IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITIONS NO. 3059 & 3060 OF 2021
(Against Judgment dated 01.03.2021 passed by the Islamabad High Court, Islamabad in RFA.Nos.01 & 2 of 2018)

Injum Aqeel ....Petitioner
(In both cases)

Versus

Latif Muhammad Chaudhry, etc. ....Respondents
(In both cases)

For the Petitioner : Mr. Mohammad Siddique Awan, ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondents : N.R.

Date of Hearing : 18.05.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- These Civil Petitions for leave to appeal are directed against the consolidated judgment dated 01.03.2021 passed by the Islamabad High Court in RFA.Nos.1 & 2 of 2018 whereby both the Regular First Appeals filed by the petitioner were dismissed and the ex-parte award dated 27.02.2017 ("**Award**") was maintained, however the additional claim of the respondent No.1 referred to in the local commission report was found to be beyond the scope of the Arbitration Proceedings which could be agitated through separate proceedings.

2. The transient facts of the case are that the instant respondent No. 1 instituted a suit for specific performance of agreement to sell dated 27.5.2004 ("**Agreement**") and injunction against the present petitioner and respondent No. 2 before the Islamabad High Court, Islamabad. The petitioner filed an application under Section 34 of the Arbitration Act, 1940 to enforce Clause 17 of the Agreement which provided a mechanism to deal with the disputes by way of arbitration. The learned Trial Court appointed the Arbitrator who commenced the proceedings. According to the petitioner, the Arbitrator, without adopting proper procedure or giving an opportunity of defence to the petitioner and respondent No. 2, announced the Award. The petitioner came to know on 10.3.2017 that he has been proceeded ex-parte, therefore he moved

two applications on 24.3.2017 before the learned Trial Court; one for setting aside the ex-parte proceedings, and the second for setting aside the Award. The learned Trial Court vide Order dated 04.10.2017 only accepted the application for setting aside the ex-parte proceedings before it, but dismissed the application for setting aside the ex-parte Award and made the Award the rule of court *vide* judgment dated 03.11.2017 against which the petitioner filed Regular First Appeals in the Islamabad High Court, however the both appeals were dismissed *vide* the impugned consolidated judgment.

3. The learned counsel for the petitioner argued that the impugned judgment is against the facts of the case and the law. It was further averred that the arbitrator committed misconduct, hence the Award is liable to be set aside. He further contended that a glaring illegality is floating on the face of the record which was not considered by the Trial Court and Appellate Court, including the fact that the petitioner surrendered his entire share in the project much prior to the decision of the Trial Court in view of the revised partnership agreement. It was further argued that the Arbitrator intentionally failed to associate the petitioner in the arbitration proceedings, and thus committed misconduct which has not been taken into consideration by both the Courts below.

4. Heard the arguments. The record reflects that there was no dispute with regard to the appointment of the Arbitrator in view of the arbitration agreement. In fact, the Arbitrator was nominated on the application of the petitioner and thereafter the learned Trial Court appointed the Arbitrator. The bone of contention activated taking into consideration the Agreement with respect to two Apartments against a total sale consideration of Rs.4,600,000/- each, out of which a sum of Rs.1,150,000/- each was paid as earnest money, while the balance sale consideration of Rs.3,450,000/- each was to be paid in 10 equal installments with effect from 21.08.2004 to 31.12.2006. The petitioner promised to hand over the possession of both the flats by 31.12.2006 with a grace period of 03 months, failing which he was bound to pay rent of both the flats to respondent No.1. The construction of the flats could not be completed within the stipulated time, hence the petitioner executed an undertaking to pay the rent in terms of Clause 18 of the Agreement @ Rs.20,000/- per month and paid the rent till April 2018, thereafter he neither paid the rent nor completed construction to handover the possession. The Arbitrator delivered the Award and found

the respondent No.1 entitled to receive the rent till actual possession of the suit flats. The objections were filed under Section 30 of the Arbitration Act, 1940 on the ground that the Arbitrator afforded no opportunity to the petitioner to defend the proceedings, hence the Award is liable to be set aside. On the contrary, the arbitration proceedings reflect that Mr. Muhammad Anwar Dar (Advocate) contacted the Arbitrator and inquired about the proceedings. The petitioner was also contacted telephonically who appeared before the Arbitrator on 04.12.2015 and informed that Mr. Rehan Uddin Golra (Advocate) will appear. The statement of claim was also handed over by the Arbitrator to Mr. Rehan Uddin Golra (Advocate) to submit the reply of the claim but neither the learned counsel nor the petitioner appeared before the Arbitrator despite being afforded repeated opportunities and ultimately, *vide* order dated 27.02.2016, the Arbitrator initiated ex-parte proceedings and delivered the Award after adopting the proper procedure. The petitioner has failed to point out any misconduct of the Arbitrator and also remained unsuccessful in demonstrating any other deficiency, error or legal infirmity in the Award.

5. The stratagem of resolving the bone of contention by means of arbitration is in essence a consensual methodology for resolving disputes on the strength of an arbitration agreement. It is an alternative course of action by means of which the disputes are submitted by agreement of the parties to the arbitrator(s) for resolution and rendering an award for the referred dispute(s). Due to somewhat moderate and flexible procedural rigidities, the resolution of disputes through arbitration often proves to be speedier and more cost-effective than Court litigation which passes through different stages or rounds of litigation from original to appellate forums. It is also a form of alternative dispute resolution (ADR) in which the parties may adopt to settle their disputes or differences outside the courts of law which sometimes runs faster to its logical end and proves to be more expeditious rather than litigating in court. Under Section 13 of the Arbitration Act, 1940, the arbitrators or umpires, unless a different intention is expressed in the agreement, may exercise (i) the powers to administer oath to the parties and witness appearing; (ii) state a special case for the opinion of the Court on any question of law involved; (iii) make an award conditional or alternative; (iv) correct in an award any clerical mistake or error arising from any accidental slip or omission; and (v) administer to any party to the arbitration such interrogatories as may in the opinion of arbitrator or umpire be necessary. In the arbitration

proceedings, the parties may also engage lawyers and produce oral and documentary evidence *vice versa* in order to enforce the reference/claim or oppose it, and the arbitrator within the stipulated time records the evidence produced by the parties and the dispute is culminated through an award which is presented in Court for making it the rule of the Court, and the Court is not supposed to act in a perfunctory manner in this regard, rather it should look into the award and, if any patent illegality is found, the Court may remit the award to the arbitrator for reconsideration or set aside the same. At this juncture, the following judicial precedents are quite relevant to be cited with regard to the scheme of arbitration, powers of the arbitrator and powers of the Court while making the award the rule of the Court:

1.Messers National Construction co Vs. the West Pakistan Water and Power Development Authority through its Chairman **(PLD 1987 SC 461).** The general principle underlying the concept of arbitration as translated in the scheme of the Arbitration Act is that, as the parties choose their own arbitrator to be the Judge in the dispute between them, they cannot when the award is good on the face of it, object to his decision, either upon law or the fact. In other words arbitration in substance ousts the jurisdiction of the Court, except for the purpose of controlling the arbitrator and preventing misconduct and for regulating the procedure after the award.

2. M/s Joint Venture KG/RIST & others Vs. Federation of Pakistan, through Secretary & another **(PLD 1996 SC 108).** 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.

3. Pakistan Steel Mills Corporation, Karachi Vs Messrs Mustafa Sons (PVT.) LTD., Karachi**. (PLD 2003 SC 301).** Arbitrator is the final Judge on the law and facts and it is not open to a party to challenge the decision of the Arbitrator, if it is otherwise valid. Even, if there was wrong interpretation of a clause in a contract, in such cases, view has been taken that an Arbitrator is not bound to give specific findings on each and every issue nor he is required to state reasons for his conclusion, if the findings are within the parameters of submissions made before him.

4. Mian Corporation through Managing Partner Vs. Messrs Lever Brothers of Pakistan Ltd. through General Sales Manager, Karachi. **(PLD 2006 SC 169).** 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. 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 an arbitrator in order to discover the error or infirmity in the award.

5. Federation of Pakistan through Secretary, Ministry of Food, Islamabad and others Vs Messrs Joint Venture Kocks K.G. /RIST

> **(PLD 2011 SC 506).** 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 which 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. The courts should not indulge into rowing probe to dig out an error and interfere in the award on the reasoning that a different conclusion of fact could possibly be drawn.

6. If we delve into the scheme of the Arbitration Act, 1940, it divulges that the Court has been vested with ample powers to render judgment in terms of the award, or modify or correct it, remit the award for reconsideration, or set aside the award. According to Section 30 of the Arbitration Act, 1940, the Court may set aside the award if (a) an arbitrator or umpire has misconducted himself or the proceedings; (b) 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. Merely filing an objection under Section 30 of the Arbitration Act, 1940 carries no great weight and is inconsequential unless some substantial grounds are alleged in the objections warranting and deserving the setting aside of the award which the petitioner failed to underline. The record reflects that an ample opportunity was afforded to join the proceedings but the petitioner was so reckless and reluctant to join for which the Arbitrator cannot be blamed. Even no plausible grounds are raised in the objection which may infer, corroborate or substantiate any act of misconduct on the part of the Arbitrator which could be proved to the satisfaction of the Court. It is a well settled exposition of law that the significance and connotation of the term ‘misconducting the proceedings’ is broader than the arbitrator’s personal misconduct. Simply making an erroneous decision would not automatically be tantamount to misconduct unless it is proved that the arbitrator has failed to decide all the issues or objections; or decided such issues not included in the scope of the arbitration agreement, or the award was inconsistent, uncertain or vague; or there was some mistake of fact, if this mistake is either admitted or is clear beyond any reasonable doubt; or the arbitrator had some pecuniary interest in the matter. Here there is also a need to distinguish the phraseology “legal misconduct” and “moral misconduct”.

"Legal misconduct" means misconduct in the judicial sense of the word, for example some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. To sum up, an arbitrator misconducts the proceedings when (i) there is a defect in the procedure followed by him; (ii) he commits breach and neglect of duty and responsibility; (iii) he acts contrary to the principles of equity and good conscience; (iv) he acts without jurisdiction or exceeds it; (v) he acts beyond the reference; (vi) he proceeds on extraneous circumstances; (vii) he ignores material documents; or (viii) he bases the award on no evidence. Above are some of the omissions and commissions which constitute legal misconduct or, in other words, that an arbitrator has misconducted the proceedings within meaning of clause (a) of Section 30 of the Arbitration Act, 1940. In the case of “moral misconduct” it is difficult to define exhaustively or determine exactly what amounts to "misconduct" on the part of an arbitrator. It is essential that there must be abundant good faith, and the arbitrator must be absolutely disinterested and impartial, as he is bound to act with scrupulous regard to the ends of justice. An arbitrator must be a person who stands indifferent between the parties. An arbitrator should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party deemed to be his client. When a claim or matter in dispute is referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part, but it may also be tantamount to *mala fide* action and vitiate the award.

7. To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award. The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not on a point of law or otherwise. It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong. Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation. The general principle underlying the concept of

arbitration as translated in the scheme of the Arbitration Act, 1940 is that, as the parties choose their own arbitrator to be the Judge in the dispute between them, they cannot, when the award is good on the face of it, object to his decision, either upon law or fact. 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. The arbitrator is the final Judge on the law and facts and it is not open to a party to challenge the decision of the Arbitrator, if it is otherwise valid. An award cannot be lawfully disturbed on the premise that a different view was possible. 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. The Court does not sit in appeal over the award and should not try to fish for or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect. The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record [Ref: Gerry's International (Pvt.) Ltd Vs Aeroflot Russian International Airlines **(2018 SCMR 662)**]**.** The following material is also quite relevant to highlight the concept and acuteness of the expression “misconduct on the part of Arbitrator”:

> **1. Halsbury’s Laws of India, Volume 2, Butterworths India, at Page 255 paragraph 20.124. Ex-parte awards.** The arbitrator has authority to pass an award ex parte especially where he is of the opinion that absence of a party is deliberate in order to avoid or delay the proceedings, but it is the duty of the arbitrator to apply his mind to the facts and circumstances of each case and not proceed ex parte automatically merely because a notice to proceed ex parte is given. (Indian Iron and Steel Co Ltd v Sutna Stone and Lime Co Ltd AIR 1991 Cal 3).
>
> **2. Halsbury's Laws of England, 3rd Edn. Vol. II, p. 57.** The expression 'misconducted’ is "of wide import" and includes: "on the one hand bribery and corruption and on the other hand a mere mistake as to the scope of authority conferred by the agreement of reference or an error of law appearing on the face of the award. Thus misconduct occurs if the arbitrator or umpire, as the case may be, fails to decide all the matters which are referred to him; if by his award he purports to decide matters which have not in fact been included in the agreement of reference; if the award is inconsistent...".
>
> **3. Halsbury’s Laws of England (4th Edn. Reissue) Volume 2 in paragraph 694 states:** ‘Misconduct has been described as "such a mishandling of arbitration as its likely to amount to some substantial miscarriage of justice". Where an arbitrator fails to comply with the terms, express or implied, of the arbitration

agreement, that will amount to misconduct ... in particular, it would be misconduct to act in a way which is or appears to be, unfair. It is not misconduct to make an erroneous finding of law or fact.

4. Halsbury's Laws of India, Volume 2, Butterworths India, at Page 283 paragraph 20.157. Legal misconduct means any neglect of duty and responsibility of the arbitrator. If the legal misconduct does not in any way reflect on the integrity or impartiality of the arbitrator, he cannot be said to have been guilty of such misconduct as was likely to have affected adversely the confidence of the parties. Such misconduct does not necessarily imply moral turpitude. It means misconduct in the judicial sense of the word and not from a moral point of view.

5. **Atkin L.J.** described "misconduct" in Williams & Wallis & Cox **[1914] 2 K.B. 478**; "That expression does not necessarily involve personal turpitude on the part of the arbitrator... The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice". **(Russel on Arbitration, 23rd edition, Footnote 493, Page 407)**.

6. "**Misconduct"** is often used in a technical sense as denoting irregularity and not any moral turpitude. But the term also covers cases where there is a breach of natural justice. Much confusion is caused by the fact that the expression is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside." **(Russel's Treatise on Arbitration, 17th Edn. Pg. 332)**.

8. In the wake of the above discussion, we do not find any irregularity or perversity in the impugned judgment passed by the learned High Court. Consequently, these petitions are dismissed and leave to appeal is refused.

Judge

Judge

Judge

Islamabad
18.05.2023
Khalid
Approved for reporting.