

**IN THE HIGH COURT OF SINDH AT KARACHI****Suit No. 355 of 2013****M/s. Jawed Pervaiz Enterprises -----Plaintiff/ Claimant****Versus****Pakistan State Oil Company Limited-----Defendant/Respondent****Dates of hearing: 18.10.2017 & 23.11.2017****Date of judgment: 21.12.2017.****Plaintiff/Claimant: Through Mr. Yousuf Moulvi, Advocate.****Defendant/Respondent: Through Mr. Rafiq Ahmed Kalwar,  
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 Sole Arbitrator and through 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 22.03.2013 passed by the learned Sole Arbitrator are being decided.

2. Precisely the facts of the case are that the Plaintiff is a Transporter duly approved by the Defendant for carriage of its petroleum products and the issue involved in this matter pertains to a Vehicle registered as LSA-8377 (**Vehicle**), which was plying under the Cartage Contract of the Plaintiff. The said Vehicle from 22.07.2010 to 20.04.2011 made 25 trips and delivered the consignments and obtained acknowledgements by the Consignees without complaint except the last

consignment of 40,000 liters of furnace oil, which was loaded from Karachi on 20.04.2011 and was to be delivered at M/s. Kohinoor Energy Limited (KEL) at Lahore. The controversy between the parties precisely is in respect of this last shipment in which KEL reported that when the said Vehicle was being unloaded they found some suspicion as apparently there was a hidden chamber in the Vehicle and this resulted in lesser delivery of the quantity of furnace oil. The other minor details are not relevant for the present purposes. This dispute was referred for arbitration as per the Agreement and an Award has been passed against the Plaintiff though a partial relief was granted.

3. Learned Counsel for the Plaintiff has contended that the said Award is based on no evidence; that the reasons are not valid; that the question as to whether any shortage happened, is not supported by any cogent evidence; that the Plaintiff's claim has not been appreciated; that it is the negligence of the Defendant, which has not been considered in favour of the Plaintiff; that the entire exercise of inspection was carried out in absence of the Plaintiff; that the Vehicle was always in custody of the Defendant, hence nothing can be attributed towards the Plaintiff; that the Vehicle was properly sealed at the time of dispatch; that without prejudice it is only the last shipment in respect of which the Plaintiff could be held responsible, whereas, deductions have been made in respect of passed shipments by relying upon the Standard Operating Procedure (SOP), which is not part of the Agreement; that the objections have been filed within time as granted by the Additional Registrar, therefore, the issue of limitation raised on behalf of the Defendants is unfounded. In support he has relied upon **2009 SCMR**

**29 (Umar Din through L.Rs. v. Mst. Shakeela Bibi and others), 2006 SCMR 614 (Allah Din & Company v. Trading Corporation of Pakistan and others), 2000 CLC 1239 (Messrs Mechanised Contractors of Pakistan Limited v. Airport Development Authority, Karachi), PLD 2007 Karachi 594 (Aquil Lotia v. Daily Ausaf, Karachi through Chief Editor and another), 2014 SCMR 1268 (A. Qutubuddin Khan v. Chec Millwala Dredging Co. (Pvt.) Limited), 2000 CLC 1216 (Messrs Sapra Scale Manufacturers through Proprietor and another v. National Bank of Pakistan).**

4. On the other hand, learned Counsel for the Defendant has raised an objection regarding limitation as according to him the objections are time barred as they have been filed beyond the period of 30 days from receipt of notice as provided under Article 158 of the Limitation Act, whereas, the Additional Registrar cannot extend such time; that the Application under Section 5 of the Limitation was filed after one year and same cannot be considered; that no contradiction has been pointed out in the Award, whereas, entire evidence was considered and this Court is not a Court of Appeal to appreciate the evidence; that SOP was always part of the Agreement and no objection to that effect was raised before the learned Arbitrator; that independent witness of KEL has corroborated the entire case; that the Plaintiff failed to bring the Driver for evidence nor lodged any FIR against him and therefore, a presumption arises as to the connivance of the Plaintiff; that offer was made for inspection but the Plaintiff chose not to do so. In support he has relied upon **1983 SCMR 716 (Dr. Abdul Waris v. Javed Hanif and others), PLD 1996 SC 797 (Superintending Engineer, Communication**

*and Works, Highway Circle, Kohat v. Mian Faiz Muhammad & Co. Akora Khattak*), SBLR 2014 Sindh 559 (*Alia Ansari & others v. Trustee of the Port of Karachi & another*), 2013 CLD 719 (*Messers Besrock (Pvt.) Ltd. through Director/Chief Executive v. Pakistan Steel Mills Corporation through Secretary*), PLD 2010 Lahore 452 (*Messrs Fabnus Construction (Pvt.), LTD. through Chief Executive/Director v. Iftikhar Ahmad and 4 others*), 2011 MLD 135 (*Province of Punjab through Executive Engineering and 2 others v. Messrs Ammico Construction (Pvt.) Limited, Lahore through Chief Executive Engineer*), PLD 1981 Karachi 730 (*Messrs Shafi Corporation Ltd., Karachi v. Government of Pakistan through Director General of Defence Purchase*), PLD 1962 (W.P) Lahore 830 (*The Thal Development Authority v. Nisar Ahmad Qureshi*), 2001 SCMR 1700 (*Muhammad Akhtar v. Mst. Manna and 3 others*).

5. I have heard both the learned Counsel and perused the record. The first question is regarding limitation in filing of the objections which are required to be filed within 30 days from the date of service of notice of filing of the award as provided under Article 158 of the Limitation Act, 1908. In this matter the notice as per bailiff report reflect that the same was delivered on 9.4.2013 and counting from this date the objections ought to have been filed by 9.5.2013, whereas, they were filed on 17.5.2013. It appears that when the matter was listed before the Additional Registrar (OS) on 2.5.2013, an order was passed whereby the defendant was directed to file objections within 30 days from that date. The defendant's case is that in view of such position the objections are within time, as he never received the notice of the Courts bailiff as reported. Subsequently, after an objection was raised in this regard by the defendant and an application under Section 5 of the Limitation Act

was also filed for condonation of 8 delay of days, if any. Though objection has been raised in this regard, however, in view of the peculiar facts of this case wherein time was allowed by the Additional Registrar, I am not inclined to agree with the contention of the learned Counsel for defendant, as it is settled law that no one should be prejudiced with the act of the Court. Reliance in this regard may be placed on the cases reported as ***Anwar Ahmed v Waqar Ahmed* (PLD 2015 Sindh 326)**, ***Mian Muhammad Lutfi v Mian Muhammad Talha Adil* (NLR 2000 Civil 422)**, ***T.D.C.P. v Moderate Builders* (2005 YLR 1269)**, ***Ghulam Hussain v Jamshaid Ali* (2001 SCMR 1001)** & ***Commissioner Inland Revenue (legal Division) LTU Islamabad v GEOFIZYKA Krakow Pakistan Ltd.* (2017 SCMR 140)**. Accordingly, I treat the objections as within time.

6. The facts to the extent of the dispute have been briefly noted down as above and need not be reiterated. The Vehicle in question was supposed to deliver 37.480 M. Tons of furnace oil at KEL and the Vehicle was brought to the weighing scale to ascertain the gross weight including the product. After decantation of the product the vehicle was again brought to the weighing scale to ensure that entire product has been decanted in the KEL's storage tanks, and during weighing it was observed that the entire product was not decanted as the weight of Vehicle did not reduce to the extent as it had to be. On this suspicion the representatives of KEL inspected the inner compartment of the Vehicle and hidden chambers of 22.310 M. Tons capacity was found, whereas, the weight of decanted products was 15.170 M. Tons. As soon as the incident was reported, the Plaintiff was called at the Head Office of the Defendant and was informed about the incident. Whereas, the

Driver also informed but absconded from KEL's premises leaving behind the Vehicle. It has further come on record that the Plaintiff after witnessing the tank shell of the Vehicle agreed/accepted the theft of petroleum products through hidden chambers of the said Vehicle and requested that the vehicle be shifted for further inspection. The Arbitration Award reflects that in detail the evidence was recorded, whereas, the Plaintiff on his arrival at KEL was advised to inspect the Vehicle but he did not do so and agreed about the presence of a hidden chamber and raised no objection. It further appears from the record that opportunity was provided to the Plaintiff to cross-examine the witnesses of Respondent but only one was cross-examined and it further appears that the Driver was never produced for evidence. On an overall examination of the record as well as the Award it appears that insofar as the happening of the incident is concerned, the Plaintiff has not been able to deny the same with any cogent and appreciable evidence. It is otherwise a settled proposition of law that in matters of arbitration, the Court even if on appreciation of evidence arrives at a conclusion that a different view can be taken, is not supposed to do so. Arbitration is a matter of arrangement between the parties and until and unless the case strictly falls within the parameters of Section 30 as to any misconduct on the part of the Arbitrator, is not to be interfered with. To that extent I am of the view that insofar as the happening of the incident and its merits are concerned, the Plaintiff has failed to make out any case of indulgence. However, having said so there is another aspect of the matter, which is to be considered. It is not in dispute that there was an Agreement between the parties for the

contract of carriage which included an arbitration clause which reads as under:-

“26.If any question, difference or objection whatsoever or any other dispute of whatever cause and nature shall arise in any way connected with or arising out of this Agreement or the meaning or operation of any part thereof for the rights, duties or liabilities of either party, then every such matter shall be referred for arbitration to the “COMPANY’S” General Manager, Operations or his nominee or such other Officer of the “COMPANY” as the “COMPANY” may designate and his decision shall be final and binding on both parties. Any arbitration under this Agreement will be held at Karachi and the Courts at Karachi will have exclusive jurisdiction in all manners connected with this Agreement.”

7. The Defendant has penalized the Plaintiff not only for the incident so happened but for the last 25 trips made by the Vehicle in question on the basis of SOP issued by them. However, in the arbitration clause as well as in the entire agreement there appears to be no reference to the SOP. It clearly reflects that it was never part and parcel of the Agreement. Though this may be the case of the Defendant that this SOP is being followed by all, and in all such matters, but in the instant case when the dispute has arisen, it cannot be presumed that SOP was agreed upon as a part of the Agreement. The learned Counsel for the Defendant could not point out any such clause in the Agreement that the SOP was also part of the Agreement, but the learned Counsel did to argue that it was never objected before the Arbitrator. However, it is to be appreciated that the arbitration clause itself has to be applied in respect of the Agreement between the parties and not beyond that. Though the Arbitrator has partly reduced the liability of the Plaintiff from 25 trips to 10 trips but again this does not have any support from the Agreement itself. Notwithstanding this, even otherwise this Court fails to understand as to what is the rationale of imposing such a harsh penalty though SOP, which was never incorporated in the Agreement,

whereas, there is no iota of evidence on record to the effect that there was any shortage reported by the recipients of the product in any of such trips by the Vehicle. Further what measures were being taken by the Defendant to inspect the Vehicle randomly or for that matter before each shipment. Merely on presumption such a harsh penalty cannot be justified when admittedly there is no evidence on record. It is needless that as per settled law, imposition of the penalty must have a direct nexus with the act complained of. In view of such position, I am of the view that the Award which has been passed is not in conformity with the Agreement between the parties and therefore needs to be modified to that extent.

8. In view of hereinabove facts and circumstances of this case, the Award is though made rule of the Court; however, it stands modified to the extent that the Plaintiff can only be made liable to pay for the theft, in the Vehicle in its trip to KEL on 20.04.2011 and not for the past trips.

9. The Award stands modified to the extent as above. Office to prepare the Decree accordingly.

Dated: 21.12.2017

J U D G E

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