while hearing objections to an arbitration award. The learned Civil Court observed that it could not carry out re-appraisal of the entire evidence produced by the parties before the learned Sole Arbitrator, like a court of appeal, in order to dig-out an error or an infirmity in the arbitration award. The learned Civil Court held that the learned Sole Arbitrator had not committed any misconduct in rendering the arbitration award.

16. As regards the contention of the learned counsel for the appellant that amendments No.4 and 6 to the Contract are void (in terms of Section 20 of the Contract Act, 1872), on account of common mistake, the same is not tenable. The appellant cannot assert that there was no consensus *ad idem* because partial performance under the said amendments had taken place. It is not disputed that the appellant made partial payments against the I.C.Ps No.19 and 20, which were almost entirely based on the said amendments. The appellant's case essentially is that since its Executive Board had, in its meeting dated 07.08.2008, decided that the said amendments in the Contract were to be effective from 01.01.2006, therefore, respondent No.1 could not expect to be paid escalation/price adjustment for a period prior to 01.01.2006. The decision of the Executive Board was taken much after the said amendments to the Contract. Therefore, the D.R.E., the learned Sole Arbitrator, and the learned Civil Court were correct in concurrently holding that the said decision of the Executive Board could not be considered as a part of the Contract between the appellant and respondent No.1.

17. I cannot bring myself to agree with the contention of the learned counsel for the appellant that the amendments to the Contract were not supported by consideration. This is because amendments to a contract during its currency may be made for a variety of reasons, and there need not be consideration for each and every amendment to the contract independently. I also do not agree with the learned counsel for the appellant that amendments to the Contract were made after the works under the Contract were completed. The learned counsel for the appellant did not deny that an extension in time (EOT) was granted in accordance with the provisions of a Contract to 29.01. 2007. This is clearly mentioned in the decision of the DRE while deciding the disputes regarding payment under I.P.Cs Nos.19 and 20.

18. The arbitrator is the final arbiter of the dispute between the parties. The scope of interference by Courts with regard to arbitral awards is limited. A Court considering an application under Section 30 or 33 of the 1940 Act, neither sits in appeal over the findings and decision of the arbitrator, nor can it reassess or reappraise evidence or examine the sufficiency or otherwise of the evidence. Appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. Reappraisal of evidence by the Court is impermissible. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the 1940 Act. Interference, however, would be available if there exists a total perversity in the award or the award is based on a wrong proposition of law. The Court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence on the record for the purposes of finding out whether or not the arbitrator has committed an error of law. In the event, two views are possible with regard to interpretation of statutory provisions and or facts, the Court would not be justified in interfering with the award by substituting its view with that taken by the arbitrator in the award.

19. The scope of powers of the Court while hearing objections to an arbitration award have been well explained in *inter alia* the following judgments of the Superior Courts:-

(i) In the case of Mian Corporation Vs. Lever Brothers of Pakistan Ltd. (PLD 2006 SC 169), it has been held as follows:-

> ***"7. ... It is well-settled that the arbitrator acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight, unless the misconduct is not only alleged, but also proved against him to the satisfaction of the Court. The arbitration award may however, be discarded, if the findings are contrary to law and the material on record. ... Suffice it to observe that while examining the award, the Court does not sit in appeal over the award and has to satisfy itself that the award does not run counter to the settled principles of law and the material available on record. Indeed, an arbitrator is final judge on the questions of law and facts and it is not open to a party to challenge the decision, if it is otherwise valid. If an arbitrator has made an award in terms of the submissions made before him, no adverse inference can be drawn against him. An award cannot be lawfully disturbed on the premise that a different view was possible, if the facts were appreciated from a different angle. In fact Court while examining the correctness and legality of award does not act as a court of appeal and cannot undertake reappraisal of evidence recorded by a arbitrator in order to discover the error or infirmity in the award."***

(ii) In the case of Premier Insurance Company Vs. Attock Textile Mills Ltd. (PLD 2006 Lahore 534), it has been held as follows:-

> ***"24. ... I feel it expedient to reiterate the basic principles, which should prevail with the Court while considering the objections to an award and the criteria on the basis of which, an award should be set aside. The statutory grounds in this behalf are clearly provided in sections 30 and 33 of the Arbitration Act. And on the basis of catena of judgments of the superior Courts of our country, it is well-settled by now that an arbitration is a forum, which is chosen by the parties out of their own free-will and consent, for the resolution of the dispute inter se them; such forum has the sanctity of the confidence of the parties reposed upon it and to all intents and purposes, the Arbitrators are the Judges of law and fact and can accordingly decide the dispute. It also cannot be disputed that the Arbitrators have the full authority to appreciate the facts of the case, according to their own perception, expertise, knowledge and wisdom, and such appreciation of facts, if not suffering from the vice of any misreading and non-reading of the record, shall not be interfered with by the Court only on account that another conclusion is possible. There also can be no cavil that the Court while considering the validity of the award should not sit as a Court of appeal, trying to fish or dig out the latent errors in the proceedings or the award, but should only confine to examining the award by ascertaining, if there is any error, factual or legal, which floats on the surface of the award or the record and if such an amiss is allowed to remain, grave injustice shall be done to the aggrieved party. The perversity about the reasoning, in view of the dictum of the Honourable Supreme***

> ***Court, though is a ground for the interference in the award, but the Court should not infer the perversity because of the factual conclusion being wrong, rather it should be taken to be analogous and akin to "perverse verdict" which means that the factual conclusion drawn is against the law; obviously this shall include the decision of the Arbitrator on the facts of the case being based upon the misreading and the non-reading of the evidence/record. In my considered view, the award of an Arbitrator, who is the Judge selected by the parties themselves, should not be lightly interfered with until and unless as earlier held that it is established that the error committed by him is so glaring that if it is overlooked, it shall lead to miscarriage of justice. But certainly the award cannot be intercepted on the ground that on the reading of the evidence, a conclusion other than arrived at by the Arbitrator, is possible."***

As the author Judge of the said report rose to grace the Honourable Supreme Court of Pakistan, the said judgment deserves reverence and respect.

20. On perusal of the arbitration award, I did not find any error apparent on the face of the award. I also find that the learned Sole Arbitrator has not misconducted himself or the proceedings in any manner in rendering the arbitration award. Hence, the appeals from the judgment and decree dated 06.02.2016, passed by the learned Civil Court making the arbitration award a rule of Court, merit dismissal.

21. For the foregoing reasons, both the appeals are dismissed with no orders as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

Sanaullah