

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 958 of 2009

Muzaffar H. Sufi ----- Claimant

Versus

M/s Tourism Promotion Services

And another ----- Respondents

Date of hearing: 07.02.2017.

Date of judgment: 22.02.2017.

Plaintiff: Through Mr. Emadul Hassan Advocate.

Defendant: Through Mr. Hassan Mandivala Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit in respect of an Award passed by the learned Sole Arbitrator and though this judgment the objections raised on behalf of the Plaintiff / Objector under Section 30 and 33 of the Arbitration Act, 1940, against the validity of the Award dated 6.7.2009 passed by the learned Sole Arbitrator are being decided.

2. The precise facts appear to be that the Plaintiff being a Sole agent of M/S OTIS Elevator International, U.S.A., participated in an invitation given by Respondents for supply, installation, testing, commissioning and maintenance of lifts / elevators for Serena Hotel Islamabad. It is further stated that after calling for tenders the Plaintiff participated but no concluded contract came into force; however, it appears to be an admitted position that Respondent paid an amount of Rs. 7 million in aggregate as advance and so also opened a Letter of Credit for Rs. 4.4 million. However, the contract could not be finally executed and thereafter, on the basis of Clause 31.1 of the tender documents, some Arbitration proceedings were thrust upon the Plaintiff and the Arbitrator gave his Award dated 14.4.2004 against which the Plaintiff filed J.M. No. 16/2004 wherein, with the consent of the parties the said Award was set-aside and vide order dated 27.2.2007 Mr. Justice Retd. Nazim Hussain Siddiqui former Chief Justice of Pakistan was appointed as Sole Arbitrator. The Plaintiff and Respondent both filed their claims before the learned Sole Arbitrator who after recording evidence has rejected the claim of the Plaintiff and has allowed the claim of Defendant with certain

modifications, against which Plaintiff has filed objections under Section 30 and 33 of the Arbitration Act.

3. At the very outset, learned Counsel for the plaintiff has very candidly conceded that he will not be pressing his objections in respect of Issues No. 1 and 3. He however, has prayed for modification of the findings given in respect of Issue No. 2 wherein, some personal remarks have been recorded against the Plaintiff and therefore, per learned Counsel to that extent the same may be modified. Insofar as Issue No. 4 which is in respect of claim of Defendants is concerned, learned Counsel for Plaintiff has contended that in the earlier proceedings of Arbitration, the Defendants had claimed a much less amount, whereas, in the present proceedings they have claimed excessive amount which has been granted by the learned Sole Arbitrator. He has contended that while granting the Defendants claim, learned Sole Arbitrator has neither discussed any evidence nor the same has been appreciated and the claim has been granted. He has further contended that the claim of Defendants to the extent of Rs. 7 million paid as advance could have been granted, but grant of 15% markup from the date of Award till its payment is not justified, nor unwarranted in law, but is even against the provisions of Section 29 of the Arbitration Act, 1940. Learned Counsel has further contended that in the first round of Arbitration the Defendants had claimed legal fee of Rs. 200,000/- whereas, in these proceedings they have been awarded a legal fee of Rs. 10,20,000/- and therefore, the Award is perverse and without any basis, hence, the same may be set aside. In support he has relied upon the case of *A. Qutubuddin Khan V. Chec Millwala Dredging Co. (Pvt.) Limited (2014 SCMR 1268)*, *Dawood Cotton Mills Ltd., V. K. F. Development Corporation Ltd., (2006 SCMR 1555)* and *Allah Din & Company V. Trading Corporation of Pakistan & Others (2006 SCMR 614)*.

4. On the other hand, learned Counsel for Defendants has contended that the Award has been made in favour of the Defendants on the basis of evidence which is a matter of record and notwithstanding the fact that the same has not been discussed in the Award, it is not a ground to set aside the same. Learned Counsel has prayed for dismissal of the objections and making the Award as Rule of the Court in favour of the Defendants.

5. I have heard both the learned Counsel and perused the record. The facts as aforesaid need not be reiterated as parties do not seem to be at variance, whereas, in J.M. No. 16/2004 with the consent of the parties the learned Sole Arbitrator was appointed and parties were directed to approach the learned Sole Arbitrator for all disputes involved about the installation of lifts and elevators in Serena Hotel Islamabad. The learned Sole Arbitrator after filing of claims of respective parties settled the following issues:-

- I) Whether the Claimant had failed to supply, install and commission five OTIS lifts, French origin timely against which the Claimants had already received an amount of Rs. 7 million by way of cheque and Letter of Credit for an amount of Rs. 4.4 million?
- II) Whether the Claimant suffered any loss and damages due to the action, commission, omission and conduct of the Respondents?
- III) Whether the Claimant transferred extra funds from his own resources and French Franc 1.597 million to the manufacturers?
- IV) Whether the Respondent No. 1 is entitled to the relief prayed for in the counter claim?
- V) What should the Award be?"

6. Insofar as the findings of the learned Sole Arbitrator in respect of Issues Nos. I & III are concerned, the learned Counsel for the plaintiff has pressed neither these issues nor his objections and has conceded that the evidence so recorded goes against the Plaintiff and therefore, he will not be pressing his objections in respect of these Issues. Insofar as Issue No. III is concerned; learned Counsel has contended that though the finding on this Issue has been given against the Plaintiff on the basis of findings in respect of against Issue No. I, which finding is not being pressed; however, the Plaintiff is aggrieved by the observations of the learned Sole Arbitrator to the effect that, *"It appears that whatever amount was paid to him by the Respondent No. 1, he kept and utilized the same for himself and did not pass it on to his Principals, as a result the Principals has also not taken any interest in the matter."* And further, *"One cannot claim relief and damages by his own maneuvering, mischief and malfeasance. A ground has also been urged on behalf of the Claimant that, in fact, the Respondent No. 1 had agreed to give him some other work for compensating him for the alleged losses in this matter."* The precise contention of the learned Counsel is to the effect that though the Plaintiff could not prove his claim in respect of Issues No. I and III, however, this does not lead to the conclusion that an affirmative finding can be given against the Plaintiff insofar as Issue No. II is concerned. On perusal of the Award and the relevant findings issue wise the contention of the learned Counsel for the Plaintiff appears to be justified inasmuch as though the Plaintiff has not been able to substantiate transfer / payment of Rs. 7 million onwards to his principals, but again it cannot be made basis to give a finding that such money was retained by him for himself and was not passed on to his principals. The Plaintiff's case is that the amount was remitted through Hawala / Hundi system, and that, he is not in possession of any evidence to that effect but then again this cannot be made basis for giving a finding that the money was retained by him. The Plaintiff in his cross examination has even gone to the extent to say that *as an agent I will be responsible for the return of said amount, if such need arises*. In view of these facts the finding in Issue No. 2 is modified to the aforesaid effect as prayed. In nutshell the claim of plaintiff and its objections in this regard i.e. Issue Nos. I, II & III stands dismissed.

7. Insofar as Issue No. 4 is concerned, it relates to the counter claim of Defendants. It would be advantageous to reproduce the claim of Defendants which reads as under:-

COUNTER CLAIM

S. No.	Description	Amount in Rs.
1.	Repayment of the advanced payment	7,000,000/-
2.	Mark-up on payment @ 15% from the date of payment up to April 28, 2007, as detailed above.	6,499,728/-
3.	Liquidated damages.	1,200,000/-
4.	Legal fee.	1,020,000/-
5.	Pakistan Cabins.	1,500,000/-
6.	Additional amount to other suppliers.	2,000,000/-
7.	Loss of revenue.	7,200,000/-
8.	Loss of opportunity, mental torture to the directors of the Respondent No. 1.	5,000,000/-
9.	Loss of reputation and image.	10,000,000/-
	Total	41,419,728/-

8. The learned Sole Arbitrator has allowed the claim of Defendants in the following terms:-

“16. The Respondent No. 1 is entitled for repayment of the advanced amount of Rs. 7,000,000/-. He is also entitled to mark up on payment at the rate of 15% per annum from the date of Award till its payment. He is also entitled to liquidate damages, legal fee, additional payment made to other suppliers and the loss of revenue as shown above. However, claims against items No. 5, 8 and 9 above are refused.”

9. Perusal of the aforesaid findings of the learned Sole Arbitrator leaves no doubt in my mind that the same cannot be sustained as awarded. There is nothing in the Award which could be appreciated for granting the claim. The learned Sole Arbitrator has not taken any pains to appreciate the evidence, if any. What was required by the learned Sole Arbitrator was to discuss the evidence so led by the Defendants, and thereafter arrive at a just and fair conclusion. No iota of evidence has been discussed and therefore, it does not require any further observation except that the same cannot be sustained at least in respect of claims listed at serial No. 2, 3, 4, 6 & 7. If any authority is needed to justify that through this Court does not sit as an appellate Court while hearing objections to award, but at the same time is not denuded from exercising its

powers to interfere with the award, when the findings of the Arbitrator are not supported by any evidence, reference may be made to the case of *Province of Sindh v. Waseem Construction Co.* (1991 CLC 66) and *Allah din & Company v. Trading Corporation of Pakistan* (2006 SCMR 614).

It is only claim at serial No.1 in respect of repayment of Rs. 7 million which can be sustained and that too because the findings in respect of Issue No.1 is against the Plaintiff who has in fact not denied that Rs.7 million were received by him as advance payment. Therefore, it is only this part of Defendants claim which can be sustained as it did not require any further evidence to be led by the defendants.

10. Insofar as awarding of markup against claim at Serial No. 2 at the rate of 15% from the date of Award till its payment is concerned, it would be advantageous to refer to the provisions of Section 29 of the Arbitration Act which deals with interest on Award and reads as under;

29. Interest on awards. Where and in so far as an award is for the payment of money the Court may in the decree, order interest, from the date of, the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

The provision as above provides that where and in so far as an award is for the payment of money, the Court may in the decree, order interest from the date of, the decree at such rate as the Court deem reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree. Learned Counsel for the Plaintiff has contended that the learned Sole Arbitrator, in view of aforesaid provision and the dicta laid down by the Hon'ble Supreme Court in a number of cases, had no right to grant any markup on the principal amount of Rs. 7 million from the date of award till payment, as it is only the prerogative of the Court to grant or otherwise, in terms of section 29 *ibid*. The grant of interest on a sum due as adjudged by the Arbitrator from the date of award till its payment has come in scrutiny in a number of cases before the Hon'ble Supreme Court as well as different High Courts. The claim and payment of interest in an Arbitration award came before the Hon'ble Supreme Court in the case of *Ghulam Abbas v. Trustees of the Port of Karachi* (PLD 1987 SC 393). The precise facts involved were that a contract for the construction of Sea-Wall-cum-Reclamation Bund, was awarded to the appellant opposite Keamari Groyne at Karachi harbor, by KPT. The contract was awarded to appellant Ghulam Abbas on 9th January, 1970, for a total sum of Rs.27,43,000 and the work under the contract was to be completed within 12 months. However, a dispute arose due to delay in completing the work. The contractor claimed to have carried out the work of the total value of Rs.25,73,194.31 but K.P.T. paid him only Rs.23,14,903.36, refusing to pay the balance of Rs.2,58,290.95. After adjustment of Rs.10,000 imposed as penalty, the claim of the contractor, so far as the work done

under the contract, was reduced to Rs.2,48,290.95. In addition the contractor claimed refund of a sum of Rs.1,36,150 on account of encashment of the bank guarantee furnished by him under the terms of contract which the K.P.T. was liable to refund. The contractor also claimed interest on the outstanding amount from 1.7.1972 to 3.10.1973 @10%. The Arbitrator through his award dated 17.7.1975 awarded certain amounts to the appellant with interest @6% from 19.5.1973 to 30.6.1975. After rejection of KPT's objections, a learned Single Judge of this Court made the award as Rule of the Court, against which an appeal was preferred and a learned Division Bench of this Court partly allowed the appeal by modifying the award by reducing the amount of award. In this case the Arbitrator had awarded certain amount of interest for period much prior to the date of reference to him i.e. from 19.5.1973. The finding of Hon'ble Supreme Court which is relevant for proper adjudication of this case is as under;

22. As far as the grant of interest from the date of the award until the payment of the principal sum it may be observed that the Arbitrator can under no circumstances award interest for the period beyond the passing of the decree by the Court on the award for the simple reason that the statutory provisions contained in section 29 of the Arbitration Act take over and it is the Court within whose discretion lies the power to order interest from the date of the decree at such rate as the Court deemed reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree. From this it necessarily follows that future interest with effect from the date of the decree could not legally be awarded by the Arbitrator. However, the facts are that the award was made the rule of the Court by the learned Single Judge with the result that the part of the award granting interest beyond the date of the decree until payment was also incorporated in the decree passed by the Court. As held in *Sheikh Mahboob Alam v. Sheikh Mumtaz Ahmad* (P.L.D. 1956 Lahore 276), although, the court could set aside this part of the award, it was open to it to exercise its own power under section 29 of the Arbitration Act and grant interest. Therefore, in making this portion of the award a part of the decree the court must be deemed to have adopted it in the exercise of its own power under section 29. However, in his statement of claim the appellant had claimed interest only upto 3rd October, 1973. The issues were framed by the learned Arbitrator on the pleadings of the parties and therefore, interest beyond 3rd October, 1973, was not the subject matter of reference for adjudication before the Arbitrator. The Arbitrator, therefore, exceeded his authority, in any case, to have awarded future interest for the period between the date of the award and the date of the decree on any basis. The reference was also earlier made to the case of *Union of India and another v. H/s D.P. Wadia and sons* (AIR 1977 Bombay 10), in which the award of interest was upheld on the ground that no reasons were assigned by the Arbitrator. We are unable to agree with that view of the law and also feel that the facts in the present case are different. The award on the face of~i it refers to the statement of the claim in which the contractor claimed interest by way of damages and it is on that basis that the decision of the Arbitrator apparently proceeds. As we have held that the Arbitrator in the facts of the present case could not according to law grant interest as claimed, there would be an error of law apparent on the face of the record. The mere fact that pleadings were filed before the Arbitrator and issues were then settled on the pleadings of the parties incorporating the question of interest does not necessarily give rise to the inference that the parties had agreed to refer specifically the question of grant of interest as a question of law for the decision of the Arbitrator, so as to preclude any party to the arbitration from challenging the award on the ground of error of law on the face of the award.

23. The conclusion from the foregoing discussion is that so far as the item of interest in dispute is concerned the Arbitrator committed an illegality in awarding interest except that the interest awarded from the date of decree onwards has been saved by virtue of section 29 of the Arbitration Act.

In this case the defendants had claimed mark-up from the date of payment till 28.4.2007 and not beyond that, whereas, the learned Sole Arbitrator has awarded mark-up from the date of Award till its payment, meaning thereby that the claim of defendant for award of mark-up from the date of payment has been dismissed and not awarded. Interestingly, the defendants have not filed any objections against this finding and in fact they support the award to make it a rule of the Court. Now in view of the judgment of the Hon'ble Supreme Court in the case of Ghulam Abbas (Supra) no interest can be awarded by the Arbitrator from the date of award and it is only the Court which can do so. Therefore, insofar as the award of mark-up from the date of award till its payment is concerned, the same cannot be sustained by this Court and must be set-aside on the principles already settled in the above case as well as in the case of *Dawood Cotton Mills Ltd., v. K. F. Development Corporation Ltd.*, (2006 SCMR 1555), *Pakistan Steel Mills Corporation Ltd., v. Syed Altaf Hussain* (PLD 1991 Karachi 386) and the case of *A. Z. Company v. Messrs S. Maula Bukhsh Muhammad Bashir* (PLD 1965 SC 505).

Whereas the claim of mark-up from the date of payment till 28.4.2007 has not been granted, against which no objections have been filed, the same I am afraid cannot be accepted and or granted by this Court in absence of any such challenge to the findings of the learned Sole Arbitrator. On equity they may have a valid claim, but since they are not aggrieved by the finding of the learned Sole Arbitrator on such issue and have not challenged the same, this Court cannot come to their rescue while hearing objections to the award for having a very limited and not plenary jurisdiction.

11. In view of hereinabove facts and circumstances of this case, the Award is modified as discussed above and made Rule of the Court only to that extent of Rs. 7 million as principal and payment of interest in terms of section 29 of the Arbitration Act, 1940, from the date of the Award till its final realization at the rate prescribed by the State Bank of Pakistan for cost of funds during such period for lending money. The Award is made Rule of the Court as above. Decree to follow.

Dated: 22.02.2017

J U D G E

ARSHAD/