IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 987 of 2013

Zulfiqar Shakoor ---------- Plaintiff

Versus

Sindh Workers Welfare Board ---------- Defendant

Date of hearing: **18.10.2016**

Date of judgment: **30.11.2016**

Plaintiff: **Through Mr. Badar Alam Advocate.**

Defendant: **Through Mr. Khalid Imran 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 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 3.6.2013 passed by the learned Sole Arbitrator are being decided.

2. Precisely, the facts are that the plaintiff was awarded four different Contracts dated 16.3.2004 (two Contracts) and 7.12.2004 (two Contracts) which were awarded pursuant to the initiation of bids by the defendant from its prequalified Contractors and the plaintiff being lowest was awarded the same. Thereafter, Letter of Acceptance dated 11.3.2014 for a total cost of Rs. 41,745,660/- was issued in respect of construction of Model School at Lakhra, Sindh (Contract No.1) and Letter of Acceptance dated 11.3.2004 for a total cost of Rs. 41,446,245/- in respect of construction of Model School at Ghotki, Sindh (Contract No. 2) and Letter of Acceptance dated 13.12.2004 for a total cost of Rs. 39,047,550/- in respect of construction of 100 Houses at Ghotki Sindh (Contract No. 3) and finally Letter of

Acceptance dated 31.12.2004 for a total cost of Rs. 13,237,155 in respect of infrastructure work of 100 Houses at Ghotki Sindh (Contract No. 4) were issued. Thereafter, the plaintiff started work as awarded and in relation to Contract No. 1, 12 Running Bills were submitted for a total sum of Rs. 5,710,753.64 which were verified by the Consultant for Rs. 2,379,982.00/- only and subsequently, the plaintiff in the given facts terminated the Contract under Clause 69.1 of the General Conditions of the Contract on or about 25.11.2010 and upon failure of the defendant to nominate Arbitrator pursuant to the Contract between the parties approached this Court through an application under Section 20 of the Arbitration Act which was allowed by this Court vide order dated 19.7.2011 and the learned Sole Arbitrator was appointed who has given his Award in favour of the plaintiff as will be discussed later in this judgment. The defendant has filed objections under section 30 & 33 of the Arbitration Act, 1940.

3. Learned Counsel for defendant has contended that the plaintiff did not complete the work in time, whereas, the Award was given to M/s. Orbit, however, the claimant is one Zulfiqar Shakoor, hence the claim is not justifiable. He has further contended that the defendant had filed their counter claim and despite framing an issue in this regard the learned Sole Arbitrator failed to give any finding on that. Per learned Counsel the Award as a whole is based on misreading and non-reading of the evidence and the claim of the plaintiff has been allowed merely on presumption without any tangible evidence in this regard. In support the learned Counsel has read out the findings of the learned Sole Arbitrator at Para 24 onwards and has contended that the learned Sole Arbitrator has allowed the entire claim of the plaintiff in respect of all the 4 contracts by relying upon the conclusion drawn by him in respect of Contract No. 1 only. In support of his submissions he has relied upon the cases *Wazir Khan V. Sardar Ali (2001*

SCMR 750), and Allah Din & Company V. Trading Corporation of Pakistan (2006 SCMR 614).

4. On the other hand, learned Counsel for plaintiff has contended that M/s Orbit is a sole proprietorship concern and therefore, it cannot sue in the name and style of M/s Orbit but only through the name of proprietor and therefore, the objection in this regard is misconceived. Learned Counsel has contended that in all the Contracts time was not the essence and the defendant had defaulted in making payments which were made after expiry of the Contract, therefore, this objection cannot sustain as by their implied conduct it has been proved that time was not the essence of the Contract. Learned Counsel has further contended that the learned Sole Arbitrator has not granted the entire claim of the plaintiff in respect of overhead expenditure and losses and has reduced the same to a very great extent i.e. up to only Rs. 5 million, and the reason being that the learned Sole Arbitrator came to the conclusion that though there was no credible evidence but there was some evidence and this Court while hearing objections to the Award does not sit as a Court of Appeal and is neither empowered to arrive at a different conclusion simply for the reason that it could do so. Per learned Counsel, it is not the case of the defendant that there was any misconduct on the part of the learned Sole Arbitrator against which any objection may be sustainable, but the findings cannot be set aside on the ground that another conclusion can be drawn by this Court. Per learned Counsel a very reasonable conclusion has been drawn by the learned Sole Arbitrator while granting compensation in respect of unexecuted work only to the extent of 10% which is a reasonable finding on fact and must not be interfered with. Insofar as the counter claim of the defendant is concerned, learned Counsel contended that the learned Sole Arbitrator was not bound to give findings on each issue and in this regard

he has relied upon *Messrs Hafeez Construction Co. V. Messrs Javedan Cement Ltd. (1989 CLC 885)* and further contended that the issues which have not discussed will be deemed to have been denied, whereas, even otherwise, the counter claim was only to the extent of termination of Contract by the employer therefore, once the Award has been given in favour of the plaintiff there was no need to give any finding on such issue. In support he has relied upon *Joint Venture KG/Rist V. Federation of |Pakistan (PLD 1996 SC 108), Zulfiqar Shakoor V. Quetta Town Co-operative Housing Society Ltd. (2013 MLD 815), Province of Punjab and 3 others V. Chaudhary Ziaul Islam (KLR 1990 Civil Cases 533), Abdul Hamid Khan V. Muhammad Zameer Khan and others (1990 PSC 1990), National Highway Authority V. Zarghoon Enterprises (Pvt) Ltd. (2015 MLD 746), Messrs Hindustan Tea Co. V. Messrs K. Sashikant & Co. (1989 MLD 212) and Messrs Neelkantan and Bros. Construction V. Superintending Engineer, National Highways, Saleem and others (1989 MLD 1487).*

5. I have heard both the learned Counsel and perused the record. The facts as discussed hereinabove do not appear to be in dispute that the plaintiff was awarded (4) four Contracts by the defendant and after carrying out some work, the payments of the plaintiff were withheld and thereafter the Arbitration clause was invoked and the learned Sole Arbitrator was appointed on an application filed under Section 20 of the Arbitration Act, 1940. The learned Sole Arbitrator after filing of the claims settled the following issues:-

> "A) What is the date of termination of Contracts under Sub-clause 69.1 of GCC (General Conditions of Contract) by the Claimant?
>
> B) Whether the unilateral termination is violative of GCC (General Conditions of Contract)?
>
> C) Whether the Claimant is entitled to claim all or any claim mentioned in Para 34 of page 20 of statement of claim?

D) Whether the counter claim filed by the respondent is maintainable, if so its effect?

E) What should the Award be?"

6. Insofar as the findings of the learned Sole Arbitrator in respect of issues "A & B" is concerned, I have gone through the same and it appears that the conclusion drawn in respect of both these issues is unexceptionable as the learned Sole Arbitrator after a threadbare discussion and screening of the evidence has come to the conclusion that all along the defendant had been accepting the request of the plaintiff for extension of time and rescheduling of the works, which continued from 2004 till 2009, and therefore, I am of the view that no interference is called for insofar as both these issues are concerned.

7. Insofar as issue No. "C" is concerned, which is the main issue by which the defendant is more aggrieved; it would be advantageous to refer to the findings of the learned Sole Arbitrator in this regard. The learned Sole Arbitrator while dealing with the dispute in respect of Contract No. 1 has come to the following conclusions:-

"(a) The 1st claim in respect of Contract No. 1 is for refund of an amount of Rs. 1,312,494.70 on account of retention money / security deposit which were deducted @ 5% from the payments of Running Bill No. 1 to 12. As it has been held that the Contractor had the right to terminate the Contract, it follows that the Employer is, in the circumstance, liable to refund the retention money / security deposit deducted @ 5% from the payments of Running Bill. This claim is accordingly allowed.

(b) An amount of Rs. 2,187,283.00 has been deducted on account of the cost of preliminary items. Credible evidence about the cost of preliminary items has not been brought on record and accordingly this claim is rejected.

(c) Overhead expenditures and losses on the work of Contract No. 1 have been claimed at Rs. 53,874,350.46. ***On this claim also there is hardly any credible evidence brought on record*** but it cannot be denied that overhead expenditures must have been incurred by the Contractor. However, the amount claimed is in excess of Rs. 53 million which has not been proved by the evidence brought on record. This claim is allowed to the extent of Rs. 5 million, which is a reasonable figure.

(d) The last claim is about loss of profit assessed @ 20%. ***This is also an exaggerated claim. No evidence had been brought on record by***

the Contractor to support this exaggeration claim. In my view, claim @ 10% profits will be a reasonable assessment of loss of profit on account of early termination of the Contract and not allowing the Contractor to complete the work, unexecuted work cost comes to Rs. 15,495,766/- and 10% of this amount is Rs. 1,549,576/-. (Emphasis supplited)

Claim for loss of profit @ 10% of balance unexecuted work of Rs. 15,495,766/- comes to Rs. 11,549,576;

Claim for loss of profit on unexecuted work is therefore allowed for the sum of Rs. 1,549,576/-.

25) (a)Claim of the Contractor in respect of Contract No. 1 is accordingly allowed to the following extent:-

(i) Refund of Retention money /Security deposit ___ Rs. 1,312,494/-
(ii) Cost of preliminary items _____ rejected
(iii) Overhead expenditure _____ Rs. 5,000,000/-
(iv) Loss of profit @ 10% on unexecuted works _____ Rs. 1,549,576/-

Total of the claims under Contract No. 1 _____ Rs. 7,862,070/-“

8. The learned Sole Arbitrator in the same manner has also allowed the claim in respect of Contract No.2 for a total sum of Rs. 86,37,870/-, for Contact No. 3 for Rs. 7,354,566/- and for Contract No. 4 Rs. 6,056,310/- and resultantly a total amount of Rs. 29,910,192/- has been awarded to the plaintiff payable within two months’ time from the date of the award and in case of failure the amount will be payable along with 10% interest per annum from the date of Award till its final payment. Insofar as the grant of claim at (i) above is concerned, it appears to be in respect of the retention money / security deposit which were actually deducted from the payment of Running Bills No. 1 to 12 and since it has been held, which I have approved, that the Contractor had the right to terminate the Contract, in the circumstances, there appears to be no exception to these findings that the defendant is liable to refund the retention money / security deposit to the plaintiff. Since claim at (ii) as above has been disallowed and no objections have been filed on behalf of the plaintiff this need not any discussion. The findings in respect of claim at (iii) above when examined, appears to be a bit confusing as this claim relates to the overhead

expenditures and losses incurred by the plaintiff in respect of Contract No. 1 amounting to Rs. 53,874,350/-. The learned Sole Arbitrator has observed that ***there is hardly any credible evidence brought on record but it cannot be denied that overhead expenditures must have been incurred by the Contractor*** and after coming to this conclusion, the learned Sole Arbitrator has been pleased to observe that ***however, the amount claim is in excess of Rs. 53 million which has not been proved by the evidence brought on record. This claim is allowed to the extent of Rs.5 million which is a reasonable figure***. In fact it is this part of the Award which has been vehemently contested by the learned Counsel for defendant and I tend to agree with him that once the learned Sole Arbitrator came to the conclusion that no credible evidence has been brought on record, there was hardly any reason and or occasion for the learned Sole Arbitrator to Award this amount of Rs.5 Million on any presumptive basis. If there was any evidence in this regard, then the compensation was also required to be based only on the basis of such credible evidence and not merely on presumption that such expenses must have been incurred. The learned Sole Arbitrator while granting Rs.5 million as overhead expenditures and losses has not referred to any part of the evidence in this regard and has only awarded on the ground that it must have been incurred and Rs.5 million is a reasonable figure. I am afraid such findings of the learned Sole Arbitrator cannot be sustained as it appears to be based on hearsay evidence or rather without any evidence. In the circumstances, this part of the Award needs to be set aside. Again in respect of claim at (iv) regarding 20% losses, the learned Sole Arbitrator has observed that no evidence has been brought on record by the Contractor to support this exaggerated claim, however, the conclusion has been drawn by the learned Sole Arbitrator that in his view claim at the rate of 10% profit will be a reasonable assessment of loss of profit on account of early termination of the Contract and not allowing the

Contractor to complete the work for which the unexecuted work cost comes to Rs. 15,495,766/- and 10% of this amount is Rs. 1,549,576/- which has been awarded. Again I am of the view that this also appears to be presumptive and imaginary in nature as the learned Sole Arbitrator on his own has disallowed the claim at the rate of 20% and then in the same breath has accepted the same at the rate of 10% without referring to any part of the evidence so led in this regard. It is needless to observe that for claiming losses on any unexecuted work positive evidence has to be led by the parties and upon failure (which the learned Sole Arbitrator accepts) no further claim in this regard could have been granted. In the circumstances, this claim is also required to be set aside. Based on these observations, the learned Sole Arbitrator has then granted the claim of the plaintiff on the same analogy in respect of Contracts No. 2, 3 & 4 and I am of the view that all these claims allowed on the basis of discussion in respect of Contract No. 1 needs to be set aside as well.

9. Coming to the objection of learned Counsel for plaintiff that this Court has no jurisdiction to set aside an Award on the ground that a different conclusion can be drawn is concerned, there appears to be no cavil to this proposition and it is settled law that while hearing objections to the Award under Section 30 and 33 of the Arbitration Act, 1940 this Court does not sit as a Court of appeal nor it is required to undertake reappraisal of evidence recorded by the Arbitrator in order to discover the error or infirmity in the award. However, there is an exception to this rule as well, that error or infirmity in the award which renders it invalid must appear on the face of the award and should be discoverable by reading the award itself. (Reference may be made to the case reported as ***Joint Venture KG/Rist v. Federation of Pakistan***-**PLD 1996 SC 108**, ***Ghee Corporation of Pakistan***

(Pvt.) Limited v. Broken Hill Proprietary Company Limited-**PLD 1999 Karachi 112**) and ***J.F.C. Gollaher v. Samad Khan*** (**1993 MLD 726**).

10. Reference may also be made to the case of Allah Din & Company (Supra) relied upon by the learned Counsel for defendant, wherein the Hon'ble Supreme Court has been pleased to observe as under;

> ....The learned Division Bench in the impugned judgment had aptly rejected the above claim on the ground that compensation for loss of goodwill or reputation is generally not awarded, particularly in the absence of tangible evidence showing additional loss and further that since the purchaser was already awarded Rs. 1 million by the arbitrator as compensation for the anticipated loss of profit further compensation on account of loss of goodwill and reputation was not justified. We find ourselves in agreement with the reasoning of the learned Division Bench. The learned counsel appearing for the purchaser was unable to show any discussion by the arbitrator in the award regarding the loss suffered by the purchaser on account of reputation or goodwill. Apart from a bare claim of the purchaser, the learned counsel could not even refer to any evidence produced by the purchaser before the arbitrator on this issue. The finding of the arbitrator on the issue reproduced above indicates the absence of such evidence as he had awarded compensation on the item simply on the ground that the purchaser was not questioned on behalf of the Food Department on the issue. Such failure by the department does not go to prove the loss caused to the purchaser. It was the burden to the purchaser to have produced independent evidence of the damage caused to his reputation and goodwill on account of non-performance of the contract by the Food Department. Bald statement of the petitioner, without more, that he had suffered loss on this account was not sufficient to establish the claim. In this view of the matter the purchaser was rightly denied damages for loss of goodwill and reputation.
>
> 6. The contention of the learned counsel for the purchaser that the Court is not entitled to disagree with the findings of the arbitrator is without force. It is true that the trial Court does not sit in appeal from the finding of the arbitrator but at the same time the Court is empowered to reverse the finding of the arbitrator on any issue if it does not find support from the evidence. The very incorporation of section 26-A of the Arbitration Act requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine the soundness of the reasons. As already held the arbitrator in the case before us had granted damages for loss of reputation and goodwill without there being any evidence to that effect. The Court were, therefore, justified in denying this claim to the purchaser.

Similarly in the case of IBAD & Co v. Government of Pakistan (PLD 1981 Karachi 236) a learned Single Judge of this Court has been pleased to hold as under;

> 9. The third challenge of learned counsel for the defendant was that it was a case of no evidence. As observed earlier, the contention was that admittedly this was a case of damages but no evidence was adduced by the plaintiffs for proving any damage suffered by them. Counsel, in the circumstances, urged that the record be perused by the Court to determine whether there was evidence before the arbitrator that the plaintiff had suffered the damages which had been awarded by the Arbitrator. To the extent that where there is an allegation that the award is based on n evidence, the Court can, even in a

> case of non-speaking award, peruse the record including the evidence while considering the objections/application under sections 30 and 33 of the Arbitration Act, 1940 the contention of learned counsel is correct. And if the Court on such perusal finds the award is based on no evidence, will be lawfully exercising jurisdiction in setting aside the award . . . . . However, it is also settled law that insufficiency of evidence or that on the evidence adduced before the arbitration the Court would have reach a different conclusion is not a ground for setting aside or interfering with the award. Keeping these principles of mind, I have perused the record of the arbitration proceedings in this case.

11. In this matter I am of the opinion the error and infirmity is appearing on the face of the award as this is a case of no evidence as reflected from a bare reading of the award, whereas, at the same time this Court has all the authority and jurisdiction to see that the Award has been passed on the basis of the evidence led by the parties and the same is not exaggerated and or defective. As discussed hereinabove, the learned Sole Arbitrator while awarding compensation to the plaintiff has based his findings on presumption and not on the evidence led by the parties. In view of such position, the objection of the learned Counsel is overruled.

12. In view of hereinabove facts and circumstances of this case, the Award to the extent of granting overhead expenditure and loss of profit at the rate of 10% on unexecuted work in respect of all the four Contracts is set aside and it is only approved and made rule of the Court to the extent of refund of retention money in respect of four contracts amounting to Rs. 36,37,460/-. Since the defendant has not paid the amount in question nor the same has been deposited by them before this Court, the plaintiff would also be entitled for 10% interest as awarded by the learned Sole Arbitrator in respect of this amount from the date of Award till its payment. The Award is made Rule of the Court only to the extent as above. Decree to follow.

Dated: 30.11.2016

J U D G E