

Form No: HCJD/C-121.

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

FAO No. 189 of 2010.

National Highway Authority

Vs.

M/S Hakas (Pvt.) Ltd. etc.

DATE OF HEARING: 06-6-2011.

APPELLANT BY: Mr. Ali Razaq Advocate.

RESPONDENT BY: Barrister Sardar Ijaz Ishaq and
Syed Akbar Javed Shah Advocates.

RIAZ AHMAD KHAN, J: This judgment is
directed to dispose of FAO No. 189 of 2010.

2. Brief facts of the case, are that National Highway Authority awarded a contract worth Rs.2.187 billion to a company known as Development International Trade Company Limited (DITCO) for the construction of 'Satra Mile Ghika Gali Dual Carriageway'. Since some differences arose between the two parties, so the project was suspended and the dispute was referred to the arbitration. However, the matter was re-negotiated and the settlement

led to the renewal of the earlier contract dated 21-6-1993, vide an agreement of revival dated 28-8-1999. According to clause 2(a)(i) of the agreement of revival, DICTO had to pay 7% rebate on the contract price to NHA, which was to be deducted from Monthly Interim Payment Certificates (IPC) in respect of the work done. Clause 2(a)(ii) of the agreement of revival, provided a further rebate by way of reduction of the Foreign Exchange Component of the contract price, from 35% to 25%; however, by virtue of clause 4 of the agreement of revival, in case the NHA delays in making the construction site available to DITCO within 22 months of the date of commencement of work, then the DITCO shall be entitled to the reimbursement of extra cost suffered by it, on account of such delay, subject to maximum of the value of the rebates offered by DITCO i.e. 7% of the contract price. Afterwards, DITCO was replaced by Hakas (Pvt.) Ltd. vide an agreement dated 25-9-1999 and in such a way, all obligations and rights relating to the construction work, were assigned to the present respondent.

3. The respondent took over the contract, but afterwards dispute arose between the parties and the matter was referred to the arbitration. The sole arbitrator was appointed. The arbitrator framed issues, recorded evidence and concluded the arbitration proceedings, on

07-10-2005. The Award was issued on 31-10-2005. The arbitrator held in award, as under:

- “(1) Contractor shall continue to give rebates under clause 2 for the entire contract period whose price from Rs.2,187,107,904/- has changed due to various addendas. Amount refunded as a result of Engineer decision to respondent to be returned to claimant (NHA).”*
- (2) NHA will now reimburse Hakas (Pvt.) Ltd. on amount equal to rebate 7% with 25% FE component for failing to comply with their commitments under clause 3 and 4. This reimbursement will be on original contract amount of Rs.2,187,107,904/- only.*
- (3) Contractor is entitled to remedies under the contract to be reimbursed the extra cost suffered by him (Clause 4 of Revival Agreement).”*

4. The respondent, M/S Hakas (Pvt.) Ltd. thereafter filed application on 20-12-2006, u/s 14 of the Arbitration Act 1940, for filing the award in Court; the said application was, however, subsequently withdrawn. On 24-10-2007 the appellant (National Highway Authority) filed application before learned Senior Civil Judge, Islamabad u/s 14 read with section 17 of the Arbitration Act, for filing award in the Court and making the same rule of the Court. The respondent M/S Hakas (Pvt.) Ltd. filed objection u/s 30 of the Arbitration Act, claiming therein that the findings of the arbitrator, for paying the rebate on entire contract price, be

set aside. The objection was filed on 15-12-2007. Learned Civil Judge Ist Class, Islamabad after hearing the parties, modified the award in the following manners:

- “(i) *Contractor (i.e. Respondent) shall be entitled for reimbursement of 7% of original contract price, which was 2,187,107,904/- from NHA and if already reimbursed the same, shall not be returned;*
- (ii) *The contractor shall not be liable to give rebate under clause 2 of the agreement beyond the contract price i.e. Rs.2,187,107,904/-;*
- (iii) *The contractor is entitled to the remedies under the contract to be reimbursed, the extra cost suffered by under clause 4 of the revival agreement.”*

Feeling aggrieved of the modification made by the learned Civil Judge Ist Class in the award, NHA has filed the present appeal.

5. Learned counsel for the appellant contended that the learned trial Court had limited jurisdiction and, therefore, modification in the award, could not be made. In support of this contention, the learned counsel has relied upon the case law reported as 1991 CLC 66, 1999 CLC 1698 and 1999 CLC 1777. The learned counsel further contended that u/a 17 of the Limitation Act, 1908 the time available to the parties for filing the award in the Court was 90-days, after the same had been awarded by the Arbitrator. The

respondents had filed objection on 15-12-2007, whereas, the award was issued on 31-10-2005, so the objection was badly time barred. The learned counsel for the appellant has, however, admitted that even the application filed by the appellant dated 24-10-2007 was also time barred. According to the learned counsel, if both the application and objection raised by the respondent, were considered as time barred, then the impugned order would become without jurisdiction and the award would remain in field, therefore, the impugned order is liable to be set aside.

6. On the other hand, learned counsel for the respondent contended that the trial Court u/s 15 of the Arbitration Act, 1940 had the authority to modify the award and the modification made was in accordance with law. It was further contended that the modification could be made, even after the period of limitation, as the trial Court could exercise this power suo-motu and, therefore, notwithstanding the period of limitation, the trial Court could modify the award. The learned counsel relied upon the case law reported as 2002 SCMR 1662, 1991 CLC 66 (DB)Note, and 1986 CLC 2362.

7. I have heard learned counsel for the parties and have also perused the record.

8. In the present case, the arbitrator had come to the conclusion that the NHA had failed to provide the site, to the contractor, within the specified time and therefore, the contractor was required to be compensated in accordance with the agreement. Keeping in view the agreement, the arbitrator had held that the contractor shall continue to give rebate under clause 2 *ibid*, for the entire contract period, whose price from Rs.2,187,107,904/- had changed due to various addendas; amount refunded as a result of Engineer's decision to the respondent, to be returned to NHA; NHA will now reimburse M/S Hakas (Pvt.) Ltd. on amount equal to rebate 7% with 25% FE component for failing to comply with their commitments under clauses 3 & 4; this re-imbursement will be on original contract amount Rs.2,187,107,904/- only and contractor is entitled to remedies under the contract to be reimbursed the extra cost suffered by him.

9. The main dispute is that according to NHA, appellant, the contractor is liable to pay 7% rebate for the entire contract period, which obviously means that 7% rebate would be over the whole amount, which is much more than the original contract amount. On the other hand, the case of respondent is that, if NHA is entitled to rebate for the entire contract period, then NHA would also reimburse M/S Hakas (Pvt.) Ltd. for the entire contract period and not on the

original contract amount i.e. Rs.2,187,107,904/-; the modification made by the learned trial Court was, therefore, legal.

10. As far as modification in the award is concerned, the Court u/s 15 of the Arbitration Act 1940, has power to modify the award provided it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on matter referred; or where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or where the award contains a clerical mistake or an error arising from an accidental slip or omission. In other words, the Court can not enter into the merits of the case and can not assume the power and authority of the arbitrator. Appreciation of evidence is entirely authority of the arbitrator, but if error is on the basis of record and merely by reading of the award the Court comes to the conclusion that there is error in the award, then that error can be rectified. It was held by Hon'ble Supreme Court of Pakistan in 2002 SCMR 1662 that the Court can suo motu modify or correct the award, notwithstanding that the objections were barred by limitation. So the Court can modify the award, even after period of limitation, provided the modification

does not require evidence and also does not change the decision of the arbitrator.

11. In the instant case, the arbitrator after appreciation of evidence, had reached a decision that NHA is entitled to get 7% rebate of whole of contract period and against that the contractor is entitled to compensation on the same rate i.e. 7% but on principal amount of contract. This decision could be changed only after appreciation of evidence and the modification could also be made on the basis of appreciation of evidence. This modification would also change the decision of the arbitrator. I am, therefore, of the opinion that the modification made by the learned trial Court was unlawful as by virtue of the said modification, the decision of the arbitrator was changed.

12. In the above said circumstances, the appeal is accepted and the judgment dated 05-10-2005 of the learned trial Court is hereby set aside. The decision of arbitrator is maintained, which is declared as rule of the Court. Parties are, however, left to bear their own costs.

(RIAZ AHMAD KHAN)
JUDGE

Tanveer Ahmed.

Blue slip added
issued 20/10/14

ORDER SHEET
ISLAMABAD HIGH COURT
ISLAMABAD

F.A.O No. 189 of 2010.
NHA
Versus
M/S Hakas Pvt. Ltd.

S.No. of order / Proceeding	Date of order/ proceeding	Order with signature of Judge, and that of parties or counsel, where necessary.
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30-05-2011. Mr. Ali Raza, learned counsel for the appellant.
Barrister Sardar Ijaz Ishaque and Syed Akbar Javed
Shah, Advocates for the respondent.

Partial arguments heard. Now to come up on
06-06-2011 for further arguments.

(RIAZ AHMAD KHAN)
JUDGE

Saeed*