

Stereo.HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT

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F.A.O. No.24690 of 2024.

M/s Staco Shahid Builders Joint Venture (JV).

Versus

Lahore Cantonment Board.

J U D G M E N T.

Date of hearing: **03.09.2024.**

Appellant by: Mr. Zahid Saleem, Advocate.

Respondent by: Mr. Shahzada Muzaffar Ali,
Advocate with Sidra Azmat and
Hanan Masood on behalf of LCB.

AHMAD NADEEM ARSHAD, J. Through this First Appeal against Order, the appellant has called into question the validity and legality of order dated 25.03.2024 whereby learned Civil Judge/Judge Special Court for Admin. Commercial Cases, Lahore, disposed of the appellant's application under Section 20 of the Arbitration Act, 1940 (*hereinafter referred to as "The Act"*), by maintaining that the same is premature and referred the matter to the already appointed Arbitrator/Director Military Lands and Cantonments, Lahore Region.

2. *Tersely*, the facts forming background of proceedings in hand are that the appellant was awarded a contract by the respondent for construction of 250 Beds Family Wing Hospital with the estimated cost of Rs.954-50 million at Sarfraz Rafique Road, Lahore Cantt, being the lowest bidder. In this regard, a contract/agreement was duly signed between the parties. Subsequently, the project was converted and its scope was enhanced to 500 Beds Teaching Hospital. Meanwhile, a dispute arose between the parties with respect to the

price variation, upon which the appellant moved application under Section 20 of the Act, with the following prayer:

“...that while accepting the application the respondent Board be issued directions to file reply of this application and resolve the disputes/difference in between the parties of this application in the light of the tender notice, agreement, initial work order, subsequent changes/enhancement in the project scope with further direction to the respondent Board to decide the complete balance work scope (including deleted scope under PPRA Rule 8 read in conjunction with PPRA Rule 9) with its increased cost on the present market rates applicable presently under 70.1 (Price adjustment/escalation) Rules, Regulations, Laws and other Government applicable Notifications in accordance with law of the Country; for the purpose parties be allowed to appoint arbitrator each of own choice, having no conflict of interest and impartial status to address all issues in the light by the Hon’ble Court, following Arbitration Act, 1940. Arbitrators so appointed by the parties be directed to file its Award on the issues raised by the applicant on the date fixed by this Hon’ble Court and Award filed by the neutral arbitrators be made rule of the Court.”

3. Respondent contested the application by filing written reply in contrast. Learned Trial Court, after hearing both sides, disposed of the application vide order dated 25.03.2024 by maintaining that the same is premature and referred the matter to the already appointed Arbitrator/Director Military Lands and Cantonments, Lahore Region. Hence, this appeal.

4. Learned counsel appearing on behalf of the appellant argued that impugned order is against the facts & law and result of mis-reading/non-reading of the record. He adds that although in the agreement Director, Military Lands & Cantonments Lahore Region is appointed as Arbitrator but he cannot render an impartial award as he is representative of the respondent; that it is settled proposition of law that no one can be judge of his own cause. In last, he prayed that while accepting the application independent Arbitrators be appointed and after their Award, the same be made Rule of the Court. To augment his arguments, he relied upon the case laws cited as “MESSRS COMMODITIES TRADING INTERNATIONAL CORPORATION V. TRADING CORPORATION OF PAKISTAN LTD AND ANOTHER” (1987 CLC 2063), “MESSRS ALLIED ENGINEERING CONSULTANTS (PVT) LTD. LAHORE. V. MESSRS SUI GAS TRANSMISSION COMPANY LTD” (1989 CLC 1143), DIRECTOR HOUSING, A.G’S BRANCH, RAWALPINDI V. M/S

MAKHDUM CONSULTANTS ENGINEERS AND ARCHITECTS (1997 SCMR 988), “ENGR. INAM AHMAD OSMANI V. FEDERATION OF PAKISTAN AND OTHERS” (2013 MLD 1132), “UNIVERSITY OF ENGINEERING AND TECHNOLOGY, LAHORE AND ANOTHER V. MESSRS UPRIGHT ENGINEERS (PVT) LTD. (2021 CLC 596).

5. On the other hand, learned counsel for the respondent hotly resisted this appeal by controverting the arguments advanced by the learned counsel for the appellant and prayed for its dismissal.

6. **Heard.** Record perused.

7. It evinces from the record that a contract/agreement for construction of hospital was arrived at between the parties on 23.08.2018. In the agreement an arbitration clause (clause 30 Part-II-B) was also settled between the parties, which reads as under:

“In case any dispute arises during the subsistence of the contract, it shall be referred to the Director Military Lands & Cantonments, Lahore Region who shall be the sole Arbitrator and his decision shall be final and binding on the both the parties who will not challenge the same in any court of law/higher authorities.”

In addition to above, clause 67.3 of Part-II particular conditions of contract under the heading ‘Arbitration’ again provides that “DML&C Lahore Region is the sole arbitrator in the case of disputes arises between (LCB) and contractor, his decision will be final and binding on both the parties”.

8. The appellant maintained that during the currency of agreement, disputes arose between the parties qua initial work order, subsequent changes/enhancement in the project, the complete balance works scope (including deleted scope under PPRA Rule 8 read in conjunction with PPRA Rule 9) with its increased cost on the present market rate applicable presently under PEC particular conditions of contract (PCC) including clause 70.1 (price adjustment/escalation) Rules, Regulation, Laws and other government applicable Notifications. The appellant posed his no confidence upon the already appointed arbitrator being the appellate authority of respondent by maintaining that the agreements were got signed under coercion and duress. Further submitted that the appellant wrote

letters to the respondent/Board as well as DGML&C but they did not give any response which constrained him to file the application.

9. Arbitration is a method for investigation and determination of a dispute or disputes between the parties by one or more persons chosen by them. The essence of arbitration is the settlement of disputes by the decision not of a regular or ordinary court of law, but of one or more persons acting as arbitrators chosen by the parties, whose decision the parties agreed to accept as binding whether they agree with the decision or not. The concept of arbitration is based upon the principle of withdrawing the dispute from the ordinary courts and enabling the parties to resolve their disputes before a domestic Tribunal. The persons deciding such private disputes are called arbitrators as they have an arbitrary power, if their decision is within the four corners of the dispute referred to them by the parties. The arbitral tribunal derive jurisdiction solely from the arbitration agreement.

10. Where differences have arisen between the parties to arbitration agreement, either both the parties or any of them could adopt procedure provided under Sections 3 to 19 of the Act, or could apply to the Court under Section 20 of the Act, that agreement be filed in the Court. Comprehensive procedure for appointment of arbitrator, without intervention of Court has been prescribed under sections 03 to 19 of the Act. Non-invoking of provisions of said Sections would entitle a party to apply for filing the agreement in the Court. Effect of such proceedings would be that the Court after notice and hearing the parties and where no sufficient cause was shown could order agreement to be filed and would make order for reference to arbitrator appointed by the parties in terms of agreement. Where parties failed to agree for appointment of arbitrator, Court would appoint one. Option is given to the parties either to proceed under Section 03 to 19 or apply to the Court that agreement be filed under Section 20.

11. Before further discussion, first I discuss the language of Section 20 of the Act, which reads as under:

Application to file in Court arbitration agreement.--(1) Where any person have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.”

Perusal of the above-quoted section, it appears that before a person can make an application under that provision for a prayer that an agreement be filed in the Court, following conditions have to be satisfied:-

- a. That there should be a pre-existing arbitration agreement between the parties;
- b. That the parties should not have taken any steps under Sections 3 to 19 of the Act prior to the institution of the application under Section 20;
- c. That differences or disputes have arisen between the parties to which the arbitration agreement applies;
- d. That the application is not barred by limitation; and
- e. That the Court to which the application under Section 20 has been made has jurisdiction in the matter to which the agreement relates.

12. Section 20 of the Act provides for powers and duties of the Court which could be divided into two distinct parts. The first part deals with the judicial function to consider the question whether the arbitration agreement should be filed in Court or not. This question has reference to the cause shown by the defendant as to why the agreement should not be ordered to be filed and normally refers to objection as to the existence and validity of the agreement. After the Court has heard the parties with regard to the question whether to order filing of the agreement or not, and if the Court orders the filing

of the agreement the first part of its powers and duties is over. The procedure thereafter to be followed relates to the ministerial act of reference to the arbitrator or arbitrators appointed by the parties. If the parties have appointed the arbitrator or arbitrators, the Court has simply to make a reference to him or them as the case may be. But if the parties do not agree the Court may be required to make a decision as to who should be selected as an arbitrator, which may again be a judicial function. In this regard, the relevant part of Section 20 of the Act is sub-section 4. A bare perusal of the provision of sub-section 4 of Section 20 shows that the statute by mandatory provisions directs the Court to make “an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise”. The statute, quite clearly refers to the arbitrator appointed in the agreement.

13. There is no doubt that the whole object underline the Arbitration Act is to enforce the arbitration agreement whereby the parties bound themselves down to have their disputes, arising out of transaction to which such an agreement is applicable, adjudicated upon and decided by the domestic tribunal.

14. Section 5 of the Act, in unmistakable terms, reveals the intention of the lawmakers in providing that the authority of an appointed arbitrator shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. For ease, Section 5 of the Act is reproduced as under:

“Authority of appointed arbitrator or umpire irrevocable except by leave of Court.--The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.”

15. The power of the Court to remove or substitute an arbitrator appointed by the parties has been vested in Court, if the prescribed conditions exist which is provided in Section 8 of the Act. For better understanding it is reproduced as under:

“Power of Court to appoint arbitrator or umpire.--(1) In any of the following cases:--
(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after difference have arisen, concur, in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to Act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied; and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.”

Section 8 of the Act stipulates under what situations the Court has power to appoint an arbitrator or an umpire. Three situations are enumerated by the Section which are as under:

- a. Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by the consent of the parties, and all the parties do not, after differences, have arisen, concur in the appointment or appointments; or*
- b. If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or*
- c. Where the parties or the arbitrators are required to appoint an umpire and do not appoint him.*

16. It was held in the case of “M/S HAFIZ ABDUL AZIZ COTTON JINNING FACTORY VS “M/S HAJI ALI MUHAMMAD ABDULLAH & CO. AND ANOTHER” (PLD 1966 (W.P) Kar. 197) that under Section 8 (1) (b) of the Act, the Court can appoint an Arbitrator or Umpire when the arbitrator or Umpire appointed by the parties “neglects or refuses to act, or is incapable of acting, or dies”, and that in terms of Section 20(4), the Court can order reference to an arbitrator appointed by itself “where the parties cannot agree upon arbitrator”. It was further held in this case that the Court can replace a person of its choice to give effect to the intention of the parties, but this power does not confer the authority on the Court to substitute the original agreement of the parties by an entirely new agreement of its own choice.

17. After the Court passes an order for filing of the agreement, the question for appointment of a new arbitrator would arise only when the parties do not agree to the appointment of an arbitrator. In

the present case the parties agreed to appoint the Director Military Lands and Cantonments, Lahore Region as their sole arbitrator. The parties at the time of agreement, had obviously contemplated the disputes to arise in the future for which provision made for reference to the arbitrator of a person. The appellant who is a leading construction company having wide experience had willingly and with his free consent entered into the agreement with the respondent. Since the parties by an agreement had chosen to refer the dispute to arbitration, they were bound to honour the agreement and could not by pass the mechanism provided in the agreement on flimsy grounds.

18. It is a fundamental principle of interpretation of documents and Statutes that they are to be interpreted in their entire context following a full consideration of all provisions of the documents or Statute, as the case may be, that every attempt shall be made to save the document and for this purpose a difference between general statements and particular statements of the document be differentiated properly to save the document rather to nullify it, that no provision of the document be read in isolation or in bits or pieces, but the entire document is to be read as a whole to gather the intention of the parties, that the court for this purpose can resort to the correspondence exchange between the parties, that the court shall lean to an interpretation, which will effectuate rather than one, which will invalidate an instrument. The said principles have been contended before the learned Full Bench of the Hon'ble Supreme Court in the case of "SAUDI PAK INDUSTRIAL AND AGRICULTURAL INVESTMENT COMPANY (PVT) LIMITED, ISLAMABAD VS M/S ALLIED BANK OF PAKISTAN AND ANOTHER" (PLD 2003 SC 215).

19. Learned counsel for the appellant maintains that the appellant signed the agreement under undue influence, under pressure and threats of blackmailing he submitted consent for appointment of Director Military Lands and Cantonment Lahore Region as sole Arbitrator. He added that the Arbitrator is of the same department as respondent Board, therefore, appellant has no hope

from him to do complete justice between the parties, therefore, an independent arbitrator is required to be appointed under the supervision of the Court. This argument of the learned counsel cannot be accepted in view of the clear pronouncement to the contrary by the Supreme Court of Pakistan in “LAHORE STOCK EXCHANGE LIMITED V. FREDRICK J. WHYTE GROUP, PAKISTAN LTD. AND OTHERS” (PLD 1990 SC 48), in which it has been ruled that the question whether the consent of a party to an agreement has been procured through fraud, coercion or misrepresentation is to be decided by the arbitrator appointed by the parties and not the Court.

20. There were three courses open to the Court under clause 4 of Section 20 of the Act, after the arbitration agreement had been ordered to be filed *viz. i.* to make reference to the arbitrator appointed by the parties in the agreement, or, *ii.* To make reference to the arbitrator not named in the agreement but with regard to him the parties agree otherwise, or *iii.* When the parties cannot agree upon an arbitrator, an arbitrator is appointed by the Court itself. Power of the Court to order reference to an arbitrator appointed by itself, does not confer the authority on the Court to substitute the original agreement of the parties by an entirely new agreement of its own choice. If the parties out of their free-will and consent appointed third person knowingly fully well his relation with any one of the parties to dispute, such arbitration agreement shall not be invalid on the principle of bias and the arbitrator cannot be removed on this ground. Known interest of an arbitrator does not in any way invalidate the appointment, and it was only in a case where such an interest is concealed or comes into existence after the appointment, that the appointment is rendered invalid or liable to be revoked. This Court in a case titled “M. A. GHANI SUFI & SONS VS FEDERATION OF PAKISTAN” (PLD 1957 (W.P) Lahore 363) held that “there is a good deal of authority saying known interest of an arbitrator does not in any way invalid the appointment, and that it is only a case where such an interest is concealed or comes into existence after the

appointment that the appointment is rendered invalid or liable to be revoked. In any event, the plaintiff was fully aware of the fact at the time of entering into the contract that, in case of any dispute, the same will have to be referred to the Federal Government for appointment of an arbitrator. Therefore, the plaintiff is estopped from objecting to the reference of dispute to the Secretary of the Federal Government.” In the present case the appellant was well aware of the authority and department of the arbitrator from the very first date. The Director Military Lands and Cantonments is not the official of the Lahore Cantonment Board rather he is an Appellate Authority under Section 84 of the Cantonment Act, 1924, who is appointed by the Government as defined under Pakistan Cantonment Service Rules, 1952. The said Director is not a participant in the meetings of Cantonment Board, therefore, any kind of allegation of biasness or partiality on his part is purely hypothetical and presumptuous, without any kind of evidence at all.

21. In the instant case, the parties have already appointed the Director Military Lands and Cantonments Lahore Region as arbitrator for adjudication of the disputes arising out of the agreement and the appellant cannot wriggle out from his commitment and precluded from approaching the court for appointing an arbitrator other than the named arbitrator. The appellant can approach the already appointed arbitrator for redressal of his grievance and thereafter if there appears any instance of biasness he may approach the court for redressal of his grievance under relevant provisions of law. The learned Division Bench of Islamabad High Court while dealing with similar type of situation in a case “PAKISTAN MEDICAL COMMISSION (PMC) THROUGH SECRETARY(SUCCESSOR OF REGISTRAR, PMDC), ISLAMABAD CAPITAL TERRITORY VS CONSTRUCTION EXPERTS (PVT) LIMITED THROUGH CHIEF EXECUTIVE/DIRECTOR, ISLAMABAD AND ANOTHER” (PLD

2023 Islamabad 01) held as under:-

“The basic idea of arbitration is the settlement of disputes by Tribunals chosen by the parties themselves whose decision is to be accepted as final between themselves. Due weight has to be given to the arrangement made

by the parties themselves relating to the personnel and machinery for the settlement of their disputes. It is settled law that in the case of named arbitrator, reference has to be made to him and a party is precluded from approaching the court for appointing an arbitrator other than the named arbitrator. Once a party enters into an agreement with eyes wide open, it cannot wriggle out of the situation on the claim that the designated person would not be impartial or objective. However, if at the conclusion of the arbitration proceedings respondent No.1 feels that the arbitrator had not acted independently or impartially or had suffered bias while rendering the award it will always be open to it to take this as a ground in its application under section 30 of the 1940 Act for setting aside the award. Additionally, during the course of arbitration proceedings, if the arbitrator proceed with the reference in a manner as to give reason to respondent No.1 to believe that he is misconducting the proceedings, he can file an application under section 5 of the 1940 Act to revoke the authority of the arbitrator or an application under section 11 of the said Act for the removal of the arbitrator. In paragraphs 5-52 of Russell on Arbitration (22nd Edition), it is stated that "an arbitrator must also appear impartial and if there are justifiable doubts as to his impartiality this will provide a ground for his removal by the court."

22. In these circumstances, learned Court has rightly referred the matter to the already appointed Arbitrator for adjudication upon the dispute.

23. Learned counsel appearing on behalf of the appellant remained unable to point out any illegality, irregularity or jurisdictional defect in the impugned order. As far as the case laws referred by him are concerned, the same are not helpful to the appellant being distinguishable from the facts/circumstances of the case.

24. For the foregoing reasons, this appeal has no force/substance, hence, the same is **dismissed**. No order as to costs.

**(AHMAD NADEEM ARSHAD)
JUDGE.**

APPROVED FOR REPORTING.

JUDGE.

M. Arsalan