IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR
MR. JUSTICE SYED HASAN AZHAR RIZVI

CIVIL APPEAL NO.1137 OF 2014
(Against Order dated 29.10.2013 passed by the Peshawar High Court, Peshawar in W.P. No.2834-P/2011)

Cantonment Board Peshawar, Peshawar ...Appellants
Cantt thr. Executive Officer & another

Versus

M/s RACO Advertisers & another ...Respondents

For the Appellants : Mr. Ihsan Ullah Khan, ASC
(via video link from Peshawar)

For the Respondents : Ch. Akhtar Ali, AOR

Date of Hearing : 13.06.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- This Civil Appeal with leave of this Court is brought to challenge the judgment dated 29.10.2013 passed by the Peshawar High Court ("**High Court**") in W.P.No.2834-P/2011 whereby the Writ Petition filed by the respondent was disposed of with the direction to the Director Military Lands and Cantonments, Peshawar Region, Peshawar ("**DML&C**") to conduct fresh arbitration and consider the grievance of the respondent No.1 (petitioner in High Court) raised in the memo of the Writ Petition.

2. The transitory facts of the case are that the respondent No.1 and the appellants entered into an agreement for the recovery of Hoarding fee charges on 29.02.2008 with effect from 01.01.2008 to 31.12.2008 ("**Agreement**"). It was mutually agreed in Clause 26 of the Agreement that any dispute arising out of the Agreement shall be referred to the DML&C for arbitration, whose decision shall be final and binding on the parties. The appellant-department called upon the respondent No.1 *vide* letter dated 23.06.2009 to pay the balance amount of Rs.83,04,766/-, but the respondent No.1 filed Writ Petition

No.1879/2009 in the High Court, which was disposed of *vide* judgment dated 13.04.2010 with the direction to the parties to approach the DML&C for arbitration. On the reference of respondent No.1, the arbitration proceedings commenced as per the Agreement and the Arbitrator set-aside the decision of blacklisting the respondent No.1, subject to payment of dues amounting to Rs.30,25,070/- to the Cantonment Board. Instead of making the payment, the respondent No.1 again filed Writ Petition No.2834-P/2011 in the High Court whereby, *vide* the impugned judgment, the matter was remanded to the DML&C.

3. On 18.08.2014, leave to appeal was granted by this Court in the following terms:-

> "Mr. Ihsan Ullah Khan, Learned ASC for the Petitioner says that the parties had entered into an arbitration agreement and accordingly their dispute was referred to the sole arbitrator who was Director Military Land and Cantonment, Peshawar region, Peshawar Cantt. Ultimately the award was delivered by such sole arbitrator and claims of both the parties were partially allowed. The Petitioners were satisfied with such award being a compromise award however the Respondents challenged it before the Learned High Court in Writ Jurisdiction and according to the impugned Judgment the matter has been referred back to the Learned Arbitrator for passing a fresh award. In these circumstances Learned ASC says that this direction is manifestly against the provision of the Arbitration Act since per Section 14 thereof any party aggrieved by the award has to file objections before the Referee Court and not a Writ Petition.
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> 2. We have heard the Learned ASC and perused the record.
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> 3. In the circumstances of the case, we would grant leave in the matter to consider the points raised by the Learned ASC for the petitioners."

4. The learned counsel for the appellants argued that the learned High Court exceeded its jurisdiction by entertaining the writ petition against the award. It was further contended that the respondent No.1 failed to avail the alternate remedy provided under Section 14 and 17 of the Arbitration Act, 1940 ("**Arbitration Act**"). It was further averred that the factual controversies about quantum of recovery could only be decided by the Arbitrator in terms of the arbitration clause incorporated in the Agreement hence the Writ Petition No.2834-P/2011 was not maintainable and the direction to conduct fresh arbitration was misconceived.

5. The learned counsel for the respondent No.1 argued that neither the details of recovery made by the Cantonment Board Staff during the period from January 2009 to 20.07.2009 were provided or adjusted, nor was the amount recovered from various advertisers payable to the respondent No.1 disclosed by the Cantonment Board, and this crucial aspect was not considered by the Arbitrator hence, the respondent No.1 was forced to file a writ petition in the High Court to challenge the calculation of amount.

6. Heard the arguments. To start, we would first like to reproduce Clause 26 of the Agreement whereby the parties agreed to the resolution of any dispute by means of arbitration as under:-

> "Any dispute of whatsoever nature (including interpretation of this or any other relevant documents) arising under this contract shall be referred to the DML&C Peshawar Region Peshawar for arbitration whose decision shall be final and shall be binding on the parties, to this agreement."

7. The remedy of arbitration elected through the written Agreement by the parties for resolving the dispute is essentially a genus of alternative dispute resolution outside the Courts whereby, rather than engaging in a lengthy lawsuit, the dispute is put to an end through arbitration. The remedy of arbitration by and large is considered efficacious and convenient for settlement of disputes and does not entail the cumbersome rigidities of procedure which time-saving for mending and patching up contractual and commercial disputes in terms of the arbitration clause delineated in the Agreement, including the choice and procedure for the appointment of an Arbitrator. The literal terms and conditions are set out in the arbitration agreement and the rationale of an arbitration agreement is more cost effective and expeditious than the pace of trial and decision of ordinary civil suits. The incidence of a dispute is rudimentary between the parties before embarking upon the remedy opted for the resolution of dispute(s) through arbitration agreement.

8. To conduct arbitration in terms of the Agreement, recourse was to be made through the Arbitration Act which is the law of the land applicable for arbitration agreements. It is not the case of either party that the arbitration was conducted or agreed to be conducted under Sections 260 to 265 of the Cantonments Act, 1924, which only applies in the event of any disagreement as to the liability of the

Board to pay any compensation under the Cantonments Act, 1924, or as to the amount of any compensation so payable for which the person claiming such compensation may apply to the Board for referring the matter to a Committee of Arbitration and the Board shall forthwith proceed to convene a five-member Committee of Arbitration to determine the matter in dispute. In the present case, the parties opted for and agreed to the resolution of contractual dispute(s) through a single arbitrator, and not through a Committee of Arbitration, hence the respondent should have availed the proper remedy under the provisions of the Arbitration Act for redress, rather than approaching the High Court under writ jurisdiction.

9. At this juncture, Section 16 of the Arbitration Act is also quite relevant which provides that the Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, and such matters cannot be separated without affecting the determination of the matters referred; or (b) where the award is so indefinite as to be incapable of execution; or (c) where an objection to the legality of the award is apparent upon the face of it. In the same parlance, sub-section (2) provides that where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court; Provided that any time so fixed may be extended by subsequent order of the Court; and according to sub-section (3) an award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed. Whereas under Section 19, where an award has become void under sub-section (3) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred. The niceties of Section 30 of the Arbitration Act explicate that an award shall not be set aside except on the ground(s) (a) that an arbitrator or umpire has misconducted himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35; or (c) that an award has been improperly procured or is otherwise invalid.

10. Compliant with the objective of the *non-obstante* segment set in motion under Section 32 of the Arbitration Act, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in the Arbitration Act; and under the exactitudes of Section 33, any party to an arbitration agreement, or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, may apply to the Court for decision. The doctrine of exhaustion of remedies prevents a litigant from seeking a remedy in a new court or jurisdiction until all claims or remedies have been exhausted (i.e. pursued as fully as possible) in the original one, and this doctrine was originally created on the principles of comity.

11. The turn of phrase “law of the land” is in fact an intact body of binding and effective laws made applicable in any country or jurisdiction. The hegemony of law is that no man is above the law, and every man is subject to the law of the land and the Courts. Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 (“**Constitution**”) envisages that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen wherever he may be, and of every other person for the time being within Pakistan and, at the same time, Article 25 of the Constitution accentuates that all citizens are equal before law and are entitled to equal protection of law. The Latin phrase “*lex terrae”* alludes to the "law of the land" which is serviceable and in effect in any country and applies across the board to the populaces; this encompasses all laws, rules and regulations which everyone is bound to follow including due process, fair trial and unbiased legal process. Whereas another Latin phrase “*legem terrae”* denotes that things should be done according to the law of the land and also connotes that each and every one should adhere to the laws and be dealt with fair and square and the legal proceedings should be conducted in accordance with the law.

12. It is a well settled exposition of law that disputed questions of fact cannot be entertained and adjudicated in writ jurisdiction. The

learned High Court in the impugned judgment observed that it cannot assume the task of recording evidence regarding what amount was collected by the Cantonment Board during the period under dispute in the constitutional jurisdiction, but despite that the High Court remanded the case in writ jurisdiction for *de novo* arbitration. The extraordinary jurisdiction under Article 199 of the Constitution is envisioned predominantly for affording an express remedy where the unlawfulness and impropriety of the action of an executive or other governmental authority could be substantiated without any convoluted inquiry. The expression “adequate remedy” signifies an effectual, accessible, advantageous and expeditious remedy. In the case in hand, the remedial provisions provided under the Arbitration Act could be invoked which set out an appropriate and alternate remedy as *remedium juris*, being more convenient, beneficial and effective and the Writ Petition to upset the award rendered by the arbitrator pursuant to the arbitration clause in the Agreement was not maintainable.

13. As a result of the above discussion, this Civil Appeal is allowed and the impugned judgment dated 29.10.2013 passed by the learned Peshawar High Court is set aside.

Judge

Judge

Judge

Islamabad
13.06.2023
Khalid
Approved for reporting.