

**IN THE HIGH COURT OF SINDH AT KARACHI****Suit No. 1761 of 2010****Syed Muzaffar Hussain Shah ----- Plaintiff****Versus****Karachi Electric Supply  
Company Limited (KESC) ----- Defendant****Date of hearing: 29.01.2016.****Date of judgment: 09-02-2016.****Plaintiff: Through Mr. Syed Hassan Ali Advocate.****Defendant: Through Mr. Asadullah Soomro Advocate.****J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** This is a Suit arising out of an Arbitration Award dated 24.3.2010 which has been filed by the learned Arbitrator in the matter of Arbitration between the above parties, pursuant to order passed on application under Section 20 of the Arbitration Act, 1940, filed by the plaintiff.

2. Briefly the facts as stated are that the plaintiff entered into a contract bearing No. A08127 & A08128 both dated 27.3.1995 with the defendant for supply of Electric poles. Thereafter the Plaintiff was assigned work for an amount of Rs. 5665200/- for the fiscal year 1994-95 and for Rs. 25525427/- during fiscal year 1995-96 and supplies were made satisfactorily, and thereafter further work was not assigned to the plaintiff. Subsequently, pursuant to clause 15 of the Agreement pertaining to Arbitration in case of dispute the Plaintiff filed an application under Section 20 of the Arbitration Act on 7.10.2005 and vide order dated 3.9.2007 passed in Suit No.1284 of 2005, the matter was referred to the Sole Arbitrator. The arbitrator has then passed the Award which the plaintiff has objected to under Section 30 of the Arbitration Act, 1940.

3. Counsel for the plaintiff has contended that the Sole Arbitrator has failed to appreciate the material placed before him in respect of the claim lodged by the plaintiff and has only decided the issue of limitation instead of deciding the entire merits of the case. Counsel has further submitted that such conduct of the Arbitrator is in violation of the Arbitration Act, 1940 as the Arbitrator was duty bound to decide the whole issue in accordance with law. Per Counsel the plaintiff is entitled for setting aside of the Award by remanding the matter to the Arbitrator for deciding the same on merits of the case. In support of his contention the Counsel has relied upon the case of *Muhammad Farooq Shah V. Shakirullah* (2006 SCMR 1657), *Wazir Khan and 8 others V. Sardar Ali and 25 others* (2001 SCMR 750) *Umar Din through L.Rs. V. Mst. Shakeela Bibi and others* (2009 SCMR 29) and *National Engineering Services Pakistan (Pvt.) Limited V. Steel Mill Corporation* (2003 YLR 1696).

4. Conversely on the other hand, the Counsel for defendant has contended that this Court while referring the matter to the Arbitrator had specifically observed that the Arbitrator shall also decide the issue of limitation, as according to the Counsel the claim of the plaintiff is hopelessly time barred. Counsel has further contended that the Agreement is dated 27.3.1995, whereas, the first letter was addressed by the plaintiff on 12.2.1998 and the second letter on 27.11.1999, whereas, the third and final letter was issued on 25.2.2004. Per Counsel the period of limitation as provided under Article 52 of the Limitation Act expired on 26.11.2002 i.e. three years from the second letter dated 27.11.1999 and therefore, the subsequent letter as well as the Suit filed for referring the matter for Arbitration under Section 20 of the Arbitration Act was time barred. Per Counsel since the claim was time barred the Arbitrator was not required in law to decide merits of the case. In support of his contention Counsel has relied upon the cases reported as *Muhammad Hussain and others V. Settlement and Rehabilitation Commissioner and other* (1975 SCMR 304), *M/s. Awan Industries Ltd. V. The Executive Engineer, Lined Channel Division and another* (1992 SCMR 65) and *Begum Hafizunnisa Qureshi & others Vs. Shaikh Mohammad Hussain & others* (SBLR 2003 Sindh 511).

5. I have heard both the Counsel and perused the record. It appears that the plaintiff who is involved in the business of construction in the name and style of *Al-Sadat Construction Company*, pursuant to a tender

issued by the defendant for the supply of ST Poles L.T. Size 9.45M X 140MM (31X5-1/2) and H.T. size 11MX140MM (36X5-1/2) vide publication dated 10.1.1995, had participated and was awarded Contract bearing No. A08127 & A08128 both dated 27.3.1995 for a total value of Rs. 30348396/- and Rs. 22881680/- respectively. Thereafter it appears that some supplies were made by the plaintiff and was paid the amount of such supply, however, an amount of Rs. 12,00,000/- was retained by the defendant on the directions of FIA and the Special Court (Offences in Banks) due to some dispute in respect of a third party (M/s Multi-pole Industries Limited) from whom the plaintiff was arranging the supply of the goods in question. However, it has been admitted by the Counsel for the Plaintiff that thereafter the amount of Rs. 12,00,000/- with profits was released in favour of the plaintiff and the claim to that extent stands satisfied. Subsequently, the plaintiff addressed two letters dated 12.2.1998 and 27.11.1999 as referred by the Counsel for the defendant and finally a letter dated 25.2.2004, whereafter Suit / application under Section 20 of the Arbitration Act was filed before this Court and in Suit No. 1284 of 2005 order dated 3.9.2007 was passed in the following terms:-

“This suit has been filed under Section 20 of the Arbitration Act, 1940, seeking reference of the controversy to the Arbitrator in terms of clause 15 of the Agreements both dated 27<sup>th</sup> March, 2005. Learned Counsel for the defendant does not dispute the Agreements but contends that the plaintiff had filed a Suit and a Constitutional Petition which were dismissed for want of jurisdiction, hence the present Suit. There is no legal impediment in the grant of the prayer for referring the matter to the Arbitrator.

In the circumstances, the Suit is disposed of. Let the controversy be decided before the Arbitrator under clause 15 of the Agreement. The issue whether Suit is time barred is also to be decide by the learned Arbitrator.” (***Emphasis supplied.***)

6. Pursuant to the aforesaid order, the Arbitration proceedings were conducted by the Sole Arbitrator and the Award in question dated 24.3.2010 was passed, whereby, the claim of the plaintiff was rejected as being time barred against which the objections have been filed by the plaintiff. The only ground which has been urged upon on behalf of the plaintiff is to the effect that the Sole Arbitrator was not justified in deciding the Award only in respect of the issue of limitation, and, should have also decided merits of the case. This according to the Counsel for plaintiff is in violation of the procedure provided under the Arbitration Act, 1940. On the basis of such contention, the Counsel has prayed that

the matter after setting aside of the Award be remanded to the Sole Arbitrator once again for deciding the case on merits. In this context it would be advantageous to refer to the claim lodged on behalf of the plaintiff before the Sole Arbitrator in which the plaintiff has stated the relevant facts and reads as under:-

“7. That the claimant complied all the legal formalities, thereafter respondent given the work to the claimant for Rs. 5665200/- during the fiscal year 1994-95 and for Rs. 25525427/- during the fiscal years 1995-96 for which supplies were made satisfactorily to the respondent in lieu whereof respondent made payments to the claimant after deducting the tax, but thereafter the respondent stopped supplies from the claimant without any cause or reason. Respondent provided to the claimant certificate of deduction of tax under section 50(4) of Income Tax Ordinance 1979 on above payments. (Copies of Tax Deduction Certificates are annexed as I & J).

8. That thereafter the claimant made visits to the office of the respondent for receiving further works in respect of above contracts and also to receive outstanding amount of Rs. 12,00,000/- to which the concerned officials of the KESC made promise for giving him further work very soon and also assured him of issuing cheque for the above amount.

11. That thereafter the claimant again visited the office of the respondent many times and in the meantime addressed two letters dated 12.2.1998 and 27.11.1999 to the Chief Controller, Purchase, KESC but all his such efforts proved to be of no avail as the respondent had not carried the actual position to the F.I.A. pertaining to Rs. 12,00,000/- that such money belongs to the claimant. Copies of above letters are annexed as M & N).

15. That due to respondent's failure in living up to their obligations, as envisaged in the said contracts the claimant was left with no other option except to serve Notice dated 25.2.2004 upon respondent's then Managing Director for commencing Arbitration proceedings and pass award in respect of dispute between the parties under clause 15 of the said contracts but such notice was not responded, therefore, the claimant sent telegram to the respondent but that was also not paid any heed. (Copy of above notice and telegram are annexed as Q & R).

7. Perusal of the aforesaid claim lodged before the Sole Arbitrator, it appears that insofar as the grievance of the Plaintiff is concerned, the same was in respect of withholding of Rs. 12,00,000/- and additionally for non-assigning any further work. The period of limitation in both the situations, i.e. for recovery of money for goods supplied (Article 52) and for recovery of damages on breach of contract (Article 115) is 3 years. It may be observed that the amount of Rs.12,00,000/- has been admittedly paid to the Plaintiff along with profit and is no more in dispute. It may be noted further that insofar as limitation is concerned, the first letter was issued on 12.2.1998 and the second letter on 27.11.1999. Thereafter the plaintiff did not pursue its claim and kept silent and for the first time on

25.2.2004 a legal notice was sent to the defendant.. Counsel for the plaintiff was repeatedly asked by the Court as to whether; there is any other correspondence on record during the aforesaid period starting from 27.11.1999 to 25.2.2004 to which the Counsel frankly conceded that there was none. In the circumstances, there appears to be no dispute that the legal notice sent on 25.2.2004 was hopelessly barred by time as the plaintiff had failed to pursue the claim after 27.11.1999, and the period of 3 years for claiming any damages pursuant to non-assigning any further work(s) on the basis of Contract dated 27.3.1995 stood expired on 26.11.2002. In fact for referring the matter for Arbitration, the Suit was also filed in 2005 before this Court, therefore, insofar as the question of limitation is concerned, there is nothing for the plaintiff to justify and the claim appears to be patently time barred. However, the Counsel for the plaintiff has relied upon Section 37 of the Arbitration Act and has contended that in terms of subsection (3) the period of limitation shall be deemed to commence when one party to the Arbitration Agreement serves notice on the other party. Section 37 of Arbitration Act, reads as under:-

**“37. Limitation Act IX of 1908.**---(1) All the provisions of the Limitation Act, 1908, shall apply to Arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an Arbitration Agreement to the effect that no cause of action shall accrue in respect of any matter required by the Agreement to be referred until an award is made under the Agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the Agreement.

(3) For the purposes of this section and of the Limitation Act, 1908, an Arbitration shall be deemed to be commenced when one party to the Arbitration Agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the Arbitration Agreement provides that the reference shall be to a person named or designated in the Agreement, requiring that the difference be submitted to the person so named or designated.

(4)-----

(5)-----“

8. Perusal of the aforesaid Section reflects that all the provisions of the Limitation Act, 1908 shall apply to Arbitrations as they apply to proceedings in Court, whereas, subsection (3) provides that for the purposes of this section and of the Limitation Act 1908, an Arbitration shall be deemed to be commenced when one party to the Arbitration Agreement serves on the other party thereto, a notice requiring the

appointment of an Arbitrator, **OR** where the Arbitration Agreement provides that the reference shall be to a person named or designated in the Agreement, requiring that the difference be submitted to the person so named or designated. A meticulous consideration of the above Section reflects that there are two different situations contemplated and the present case falls within the second part of subsection (3) starting after the words "**OR**" which stipulates that if the Arbitration Agreement provides that the reference has to be made to a person named or designated in the Agreement, then the limitation for the purposes of this section and of the Limitation Act would start when such reference is made to the person so named or designated. Clause 15 of the contract in question relating to Arbitration has specifically provided and agreed upon by the plaintiff that in case of any claim or dispute arising out of and in connection with the purchase order, the matter shall be referred to the Managing Director (Agents) of KESC for his Sole Arbitration. Since the Arbitrator itself was named / designated in the Agreement between the parties therefore, it was incumbent upon the plaintiff to refer the matter for Arbitration or approach the Sole Arbitrator as soon as the dispute arose between the parties, or in the alternative approach this Court under Section 20 of the Arbitration Act, 1940, for appointment of an Arbitrator. The limitation period in any case is three years and the arguments so raised on behalf of the plaintiff that the limitation period would start only from the date when the Arbitrator is approached by any of the parties does not seem to be correct. The provisions of Limitation Act apply to the Arbitration proceedings as provided under Section 37 of the Act *ibid* and therefore, once the law provides a specific period of limitation, then the same cannot be enlarged in the manner as contended on behalf of the plaintiff. Hence on the face of it, it appears that the claim of the plaintiff before this Court for referring the matter to the Arbitrator as well as before the defendant through letter dated 25.2.2004 was apparently time barred and there cannot be any exception to it.

9. Insofar as the argument of the Counsel for the plaintiff to the effect that the Arbitrator was not justified in merely deciding the issue of limitation, and should have decided the merits of the case as well is concerned, the same also appears to be misconceived and incorrect as it is a settled proposition that if any proceeding(s) or Suit is barred by law, then such issue has to be decided first and the Court or the Tribunal or

the Arbitrator as the case maybe, is not necessarily required to decide merits of the case as well. This is so because otherwise it would burden the Court, whereas, no useful purpose would be served for deciding of the merits unnecessarily, if the claim itself or the case is time barred. Therefore, this ground so raised on behalf of the plaintiff also fails. The Hon'ble Supreme Court in the case of ***Awan Industries Limited(supra)*** has been pleased to observe as under:-

“22. There is yet another objection which is apparent on the face of the record. In the statement of claim before the arbitrator it was mentioned that the dues were pending since 1962. We have already reproduced in Para 6 the heading and part of the opening paragraph which shows what I have stated above. It is obvious that the claim before the arbitrator was barred by time. It was also barred by time when Suit No. 15 of 1969 was filed. It was hopelessly barred by time when reference to the arbitrator was made on 27.4.1978. Now, under section 37 of the Arbitration Act, all provisions of the Limitation Act, 1908 are made applicable to Arbitration as they apply to proceedings in Court. Under Section 3 of the Limitation Act, it is duty of the Court to see that the claim is within limitation period. Accordingly, it was also the duty of the Arbitrator to see that the claim before it was within the period of limitation, notwithstanding whether such a plea was taken or not. Section 3 of the Limitation Act reads as follows:-

“3. Dismissal of suit, etc. after period of limitation.— Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred and application made after the period of limitation prescribed therefore by the First Schedule shall be dismissed, although limitation has not been stop as a defecne.”

23. In the memo of reference the respondent has not claimed any acknowledgment or admission or Agreement to pay a time barred debt. Indeed, the case of respondent No. 1 though out was that there were no dues outstanding.”

9. In view of hereinabove facts and circumstances of the instant case, I do not see any reason to interfere with the Award dated 24.3.2010 passed by the Sole Arbitrator which is accordingly upheld and made rule of the Court. The objections filed on behalf of the plaintiff against the said Award are hereby dismissed, however, parties to bear their own cost(s).

Dated: \_\_\_-02-2016

JUDGE