# IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. 1541 of 2005**

**Jahanzeb Aziz Dar ---------- Plaintiff**

**Versus**

**Asad Ali Awan ---------- Defendant**

**Date of hearing:** **05.10.2016.**

**Date of judgment:** **26.10.2016.**

**Plaintiff:** **Through Mr. Muhammad Ali Jan Advocate.**

**Defendant:** **Through Mr. Jamshed Malik Advocate.**

**J U D G M E N T**

***Muhammad Junaid Ghaffar, J.*** Through this judgment the objections raised on behalf of the defendant / objector under Sections 30 & 33 of the Arbitration Act, 1940, against the validity of the Award dated 12.12.2005 passed by the learned Sole Arbitrator are being decided.

2. Briefly, the relevant facts are that the plaintiff and defendant entered into a Partnership Agreement through Deed of Partnership dated 16.2.2000, and when some dispute arose between them the plaintiff filed a Suit for Dissolution of Partnership, Rendition of Accounts, Permanent Injunction and Recovery, (Suit No. 753/2002) and since it was provided in the Partnership Deed that in case of dispute the same would be resolved through Arbitration, vide order dated 10.5.2004 a Sole Arbitrator was appointed, whereafter, the parties led their evidence and the learned Sole Arbitrator has given his Award dated 12.12.2005 which has been filed

before this Court for making it as a rule of the Court against which objections have been filed on behalf of the defendant / objector under Section 30 and 33 of the Arbitration Act, 1940.

3. Learned Counsel for the defendant / objector has contended that the Award of the learned Sole Arbitrator is contrary to the evidence on record and the same is based on misreading of facts as well as evidence. Per learned Counsel the defendant had discharged its burden by leading appropriate evidence to the effect that the accounts were mutually settled by the plaintiff and the defendant in presence of two independent witnesses; and therefore, the plaintiff had no claim against the defendant. He has further submitted that even the learned Sole Arbitrator while passing his Award has come to the definite conclusion that the evidence cannot be conclusively relied upon, however, he has gone further to give the Award in favour of the plaintiff. Per learned Counsel in the circumstances, the Award is to be set aside as the same is based on clear misreading of evidence and in support of such contention the learned Counsel has specifically referred to the observations at typed page 14, 15, 16 and 17 of the Award.

4. On the other hand, learned Counsel for the plaintiff has contended that no settlement had been reached between the parties, whereas, the hand written accounts which were relied upon by the defendant in its evidence were forged, as even one of the alleged signatory produced as witness by the defendant, had denied his signatures. Learned Counsel has also referred to the written statement and has contended that no such plea was raised in the original Suit. Per learned Counsel the entire investment was done by the plaintiff as per the partnership agreement between the parties, whereas, the defendant has failed to prove that he ever invested in the partnership business and was required to maintain

proper accounts, but he did not do so and therefore, the Award has been passed correctly in favour of the plaintiff.

5. I have heard both the learned Counsel and perused the record. It appears that the parties entered into a partnership business pursuant to Partnership Deed dated 16.2.2000 which was in respect of import and installation of machinery under Non-Repatriable Investment Scheme (NRI) and it further provided that all the investment in the import of second hand machinery will be made by the plaintiff out of his foreign exchange earnings as at the relevant time he was residing in Sweden as a non-resident Pakistani. It further appears that the dispute between the parties is in respect of three shipments made by the plaintiff which according to the plaintiff were sent by him and the defendant failed to return his investment as well as proceeds and therefore, he was compelled to file a Suit for Dissolution of Partnership and Rendition of Accounts, whereafter, the learned Sole Arbitrator was appointed. Before the learned Sole Arbitrator as many as seven issues were framed and both the parties led their evidence respectively through their witnesses. The learned Sole Arbitrator through his Award has considered the entire evidence and has come to the conclusion that out of the claim on four accounts, the plaintiff is only entitled for his claim in the sum of Rs. 700,562/- and Rs. 20,99,300/- whereas, the plaintiff's other claims have been rejected against which though initially the plaintiff had filed its objections but on 29.3.2016 a candid statement was made by the learned Counsel for the plaintiff that he will not be pressing his objections filed against the dismissal of his claim in the Award.

6. On perusal of the Award given by the learned Sole Arbitrator it reflects that the learned Sole Arbitrator has considered the entire evidence placed before him and since primarily in this matter it was

obligatory upon the defendant to discharge the burden so as to maintaining and settling of accounts pursuant to the terms of Partnership Deed, which burden the defendant failed to discharge. The learned Sole Arbitrator after having appraisal of the entire evidence in respect of maintaining of proper accounts has come to a conclusion in the following terms:-

> "It is always seen in any dispute of this sort that the partners fallout when mistrust come into the transaction and the accounts that are maintained are challenged. Indeed Clause 4 of the Partnership Deed stipulates that the Defendant shall maintain and keep accounts. For any individual or a firm or a company keeping of account per se means proper keeping of accounts, which would include cross verification of the figures by Cash Books, Balance Sheets, Receipts, Vouchers etc and all in all system that would enable any third party to appreciate the accounts that are maintained. A haphazard way of maintaining accounts would always raise a question mark. It is accepted that the defendant had to maintain accounts and it is also accepted that accounts have to be properly kept. If they were not done then the person challenging the accounts would be well within his rights not to accept the figures. The figures in the Register are not in conformity with the figures available in the documents. There is also overwriting."

7. It further appears that the two witnesses which according to the defendant were signatories of the so-called settlement of accounts also appeared before the learned Sole Arbitrator, out of which one Mr. Shakil denied his signatures on the documents, whereas, while appreciating the evidence of the other witnesses namely Mr. Luqman the learned Sole Arbitrator came to the conclusion that he cannot rely upon the evidence of this witness as there were several question marks in his evidence as well as cross-examination and therefore, the learned Sole Arbitrator held that the defendant had failed to maintain proper accounts which under the terms of Partnership Deed were required to be maintained by him. The learned Sole Arbitrator had framed a specific issue in this regard that "*whether the defendant maintained proper account of the income and expenditure of Partnership business and whether the Partnership firm's accounts were ever settled* ", whereas, the defendant was required to lead evidence in his support to get this issue resolved in his favor. The learned Sole

Arbitrator after proper appraisal of evidence before him has concluded that the defendant did not maintained proper accounts and consequently the same were never settled. Such finding being based on proper appreciation of facts and law cannot be disturbed by this Court while hearing the objections to the award.

8. This Court while hearing objections under Section 30 and 33 of the Arbitration Act, 1940, has a very limited jurisdiction, and normally no interference is to be made in an Award which has come before the Court after mutual agreement between the parties to decide their dispute(s) through Arbitration. It is a settled proposition of law that a Court while hearing objections against an Award does not sit as a Court of appeal and cannot undertake reappraisal of evidence recorded by the Arbitrator and even if a different conclusion can be drawn from such evidence, does not necessarily binds this Court to reach such different conclusion.

9. A learned Single Judge of the Lahore High Court in the case reported as **PLD 2006 Lahore 534** (***Premier Insurance Company and others v. Attock Textile Mills Limited***), has eloquently dilated upon the basic principles which should prevail with the Court while considering the objections to an award and the criteria on the basis of which, an award should be set aside in the following terms;

> 24. 1 have heard the learned counsel for the parties. Before dilating upon the propositions involved in the matter, I feel it expedient to reiterate the basic principles, which should prevail with the Court while considering the objections to an award and the criteria on the basis of which, an award should be set aside. The statutory grounds in this behalf are clearly provided in sections 30 and 33 of the Arbitration Act. And on the basis of catena of judgments of the superior Courts of our country, it is well-settled by now that an arbitration is a forum, which is chosen by the parties out of their own free-will and consent, for the resolution of the dispute inter se them; such forum has the sanctity of the confidence of the parties reposed upon it and to all intents and purposes, the Arbitrators are the Judges of law and fact and can accordingly decide the dispute. It also cannot be disputed that the Arbitrators have the full authority to appreciate the facts of the case, according to their own perception, expertise, knowledge and wisdom, and such appreciation of facts, if not suffering from the vice of any misreading and non-reading of the record, shall not be interfered with by the Court only on account that another conclusion is possible. There also can be no cavil that the Court while considering the validity of the award should not

> sit as a Court of appeal, trying to fish or dig out the latent errors in the proceedings or the award, but should only confine to examining the award by ascertaining, if there is any error, factual or legal, which floats on the surface of the award or the record and if such an amiss is allowed to remain, grave injustice shall be done to the aggrieved party. The perversity about the reasoning, in view of the dictum of the Honourable Supreme Court, though is a ground for the interference in the award, but the Court should not infer the perversity because of the factual conclusion being wrong, rather it should be taken to be analogous and akin to "perverse verdict" which means that the factual conclusion drawn is against the law; obviously this shall include the decision of the Arbitrator on the facts of the case being based upon the misreading and the non-reading of the evidence/record. In my considered view, the award of an Arbitrator, who is the Judge selected by the parties themselves, should not be lightly interfered with until and unless as earlier held that it is established that the error committed by him is so glaring that if it is overlooked, it shall lead to miscarriage of justice. But certainly the award cannot be intercepted on the ground that on the reading of the evidence, a conclusion other than arrived at by the Arbitrator, is possible.

10. The Honorable Supreme Court in the case reported as **PLD 2011 SC 506** (***Federation of Pakistan through Secretary, Ministry of Food, Islamabad and others vs. Messrs Joint Venture Kocks K.G/Rist***) has cited the aforesaid judgment with approval and has been pleased to hold as under:

> "Heard. While considering the objections under sections 30 & 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 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, 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. Obviously if there is a blatant and grave error of fact such as misreading and non-reading or clear violation of law, the interference may be justified by the courts. But for the appraisal and appreciation of the evidence, 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. (See Premier Insurance Company and others v. Attock Textile Mills Ltd. PLD 2006 Lahore 534)"

11. Similarly a learned Single Judge of this Court while dealing with the same issue as to whether the award of an Arbitrator can be upset by a Court while hearing the objections filed under sections 30 and 33 of the Arbitration Act 1940, in the case reported as **1999 YLR 1213** (***Haji Abdul Hameed & Co. Vs. Insurance Company of North America***) has observed that in so far as the law on the subject is concerned, it is now well settled that the Court in which the award is filed ought not to launch into an

exercise of re-appraisement of the evidence or to set itself up as an Appellate Court and that it should only interfere with the award when there is an error on the face of the award. The learned Single Judge after having fortified itself with the law laid down by the Hon'ble Supreme Court in the case reported as **PLD 1996 SC 108** (***Joint Venture KG/RIST V/s Federation of Pakistan)*** went a step further and observed as follows:-

> "It may be added here that invariably the parties after arbitration ends embroil themselves in protracted litigation mostly at the instance of the one against whom the award is given usually to avoid payment. Consequently, the entire purpose of arbitration is lost which is to give opportunity to the parties to settle their disputes quickly in a commercial manner without being hamstrung due to intricacies of Court procedures. Consequently, in my view it is incumbent upon the Courts to strictly follow the rule laid down in the above Supreme Court judgment and interfere with the award only in case the error is apparent on the face of the award. To illustrate, I would go to the extent of saying that the error in the award should be so manifest that a person with even a rudimentary knowledge of law should be able to perceive it, since arbitration ought to be essentially commercial in nature. In so far as this case is concerned I find that let alone there being any error on the face of award I find that the award is well-reasoned and the deductions arrived at by the learned umpire are logical and, hence ought to be endorsed. I, therefore, find no merit in the objections raised by the plaintiff and, therefore, direct that this award dated 28.01.1994 be made rule of the Court and accordingly this is disposed of alongwith the application under Section 33 read with section 30 of the Arbitration Act".

12. In view of hereinabove facts and discussion, I am of the view that the award passed by the learned Sole Arbitrator is based on proper appraisal of evidence and there is no error of which this Court can take notice of. Consequently, the objections filed on behalf of the defendant are hereby dismissed and the Award dated 12.12.2005 passed by the learned Sole Arbitrator is made rule of the Court, with a decree to follow accordingly.

Dated: 26.10.2016

J U D G E

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