IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MR. JUSTICE JAMAL KHAN MANDOKHAIL

Civil Appeal No.315 of 2022
(On appeal against the judgment dated 27.04.2017 passed by the Peshawar High Court, Peshawar in RFA No.128-P of 2016)

Shahin Shah — ***Appellant***

Versus

The Government of Khyber Pakhtunkhwa through Secretary Irrigation Department, Peshawar and others. — ***Respondents***

For the Appellant(s): Qazi Jawad Ehsanullah, ASC.
Ch. Akhtar Ali, AOR.

For the Respondent(s): Mian Shafaqat Jan, Addl. AG, KP.
Nemo (for respdt.#6)

Date of Hearing: 20.06.2022.

JUDGMENT

IJAZ UL AHSAN, J: - The Appellants through the instant appeal have challenged a judgment of the Peshawar High Court, Peshawar dated 27.04.2017 passed in Regular First Appeal No. 128-P of 2016 ("Impugned Judgment"). Through their Regular First Appeal ("RFA"), the Respondents had challenged the judgment and decree of the Trial Court dated 19.03.2016 whereby, the Arbitration Award given in favour of the Appellants was made a Rule of Court. The learned High Court set aside the judgment and decree dated 19.03.2016 and remanded the matter back to the Trial Court.

2. The case at hand has a complicated history, hence, for the sake of clarity, the necessary facts of the case

are divided into two parts i.e., the background of the case containing facts from the award of the tender to the first decision of the Trial Court and the history of litigation comprising of the remand and post remand proceedings and their outcome.

Background of the Case: -

On 01.03.2001, a tender submitted by the Appellant for a contract for remodelling of the Surface Drainage System in Tanda Dam, Kohat, was approved. Resultantly, an Agreement dated 25.03.2001 between the Appellant and the Respondents ("**Agreement**") was signed. In the Agreement, Clause 21 provided that all disputes between the parties would be settled by way of arbitration. The Respondents (*as alleged by the Appellants*) did not hand over the site in time, resulting in a dispute arising between the parties. Consequently, a suit for recovery of damages was filed by the Appellant on 16.01.2004. The suit was accompanied by an application filed by the Appellant under Section 8 of the Arbitration Act, 1940, seeking a direction by the Trial Court to refer the matter to arbitration as provided in clause 21 of the contract between the parties. Subsequently, the Respondents also filed an application on 06.03.2004 for the grant of a stay in the suit to resolve the dispute through arbitration.

The Appellant and the Respondents agreed that the matter should be referred to Arbitration under the Rules of Reconciliation and Arbitration of the International

Chambers of Commerce. The applications to stay the suit were dismissed and on 24.07.2004. However, the Trial Court passed an order referring the matter to arbitration. The Appellant and the Respondents submitted their nomination of arbitrators on 17.02.2005.

The arbitration proceedings were conducted, both parties freely and voluntarily participated in the proceedings. The arbitrators appeared before the Trial Court to seek extension of time to complete the proceedings and render an award. Two-months time was granted to the arbitrators to file the Arbitration Award (**"Award"**). The matter was then adjourned to 14.02.2005. The arbitrators once again appeared before the Trial Court on 14.02.2005 and sought a further extension of two months, which was granted by the Trial Court and the case was fixed for 15.07.2005. On 15.07.2005, the arbitrators sought another extension to file the Award and were again granted two further months to file the Award.

Ultimately, the Award was filed in Court on 15.09.2005. The case was adjourned to 15.10.2005. The Appellant filed objections to the Award on 15.10.2005. The Respondents filed their objections to the Award on 05.01.2006. The Respondent's objections to the Award were replied to by the Appellants on 24.01.2006 as *inter alia,* barred by time. The Respondents, on 26.07.2006, submitted an application for condonation of delay in support of the

objections filed by them which were filed four months beyond the period of limitation.

Finally, the Award was made Rule of Court on 27.11.2006.

History of Litigation: -

The Respondents filed RFA No. 94/2007 against the judgment and decree of the Trial Court dated 27.11.2006 whereby the award was made a rule of the Court. The RFA was allowed. The matter was remanded to the Trial Court vide judgment of the High Court dated 24.06.2009. However, in post remand proceedings, the Award was once again made Rule of Court vide judgment and decree dated 12.09.2009.

The Respondents filed another RFA No. 225/2009 on 17.11.2009. This RFA was also allowed on 13.10.15. Resultantly, the matter was again remanded to the Trial Court with directions to record statements of the Arbitrators. The order of the trial Court regarding dismissal of objections petition filed by the Respondents as barred by time was not interfered with. Having not been challenged before any higher forum by the Respondents, it attained finality. On 08.12.2015, the Respondents filed an application before the trial Court for filing fresh objections against the award. The said application was dismissed on 07.01.2016. Such dismissal was not challenged before any higher forum.

Thereafter, the statements of the two Arbitrators were recorded on 01.02.2016 and they were cross-examined

by the Respondents. Finally, the Award was once again made Rule of Court vide judgment and decree dated 19.03.2016. Aggrieved, the Respondents filed an RFA against the judgment dated 19.03.2016. Vide the Impugned Judgment, the Award was set aside, and the matter was once again remanded to the Trial Court to commence the proceedings from where the Arbitrators were appointed.

Aggrieved by the decision of the learned High Court, the Appellants have approached this Court.

3. Leave to appeal was granted by this Court vide order dated 09.02.2022 in the following terms: -

> *"After hearing the learned Counsel for the Petitioner and the learned Counsel for the Respondents, who has appeared pursuant to our notice to the Respondents, leave to appeal is granted to examine, whether the petitioner was non-suited on the ground that on account of delay in passing the award, the arbitrators committed misconduct and whether the learned High Court misread the evidence and the record to come to the conclusion that the arbitrators had committed misconduct, despite the fact that in the three rounds of litigation, the award had repeatedly been upheld by the Civil Court. Further, whether the High Court has correctly interpreted the law of limitation..."*

4. The learned ASC for the Appellant submits that the High Court could not have exercised jurisdiction as a Court of Appeal over a judgment making an Arbitration Award a Rule of Court. Arbitration awards can be interfered with on limited grounds provided in the law. He further submits that when an Award has been rendered by an Arbitrator(s) in accordance with the law, the High Court as per Section 17 of the Arbitration Act, 1940 ("**Act, 1940**") cannot set aside the judgment and decree making an Award, Rule of Court, except where the Award rendered is against the law. Learned ASC for the Appellants further submits that the Objections to the

Award filed by the Respondents were barred by time which fact was not interfered with by the High Court in the Impugned Judgment. As such, the High Court could not have remanded the case to the trial Court for the third time. The learned ASC has further argued that, after the case was remanded for the second time, the Respondents filed objections which were dismissed vide order dated 07.01.16 and, the said order was never challenged or questioned by the Respondents, therefore, the order dated 07.01.2016 had attained finality and could not be reopened by the High Court. The learned ASC for the Appellants further submits that the filing of the Award beyond the period of limitation of 04 months was not fatal and, was within the confines of Section 28 of the Act, 1940 which provides that an extension of time for the submission of an Arbitration Award may be sought from the Court. The learned ASC further argued that notice as per Section 14 of the Act, 1940 was served by the arbitrators and, the High Court misread the record in holding that no such notice was served and, even if no such notice was served, substantial compliance of Section 14 of the Act, 1940 was done since the Award was filed in Court in the presence of the parties and their counsel. He has submitted that the statements of the two Arbitrators were recorded and the Award was tendered in evidence on which no objection was raised. Learned ASC has further argued that Section 34 of the Act, 1940 was not attracted in the present case and, that if objections in this regard were not raised before the trial

Court, such objections could not be raised before the High Court.

5. The learned Additional Advocate General, Khyber Pakhtunkhwa ("**AAG KP**") argued that the entire proceedings before the Trial Court were illegal since the Trial Court failed to observe the procedure provided in Section 34 of the Act, 1940 before sending the reference to arbitrators. Learned AAG KP, while accepting that the objections filed by the Respondents were barred by time, has further argued that the Trial Court was bound to examine the Award notwithstanding the delay in filing the objections. Learned AAG KP further argued that since the Act, 1940 was not followed in letter and spirit, therefore, the High Court correctly remanded the case to the Trial Court to be examined afresh, in the interest of justice. The learned AAG KP has further argued that the Arbitrators misconducted themselves by not filing the Award within the prescribed time limit of 04 months, which itself was sufficient to render the Award invalid.

6. We have heard the learned Counsel for the parties and perused the record. The questions which require adjudication by this Court are as follows: -

(i) *Was the order of the Trial Court making the Arbitration Award, Rule of Court, appealable?*

(ii) *Did the Arbitrators misconducted themselves by not filing the Arbitration Award within time?*

(iii) *Whether notice under Section 14 of the Arbitration Act, 1940 was served by the Arbitrators. Were the Arbitrators required to file the Arbitration Award in Court within 90 days as per Article 178 of the Limitation Act, 1908?*

(iv) *Was the fact that the Respondents did not file their objections to the Arbitration Award within time, fatal to the Respondent's case?*

(v) *Were the proceedings before the Trial Court illegal due to the absence of a formal order under Section 34 of the Act, 1940?*

WAS THE ORDER OF THE TRIAL COURT MAKING THE ARBITRATION AWARD, RULE OF COURT, APPEALABLE?

7. Section 39 of the Act, 1940 provides five instances in which an aggrieved party may file an appeal against an order passed under the Act, 1940. Section 39 of the Act, 1940 is reproduced below: -

> *"39. Appealable orders: (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order: -*
>
> *An order-*
>
> *(i) superseding an arbitration;*
> *(ii) on an award stated in the form of a special case;*
> *(iii) modifying or correcting an award;*
> *(iv) filing or refusing to file an arbitration agreement;*
> *(v)staying or refusing to stay legal proceedings where there is an arbitration agreement;*
> *(vi)setting aside or refusing to set aside an award:*
>
> *Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.*
>
> *(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect to take away any right to appeal to the Supreme Court."*

The aforenoted provision of the Act, 1940 restricts and limits the instances in which an appeal may be filed. This is evident from the words "*and from no others*" provided in Section 39 *ibid* which essentially means that except for an appeal that falls in the limited parameters provided in the aforenoted provision, no appeal would be competent. The use of specific words by the legislature is an expression of the legislative intent and, Courts cannot interfere with the same unless a literal interpretation of the law would not correct the

mischief sought to be corrected. As evident from the grounds agitated by the Respondents in RFA No. 94/2007, the Respondents *inter alia,* out rightly denied the existence of an Arbitration Agreement; denied the existence of an arbitrable dispute between the parties, and essentially, prayed for the Arbitration Award to be set aside. This Court's discussion, therefore, will be confined in the present question to Section 39 (vi) which covers the situation where an order is passed that either sets aside the Arbitration Award or refuses to set aside an Arbitration Award.

8. The Respondents are aggrieved of a "composite order" dated 19.03.2016, passed by the Trial Court, whereby the objections filed by the Respondents were dismissed *and* the Arbitration Award was made Rule of Court. The word "composite" means that the order is comprised of two distinct elements or parts. An example of a composite order can be seen in the case titled ***Rashida Begum v. Ch. Muhammad Anwar and Others (PLD 2003 Lahore 522)*** in which, the objections raised by the Appellant (*before the High Court then)* were dismissed and, the Court made the award rule of Court, followed by a decree dated 05.03.1985. The said order is a "composite order" because it comprises two distinct parts i.e., the dismissal of the objection petition filed by one party *and*, the making of an arbitration award, Rule of Court. Another example of a composite order can be seen in the case of ***Muhammad Alam Khan v. Jewan Khan (PLD 1985 Lahore 181)*** in which, the Court held as follows:-

> *"It would be seen that under clause (b) the relief claimed is undervalued. Therefore, the Court after determination of the real value should direct the plaintiff to correct the valuation in the relevant para of the plaint within the specified time. It means that order under clause (b) is to be followed by order under clause (c) to make up the deficiency in the court-fee. It may be a composite order. Conversely speaking when the plaintiff is* ***directed under*** *clause (b) to correct the valuation of the suit for purposes of court-fee and jurisdiction, then it becomes his duty not only to amend the plaint but also to pay the court-fee accordingly. This means making up of the deficiency in the court-fee in cases covered by clause (b) is automatic. To my mind, the proper order would be a composite order i.e. the plaintiff should be directed to amend the plaint and also to fix the court-fee accordingly and the failure shall entail the rejection of the plaint. But in a case under clause (c) the relief claimed is valued properly but plaint had been written upon a paper insufficiently stamped, therefore, the Court would simply direct the plaintiff to supply the requisite stamp paper within the time to be fixed by the Court. This way there is a clear distinction between the two provisions. The same was not kept in mind by the Trial Court while invoking clause (b) of Order VII, Rule 11, C.P.C. in this case."*(Underlining is ours)

In the present case, the Trial Court's order has two distinct parts as well. The Trial Court has not only dismissed the objections of the Respondents as being barred by time by four months but has also made the Arbitration Award, Rule of Court.

9. The learned High Court has held that even where an application to set aside an Award is rejected by the Trial Court under Section 17 of the Act, 1940, nonetheless, the right of an aggrieved party under Section 39 of the Act, 1940 cannot be circumscribed since, in a composite order, each part of the order may be taken as an independent and separate order and can be challenged under Sections 39 and 17 separately. The learned High Court has further held that a challenge under Section 17 "*shall only be maintainable if conditions laid down in Section 17 of the Act were met*". It, therefore, becomes necessary to examine Section 17 of the Act, 1940, which is reproduced as under: -

> *"**17. Judgment in terms of award**. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."*

Section 17 *ibid* provides that an appeal under the said provision may only be filed against a decree on the grounds that (a) the decree is in excess of the award and (b) it is otherwise not in accordance with the award.

10. The difference between Section 39 and Section 17 is that Section 39 provides more grounds under which an order passed under the Act, 1940 may be challenged, than the grounds of challenge under Section 17. It is evident from the grounds taken by the Respondents in RFA 94/2007 that they did not dispute the decree of the Trial Court as being either in excess of the Arbitration Award or otherwise, against the Arbitration Award. The learned High Court conceded that, for a challenge to be maintainable under Section 17, the conditions prescribed therein *must* be met. However, it escaped the learned High Court's notice that the Respondent had not challenged the decree of the Trial Court on the grounds mentioned in Section 17 (*supra)* inasmuch as it was not the stance of the Respondents that the judgment and decree of the Trial Court was either in excess of the Arbitration Award or otherwise against the Arbitration Award. Since the Respondents had not taken the stance that the decree of the Trial Court was in excess of or against the Arbitration Award; they effectively admitted that the decree of

the Trial Court was correct to the extent that the decree was in accordance with the Award. As such, the findings of the learned High Court in this respect are in our opinion erroneous and unsustainable. If the High Court found that the order of the Trial Court had two distinct parts, then, it had to examine whether the Respondents had challenged both parts of the order independently by raising independent grounds in terms of Section 17 and Section 39. The High Court could not have *suo motu* implied that such grounds had been taken. The High Court was required to proceed on the basis of record which clearly showed that the Respondents had nowhere taken the stance that the decree of the Trial Court was in excess of or against the Arbitration Award. As such, the High Court could not have assumed jurisdiction in the matter, especially when the Respondents did not question the decree on the grounds mentioned in Section 17 of the Act, 1940. Even otherwise, the failure of the Respondents to agitate the grounds mentioned in Section 17 before the Trial Court barred them from raising any such grounds before the High Court since the Respondent was appealing against the judgment of the Trial Court. They were to show that the judgment of the trial Court was hit by any of the grounds available under Section 17 ibid which they failed to do. The High Court, in our opinion, erred in law and exceeded its jurisdiction in proceeding beyond the grounds agitated by the Respondent in its appeal.

DID THE ARBITRATORS MISCONDUCTED THEMSELVES BY NOT FILING THE ARBITRATION AWARD WITHIN TIME?

11. Section 39(vi) of the Act, 1940 provides that an order shall be appealable which either sets aside or does not set aside an Arbitration Award. The grounds under which an Arbitration Award may be set aside are enumerated in Section 30 of the Act, 1940 which reads as follows: -

> ***"30. Grounds for setting aside award.*** *An award shall not be set aside except on one or more of the following grounds, namely: —*
>
> *(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;*
> *(c) that an award has been improperly procured or is otherwise invalid"*

It has been argued by the Respondents that the Arbitrators misconducted themselves within the meaning of Section 30(a) by not filing the Arbitration Award within time. It is further alleged in the grounds of the RFA that the Arbitrators were close friends of the Appellant, they did not provide a proper hearing to the Respondents and they did not properly scrutinize the record before rendering the Award. The learned High Court has, however, only given a finding on the fact that the Arbitrators misconducted themselves only to the extent of not filing the Arbitration Award within time. The heart of the Respondent's argument, therefore, is, that the alleged misconduct of not filing the Arbitration Award within time was so glaring that, if it is overlooked, it would lead to a miscarriage of justice. We, therefore, deem it appropriate to examine the term "misconduct" on part of the Arbitrator. The term misconduct was interpreted in the judgment titled ***Gerrys International (Pvt.) Ltd v. Aeroflot Russian***

International Airlines (2018 SCMR 662 Supreme Court)

wherein, this Court held as follows:

> *"(27) Misconduct is of two types: "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. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice."*

The term "misconduct" was further interpreted in the case of ***Pakistan Steel Mills Corporation, Karachi v. Messrs Mustafa Sons (Pvt.) Ltd, Karachi (PLD 2003 Supreme Court 301)*** in which, the Court held as follows: -

> *"The word "misconduct" with reference to arbitration proceedings, is interpreted in the sense in which it is used in English Law and it is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator."* (Underlining is ours)

This Court in the case of ***Gerrys International*** *(supra)* further held that the misconduct alleged by the parties must be *prima facie* apparent on the surface of the Arbitration Award and, that the Court cannot sit as a Court of Appeal on the award given by the Arbitrator(s) and substitute its view for the one taken by the Arbitrator(s). The aforenoted view of this Court finds support from the case of ***A. Qutubuddin Khan v. CHEC Mill Wala Dredging Co. Pvt. Ltd. (2014 SCMR 1268)***. As such, the Court cannot reappraise the evidence relied upon by the Arbitrator(s) and engage in a roving inquiry to *discover* infirmities in the Arbitration Award. The illegality or infirmity in the Arbitration Award must be apparent on the face of the Award. Reliance in this respect is placed on ***Mian Corporation through***

Managing Partner v. Messrs Lever Brothers of Pakistan Ltd (PLD 2006 Supreme Court 169) and ***National Construction Co. v. WAPDA (1987 PLD 461 Supreme Court)***. The Court is required to examine the Arbitration Award filed in Court to see whether there was an infirmity within the Award itself. We have gone through the judgment of the Trial Court dated 19.03.2016. The judgment of the Trial Court, making the Award Rule of Court is comprehensive and touches upon all aspects of the case. The learned Trial Court in paragraph 12 of its judgment has held as follows: -

> *"It is a hard fact that Arbitrator being final judge on question of law and fact, his decision is entitled to utmost respect and weight unless misconduct was alleged and proved against him to the satisfaction of the court. Although the objection on Award was filed beyond the period of limitation, but the objection so filed if gone through, no allegation of misconduct is either alleged or proved."*(Underlining is Ours)

It is clear and obvious to us that the Trial Court not only considered the Award but also examined the objections raised by the Respondents. The Trial Court in paragraph 13 of its judgment has minutely examined the record and concluded that a total of fourteen meetings were held by the Arbitrators in which the controversy was sought to be resolved. The Trial Court, therefore, judicially scrutinized the record by applying its mind to the facts and circumstances of the case. As such, the findings of the High Court that the Trial Court did not act properly, are repelled and held to be factually and legally unsustainable.

12. The learned Counsel for the Appellant has taken us to the orders of the Trial Court, whereby, the Arbitrators

were given extensions in time to file the Arbitration Award vide orders dated 14.03.2005 and 15.07.2005. It is apparent from the orders of the Trial Court that the parties i.e., Appellant and Respondents were present at the time when the Arbitrators sought extensions of time to file the Award. There is nothing on the record to show that the Respondent's Counsel objected to any extension in filing the Award. As such, the plea that the Arbitrators committed misconduct and should have filed the Award within four months is totally misconceived. If the Respondents were aggrieved by the Trial Court's orders dated 14.03.2005 and 15.07.2005, they ought to have challenged the same. In absence of any appeal against the aforenoted orders, the said orders attained finality.

13. The record indicates and it is an admitted position that the Respondents participated in the arbitration proceedings despite extensions without raising an objection whatsoever. It is categorically mentioned in the minutes of the arbitration proceedings that the Respondents "*expressed their confidence*" in the nominated Arbitrators i.e., Mr Imdad Hussain and Mr Inamullah Khan. As such, the argument that the Arbitrators were "close friends" of the Appellant is baseless and unsubstantiated. As such, when the Respondents were present before the Trial Court and did not raise the objections to extension of time and voluntarily participated in the proceedings without raising any objection at any stage, they could not be allowed to change their stance at the appellate stage having practically waved their right to object to extension of time. If they were aggrieved of the

conduct of the Arbitrators, they could have filed an application under Section 11 of the Act, 1940 which empowers the Court to remove an arbitrator if the conditions in Section 11 are fulfilled. No such application is available on the record.

14. It is pertinent to mention that the time limit of filing an Arbitration Award within four months is not absolute. Section 28 of the Act, 1940 clearly provides that said time limit can be enlarged. As such, the non-filing of an Award within four months does not *ipso facto* make the Award invalid. For ready reference, Section 28 of the Act, 1940 is reproduced as under: -

> *" **28. Power to Court only to enlarge time for making award.** (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.*
>
> *(2) Any provisions in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."*

We have already found that the time limit mentioned in Section 28 *ibid* was enlarged by orders of the Trial Court in presence of the parties and even otherwise the Respondents by willingly and voluntarily participating in the proceedings held during extended periods had waved their right to object, the fact that the Award was filed after expired the four-month period was not fatal and the finding of the High Court with all due respect has been found by us to be legally and factually erroneous and unsustainable. Reliance in this respect is placed on the case of ***WAPDA v. Khanzada***

Muhammad Abdul Haque Khan Khattak & Co (PLD 1990 SC 359)

WHETHER NOTICE UNDER SECTION 14 OF THE ARBITRATION ACT, 1940 WAS SERVED BY THE ARBITRATORS & WERE THE ARBITRATORS REQUIRED TO FILE THE ARBITRATION AWARD IN COURT WITHIN 90 DAYS AS PER ARTICLE 178 OF THE LIMITATION ACT, 1908?

The record indicates that the Arbitrators had duly served notice of signing and making of the Award to the Respondents in substantial compliance of the provisions of Section 14 of the Arbitration Act, 1940. There is clear misreading/non-reading of the record on the part of the High Court in holding that such notice was not served by the Arbitrators. Notice in question which bears the date of signing by the Arbitrators on 14.09.2005 is available on the record. Such notice was filed in Court with the Award as is apparent from the notice itself which bears the signatures of the Trial Court on the date when the Award was filed in Court on 15.09.2005. Even otherwise, if an Award is filed by the Arbitrator in Court in the presence of the parties or their authorized agents then the requirements of Section 14 qua serving of notice of signing and making of the Award are substantially met. This is on the basis of the principle of the issuance of notice of making and signing of the Award under Section 14 is connected with the start of period of limitation as prescribed in Article 158 of the First Schedule of the Limitation Act, 1908 to file objections on the Award. The rationale is that the parties must know that the Award has been filed in Court and if the Award is filed in Court in the presence of parties or their authorized representatives then in

that case strict compliance of serving of notice is not mandatory. Reference in this regard may be made to Tribal Friends Co. Province of Balochistan **(2002 SCMR 1903)**, Pakistan through General Manager Pakistan Railways **(PLD 1990 SC 800)**, Ashfaq Ali Qureshi v. Municipal Corporation Multan **(PLD 1985 SC 597)** and Sheikh Mehboob Alam v. Sheikh Mumtaz Ahmed **(PLD 1956 (WP) Lahore 276)**.

15. As far as the question of limitation is concerned, Article 178 of the Limitation Act, 1908 provides a 90-day limitation period from "*the date of service of notice of the making of the award*" to file an application for the Arbitration Award to be made Rule of Court. This provision applies to situations where a party to arbitration receives notice from the Arbitrator(s) to the effect that an Arbitration Award has been made. The parties then either request the Arbitrator(s) to file the Arbitration Award in Court or, file an application before the Court to direct the Arbitrator(s) to file the Arbitration Award in Court so that it may be made a Rule of Court. As such, Article 178 of the Limitation Act, 1908 applies to parties to an arbitration agreement who have been given notice of making of the award and not to the Arbitrator(s). The Arbitrator(s) must be requested by the parties to file the Arbitration Award or must be given a direction by the Court to do so. The said view is further provided in Section 14 of the Act, 1940 which reads as under:-

> *"**14. Award to be signed and filed.** (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof*

and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under clause (b) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award." (Underlining is ours)

This view finds reliance from the case of ***Inayat Ullah Khan v. Obaidullah Khan and Others (1999 SCMR 2702)*** in which, this Court held as follows: -

"6. Moreover, in view of the special Article 178 of the Limitation Act which governs an application for filing in Court of an award to be made rule of the Court under the Arbitration Act the question of applying the residuary Article 181 of the Limitation Act would not arise. In Article 178 the period is 90 days from the date of service of notice of the making of the award as rule of the Court and in the circumstances of this case the said Article would apply. The judgments referred to by the learned counsel in his support are distinguishable as PLD 1972 SC 123 deals with a case under section 20 of the Arbitration Act, whereas present is the case covered by section 14 of the Act and both the sections regulate entirely distinct situations. The judgment reported as AIR 1941 Peshawar 3 appears to have dealt with the original Article 178 which then applied only to the application under the Civil Procedure Code and not to the amended Article 178 which specially covers section 14 of the Arbitration Act. Even otherwise, this point could lose significance and nothing would turn on it because in the latter part of this judgment we are going to hold that the arbitrators by themselves were not competent to file the award in Court as such filing of an award was not envisaged under section 14 of the Act because the arbitrators had neither been requested by any party to the arbitration agreement to file the award in Court nor had been so directed by the Court." (Underlining is Ours)

17. It has been argued by the learned Counsel for the Respondents that the Arbitrators did not serve a notice on the Respondents under Section 14 of the Act, 1940. The learned High Court has held that there is nothing on the record to the effect that the said notice was served before the Arbitration Award was signed. We are unable to agree with the High Court. It is pertinent to mention that the parties were present before the Trial Court when the Arbitration Award was filed in

Court, as such, they had knowledge of the proceedings and had notice of the same. Substantial compliance of Section 14 of the Act, 1940 was made. Since the parties were present in Court when the Arbitration Award was filed, issuance of formal notice under Section 14 of the Act, 1940 was a mere technicality which could not vitiate the proceedings. The purpose of a notice is to *inter alia* make the parties aware of the proceedings before a Court so that they may participate or, as in the present case, may file objections, if any, within the prescribed time provided by law.

18. It is a settled principle of the law that the law favours the vigilant and not the indolent. If the Respondents were present before the Trial Court, they cannot object on the ground that formal notice to them was not issued. Reliance in this respect is placed on ***Ashfaq Ali Qureshi v. Municipal Corporation, Multan and another (1984 SCMR 597)*** in which the Court held as follows: -

> *"9. Apparently, the prevalent view is that as the provision of the law is meant to enable the parties to know that the award has been filed in Court so that they may file their objections, if any, within the time prescribed, a formal compliance in strict conformity with the relevant provision of law is not to be insisted upon when substantial compliance has been made of it. In keeping with this view where the fact of filing of the award by the Arbitrator had already been in the knowledge of the parties and their counsel had in response to notice issued by the Court appeared and taken time to file their objections, as is in the present case, an insistence on a formal service of notice under Order XXIX would be a mere technicality. Even otherwise, an objection on this score had neither been taken before the Trial Court nor in the memorandum of appeal before the High Court and was, therefore, only an afterthought not entitled to serious consideration."* (Underlining is ours)

The Respondents have argued that the Court should have issued a formal notice in terms of Section 14 of the Act, 1940. We are unable to agree with this argument. In

ordinary circumstances, a Court of law is required to issue notice to the parties so that they may be able to participate in the proceedings. However, if the parties were present in Court and were aware that the award had been signed and filed. If at all a formal notice was not issued it was inconsequential and would in any event have been an exercise in futility. In such circumstances, the doctrine of substantial compliance would apply which provides that the procedural fault in complying strictly with a provision of the law is so minor that it does not have a bearing on the essence of the dispute and the object sought to be achieved. The applicability of the doctrine of substantial compliance depends on the facts and circumstances of a dispute. It is for the Court to determine whether the object, purpose, and intent of a statutory prerequisite have been fulfilled and, formal compliance would be unimportant. The question of substantial compliance arose in the case of ***The State through Regional Director ANF v. Imam Bakhsh (2018 SCMR 2039)*** wherein, this Court held as follows: -

> *"To distinguish where the directions of the legislature are imperative and where they are directory, the real question is whether a thing has been ordered by the legislature to be done and what is the consequence, if it is not done. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Thus, some parts of a statute may be mandatory whilst others may be directory. It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of*

> *a single provision or rule may be mandatory or directory. "In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured." Crawford opined that "as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory." In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man. According to Maxwell, "Where the prescription of statute relates to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or in other words as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them." Our Court has held while determining the status of a mandatory or directory provision that "perhaps the cleverest indicator is the object and purpose of the statute and the provision in question." And to see the "legislative intent as revealed by the examination of the whole Act."*

19. The legislative intent of Section 14 of the Act, 1940 can be ascertained from a reading of the provision which is that parties should be aware of the filing of an Award before the Court through their participation in the proceedings. This is because the parties either request the arbitrator to file an Award in Court or, seek a direction from the Court in this respect to be given to an arbitrator. In the present controversy, since the parties were aware of the date when the Award was going to be filed and were present on such date, strict compliance with Section 14 was not required and, the argument of the Counsel for the Respondents in this respect is misconceived. The High Court of Peshawar examined a similar situation in ***Labab Gul v. Badshah Gul (PLD 1952 Peshawar 23)*** wherein, it was held as follows:-

> *"I do not think the failure by the arbitrators to give a notice under section 14 of the Act is such an omission which would invalidate the award. It should be noticed that an award*

> *cannot be set aside except on one or more of the grounds given in section 30 of the Act. They are, (a) that an arbitrator or umpire has mis-conducted 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, and (c) that an award has been improperly procured or is otherwise invalid. The omission to give notice cannot be covered by (a) or (b), and this is even conceded by the learned counsel for the appellant. He, however, wishes to bring it under "otherwise invalid" mentioned in (c). By no stretch of imagination can it be said that the omission to give the notice can invalidate the award, and I consequently hold that it is not covered by "otherwise invalid" too. In any case, I do not think that it is the intention of the law that notice in order to be valid should be given by all the arbitrators. If a notice is given by one, arbitrator only, it shall be deemed to have been given by all, unless the contrary is proved, and it will thus be a perfectly good notice."*

20. The Arbitrators were summoned before the Trial Court and their statements were recorded, who had tendered the Award in evidence as Ex.CW.1/1 to 1/4. The Respondents neither raised any objection to the filing of the Award nor was the question of limitation raised. In any event there was, in our opinion, no question of operation of law of limitation involved in the facts and circumstances of this case.

WAS THE FACT THAT THE RESPONDENTS DID NOT FILE THEIR OBJECTIONS TO THE ARBITRATION AWARD WITHIN TIME, FATAL TO THE RESPONDENT'S CASE?

21. The learned High Court has held that even though the Respondent's objections were filed beyond the prescribed period of limitation of 30 days, nonetheless, the Trial Court was required to examine the Award to do complete justice and, by not doing so, the Trial Court committed illegality. It is manifestly clear from the judgment of the Trial Court that it did not merely dismiss the objections of the Respondents as barred by time without examining the Award. The Trial Court's judgment in paragraph 10 specifically notes that the Respondents were given a chance to cross-examine the

Arbitrators who appeared as CW-01 and CW-02. The Trial Court has further held that the Arbitrators remained firm in their viewpoint. The Trial Court at paragraph 12 categorically stated as follows:

> *"...although the Award was filed beyond the period of limitation but the objection so filed if gone through, no allegation of misconduct is either alleged or proved."*(Underlining is Ours)

A bare perusal of the aforenoted excerpt establishes that the objections filed by the Respondents were examined by the Trial Court which also applied its mind to the contents of the award and thereafter an opinion was formed that it was appropriate to make it a rule of Court. We are satisfied that the trial Court fulfilled its duty to examine the Respondent's objections as well as the award before making it a rule of Court. As such, the finding of the High Court to the effect that the Trial Court erred in law in making the award a rule of Court is unsustainable and against the record.

22. Even otherwise, it is to be noted that the first objections filed by the Respondents were barred by 04 months. The prescribed limitation period as provided in the Limitation Act, 1908 is 30 days from date of notice of filing of the award to object to an Award being made a rule of Court. A party must explain each day of delay and, the Court ought to adjudge whether each day of delay has been sufficiently explained to the satisfaction of the Court with evidence. If such discretion has been exercised properly, then, an appellate Court cannot arbitrarily disregard the reasons so

given by the Trial Court while discounting the reasons provided by one party in an application for condonation of delay by the Trial Court unless there is misreading or non-reading of the record. It is a matter of record that the Respondents first filed objections on 05.01.2006 which were barred by time and, not in the proper form as admitted by the Respondents since they sought permission from the Trial Court during post-remand proceedings on 08.10.2015 to file their objections afresh in "proper form". The said application was dismissed on 07.01.2016. As such, in the facts and circumstances of the case, the belated objections were fatal to the Respondent's case because (a) they were filed after a delay of 04 months (b) they were not in proper form (c) the application for condonation of delay was rejected (d) the Respondents were well aware of the filing of the Award in Court.

WERE THE PROCEEDINGS BEFORE THE TRIAL COURT ILLEGAL DUE TO THE ABSENCE OF A FORMAL ORDER UNDER SECTION 34 OF THE ACT, 1940?

24. The High Court has held that the proceedings carried out by the Trial Court were in violation of Section 34 of the Act, 1940 and, the proceedings in the suit were not stayed. We are unable to agree with this conclusion. The parties had mutually agreed to refer their disputes arising out of their contract to be resolved under the Rules of Reconciliation and Arbitration of International Chamber of Commerce (hereinafter referred to as the **"ICC Rules"**). The Respondent, however, out rightly argued that the trial Court lacked jurisdiction. This plea was rejected by the Trial Court

vide order dated 24.07.2004 while relying on the provisions of the Agreement. The Counsel for the Respondents has been unable to take us to any document to show that the Respondents ever challenged the order dated 24.07.2004. It is essential to point out that the ICC Rules do not divest the Courts in Pakistan of their jurisdiction. This matter was decided by this Court in the case of ***Hitachi Limited and Another v. Rupali Polyester and others (1998 SCMR 1618)*** in which, it was held as follows:-

> *"The legal position obtaining in Pakistan is that the I.C.C. Rules are recognised but they cannot divest the Courts of the jurisdiction vested in them under the law. In England the English Courts recognise the I.C.C. Rules and they decline to exercise discretionary jurisdiction under the English Arbitration Act in derogation to the I.C.C. Rules not because of lack of jurisdiction but to ensure that the parties should adhere to their contractual commitment. It may be pointed out that it has also been consistently held by the English Courts that they have the power to pass appropriate order in a fit case notwithstanding the application of I.C.C. Rules. In this regard, reference may be made to a recent judgment in the case of Coppee-Lavalin v. Ken-Ren Chemicals Ltd. (1994) 2 All England Law Reports 449), in which the House of Lords directed for the deposit of costs of arbitration for the respondent though the I.C.C."*

Even otherwise, Article 21(1) of the ICC Rules provides the following: -

> *"The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."*

The record shows that the parties decided that the law of Pakistan would apply to the case at hand. As such, the intent of the parties is clear insofar as the law governing the Arbitration proceedings is concerned. The question is whether the Trial Court performed functions of a faciliatory nature or, was it required adjudicate on the merits of the case. If the trial Court facilitated the Arbitration, then, it did not commit

any illegality. It is clear from the orders of the Trial Court that it acted in a faciliatory manner. The Trial Court facilitated the arbitration and did not adjudicate the merits of the *lis*. When the Respondents objected to the jurisdiction of the Trial Court; the Trial Court rejected the objections while relying upon the Agreement between the parties and, proceeded to refer the matter to Arbitrators nominated by the parties as per Section 8 of the Act, 1940. Essentially, the Court referred the matter to Arbitration nominated/appointed by the parties. Nowhere have the Respondents argued that they had filed a written statement which constituted a *step* in the proceedings within the meaning of Section 34 of the Act, 1940. The minutes of the Arbitration Proceedings are available on the record which show that the Arbitrators adjudged the merits of the case. As such, proceedings in the suit were stayed for intents and purposes with express or implied consent of the parties who consciously, willingly and voluntarily participated in the proceedings throughout. At this stage, the respondents cannot be heard to say that certain technical and procedural formalities were not followed *stricto sensu*. While they never raised any objections to the same during the arbitration proceedings and even during multiple rounds of litigation in Courts.

25. The Respondent took an objection to the proceedings as an afterthought when the Award was made Rule of Court, which cannot be permitted. It is worth mentioning that when parties opt to settle their disputes out of Court, they must be facilitated and, they ought to live up to

the terms that they agree upon in ***Eckhartd & Company v. Muhammad Hanif (1993 PLD 42 Supreme Court)*** in which Ajmal Mian, J (as he then was) opined as follows:-

> *"I may observe that while dealing with an application under section 34 of the Arbitration Act in relation to a foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honoured as generally the other party to such an arbitration clause is a foreign party. With the development and growth of International Trade and Commerce and due to modernization of Communication/Transport systems in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the Court should not lightly release the parties from their bargain, that follows from the sanctity which the Court attaches to contracts, must be applied with more vigour to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will- tarnish the image of Pakistan in the comity of nations. A ground which could be in contemplation of party at the time of entering into the contract as a prudent man of business, cannot furnish basis for refusal to stay the suit under section 34 of the Act. So the ground like, that it would be difficult to carry the voluminous evidence or numerous witnesses to a foreign country for arbitration proceedings or that it would be too expensive or that the subject matter of the contract is in Pakistan or that the breach of the contract has taken place in Pakistan, in my view, cannot be a sound ground for refusal to stay a suit filed in Pakistan in breach of a foreign arbitration clause contained in contract of the nature referred to hereinabove. In order to deprive a foreign party to have arbitration in a foreign country in the manner provided for in the contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or would amount to forcing the plaintiff to honour a different contract, which was not in contemplation of the parties, and which could not have been in their contemplation as a prudent man of business.*

The crux of the matter is that once a party has agreed to arbitration, it should be the Court's responsibility to either facilitate the said party in the arbitration while staying within the confines of the Act, 1940 or, to compel the party to abide by the terms and conditions of a contract. The purpose of arbitration is defeated if a party refuses to abide by the agreed mode of dispute resolution. This trend must not be encouraged.

26. The High Court has proceeded on erroneous grounds and has misapplied the applicable law to the facts and circumstances of the instant controversy, which warrants interference of this Court. We have been unable to agree with the conclusions reached by the High Court in the Impugned Judgment. Accordingly, the Impugned Judgement is found to be unsustainable in law as well as facts and is therefore set aside. This appeal is allowed.

27. Consequently, the judgment and decree dated 19.03.2016 whereby the Award was made Rule of Court is restored and affirmed and the Award rendered by the arbitrators is made Rule of Court.

ISLAMABAD, THE
20th of June, 2022.
Haris Ishtiaq/*
'Not Approved For Reporting'