# IN THE HIGH COURT OF SINDH AT KARACHI

**SUIT NO. 1925 / 2014**

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| **Plaintiff:** | **Etimaad Engineering (Pvt.) Ltd. Though Mr. Bilal A. Khawaja and Ghulam Hussain Advocates.** |
| **Defendant:** | **Aisha Steel Mills Limited through Mr. Arshad Tayyabaly and Waqar Ahmed Advocates.** |
| **Date of hearing:** | **07.02.2019.** |
| **Date of judgment:** | **15.04.2019.** |

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

**Muhammad Junaid Ghaffar, J.** This is a Suit in respect of an Arbitration Award dated 25.09.2014 for making the same as Rule of the Court in favor of the Plaintiff ("**Contractor**") against which objections have been raised by the Defendant ("**Employer**") under Section 30 and 33 of the Arbitration Act, 1940 for setting aside the same, and both these are being decided through this judgment.

2. Brief facts as stated appear to be that Plaintiff and Defendant entered into a contract dated 01.12.2007 for turnkey construction of main production line buildings, civil and electromechanical works, including the supply of 132KV Grid Station, 11KV step-down transformer and medium voltage switch gear as well as design services for civil works and detailed engineering of electrical and mechanical works for a total amount of Rs.1,159,000,000/-, whereas, the work was to be completed within 23 months. It further reflects that some dispute arose and in view of clause 16 of the Contract in question dealing with dispute resolution, a Sole Arbitrator was appointed. Both parties filed their claims and the learned Sole Arbitrator has passed the Award in favour of the Plaintiff for a sum of Rs. 371,731,769/- with mark up at the rate of 6% per annum, whereas, an amount of Rs. 75,000,000/- has been deducted from the said claim pursuant to Para 27(c) of the Award and the total amount left thereafter is Rs.

296,731,769/- with mark up at the rate of 6% per annum, whereas, the Defendant‘s claim has been dismissed.

3. Learned Counsel for the Defendant has raised various legal as well as factual objections on the validity of the Award and has contended that; firstly the Award cannot be sustained as it has been passed after much delay as it was reserved after hearing arguments on 30.11.2013, and was finally announced on 25.09.2014 i.e. after delay of almost 10 months after it was reserved; hence, in view of the judgment of the Hon'ble Supreme Court reported as ***Muhammad Ovais and another V. Federation of Pakistan and others (2007 S C M R 1587) and Messrs MFMY Industries Ltd. and others V Federation of Pakistan and others (2015 S C M R 1550)*** is liable to be set aside as it is not possible for an Arbitrator to remember all facts and arguments while dictating the Award after 10 months. He has next contended that in fact delay on the part of the learned Sole Arbitrator was also the case of the Plaintiff as claimed through J.M. No. 35/2014 filed under Section 5 of the Arbitration Act, 1940, for revocation of the authority of the learned Sole Arbitrator on the ground of such delay. Per learned Counsel, the Plaintiff itself alleged gross negligence against the learned Sole Arbitrator due to such delay, and once the Award has been given in its favour, the same is being supported without any justification. The second objection raised by the leaned Counsel is to the effect that the Agreement in question i.e. Contract dated 01.12.2007 was not duly stamped in accordance with law and to this effect the learned Sole Arbitrator filed his report dated 08.08.2014 by referring such question that whether the Contract between the parties was required to be stamped or not and further reference was made to Section 35 of the Stamp Act 1899 on which this Court passed an order on 26.08.2014 in J.M. No. 35/2014, whereby, the parties were left at liberty to argue such legal objections after the Award has been passed; hence, at this juncture, the Defendant's case is that since the Agreement in question was not properly stamped, therefore, cannot be further acted upon for legal purposes and hence; the Award is liable to be set aside. In support he has relied upon ***Pakistan Cement Industries Ltd. Rawalpindi V. Teekayef Trading Co. (P L D 1971 Lahore 522).*** According to him even the learned Arbitrator also ought to have taken proper action in respect of the stamp duty and this also renders the Award as illegal. As

to the merits of the Award, learned Counsel has contended that the said Award has errors on the face of it and is a case of misconduct on the part of the Sole Arbitrator and so also non-appreciation of facts as well as the evidence led by the parties; hence it is liable to be set-aside. Learned Counsel has then made detailed arguments on all the issues settled and the findings recorded by the learned Sole Arbitrator and has also referred to the evidence led by the parties to suggest and argue that this amounts to, not only misconduct on the part of the learned Sole Arbitrator, but so also to the effect that it is a clear cut case wherein, errors are floating on the surface of the Award; hence, this Court while exercising jurisdiction under Section 30 and 33 of the Arbitration Act is fully competent to set aside the same. Learned Counsel has then relied upon heavily on two judgments of Hon'ble Supreme Court reported as ***Karachi Dock Labour Board V. Messrs Quality Builders Ltd. (P L D 2016 SC 121)*** and ***Gerry's International (Pvt.) Ltd. Aeroflot Russian International Airlines (2018 S C M R 662),*** and has contended that in view of these latest pronouncements of the Hon'ble Supreme Court this Court while exercising jurisdiction under the Arbitration Act, 1940 has all the powers to examine the Award as well as conclusion arrived therein to see that, whether the case falls within misconduct and has errors on the face of the record. In view of these submissions learned Counsel has prayed for setting aside of the Award in question. He has also relied upon the case reported as ***Suleman and others V. Muhammad Siddique (1989 M L D 3052).***

4. On the other hand, learned Counsel for the Plaintiff has contended, at the very outset, that this is not an Appeal nor this Court has any jurisdiction to examine the evidence, and the inference drawn by the Arbitrator on the basis of such evidence to the effect that whether correct approach has been adopted or not. Per learned Counsel the judgment heavily relied upon by the learned Counsel for the Defendant in the case ***Gerry's International*** (supra) is not to be appreciated inasmuch as the said judgment is *per-incurium* as it has been rendered by a three member bench, while ignoring an earlier decision of the Hon'ble Supreme Court of a four member bench in the case reported as ***Messrs National Construction Co. V. The West Pakistan water and Power Development Authority through its Chairman (P L D 1987 SC 461)***. According to him the law stands

settled to the effect that a Court while hearing objections to the Award is not required to conduct any inquiry so as to find out and trace errors, if any, whereas, an express language enacted by the legislature in the relevant law cannot be altered or deviated from by the Courts which are itself creation of law and are required to abide by it. According to him, in these matters of Arbitration the Arbitrator's finding is a final judgment on law and facts, whereas, the Arbitrator is not even bound to give specific finding(s) in respect of each and every issue, whereas, even if a different view was possible, it is no ground to set aside the Award itself. Per learned Counsel it is settled by the Hon'ble Supreme Court in the case reported as ***M/s Joint Venture KG/Rist and 2 others V. Federation of Pakistan and another (P L D 1996 SC 108)*** that Court while examining the validity of an Award does not act as a Court of appeal and while hearing the objections to the Award cannot undertake reappraisal of evidence in order to discover the error or infirmity which must always be available on the face of the Award and should be discoverable by reading the Award itself, whereas, if it is alleged that the reasons recorded by the Arbitrator are perverse, the perversity in the reasoning has to be established with reference to the material considered by the Arbitrator in the Award. According to the learned Counsel, such view has prevailed upon the Courts for the simple reason that the object of getting the disputes settled through Arbitration is to by-pass the lengthy procedure involved in cases before the Court, whereas, it is a medium adopted and controlled by the parties itself, and is an effort by them to resolve the dispute as early as possible without getting themselves involved in technicalities embodied in procedural law; hence, the Court while hearing objections to the Award, must keep such aspect of the matter as foremost. According to him, even a mistake of law or fact is not a ground to set aside the Award as held by the Hon'ble Supreme Court in the case reported as ***Ashfaq Ali Qureshi V. Municipal Corporation Multan and another (1985 S C M R 597).*** Learned Counsel has then relied upon the case reported as ***Province of Punjab Etc. V. M/s Mian Muhammad Saleem & Co. (N L R 1987 SCJ 15)*** and has contended that defects which do not amount to misconduct does not vitiate the Award itself. Insofar as the objection regarding stamp duty is concerned, learned Counsel has contended that such an objection is now belated and stands waived in view of the fact that such objection if any, ought to have been referred to or objected on

before the matter was being referred for Arbitration, whereas, even otherwise, if there is any deficiency, it is for the Defendant who was the employer in this case to pay the same; hence, the objection is misconceived. In support he has also relied upon the cases reported as ***Messrs Port Services (Pvt.) Ltd. V. Port Qasim Authority (2016 M L D 506) The Premier Insurance Co. (Pakistan) Ltd. Karachi V. Ejaz Ahmed Khawaja and 3 others (1981 C L 311), Messrs Qamar Din Ahmed & Co. V. Pakistan and another (P L D 1971 Lahore 38), Province of East Pakistan V. Messrs Architect Engineer & Co (P L D 1968 Dacca 245), Board of Governors, Divisional Public High School, Lyallpur V. Sh. Fazal Hussain & Company (2002 C L C 159), Messrs Ibad & Co. V. Province of Sindh and 2 others (P L D 1980 Karachi 207), Ali Muhammad V. Yousuf & 3 others (1982 C L C 85), Messrs Hassan Brothers & Company V. Messrs Maqbool Cotton Ginning & Pressing Factory and another (P L D 1986 Karachi 21), AJK Government V. Ghulam Rasul Lone (N L R 1983 AC 383).***

5. I have heard both the learned Counsel and perused the record. First I would like to deal with the objection raised by the learned Counsel for the Defendant in respect of deficiency of stamp duty, and as a consequence thereof, rendering the award as a nullity in law. At the very outset I may say that objection regarding deficiency and or non-affixation of stamp duty on the Agreement and its purported inadmissibility affecting the entire award in question in terms of Section 35 of the Stamp Act, 1899, is not at all impressive and is rather misconceived as well as an afterthought. The contract / agreement has been acted upon fully by the Defendant, and at this stage when award has been passed against it, it does not lie in the mouth of the Defendant to raise such an objection, considering the fact that the Defendant itself was also a claimant before the learned Arbitrator. It is also a settled proposition of law that oral Agreements are even admissible and enforceable. Finally, it is also a settled proposition of law that the intent and purpose of S.35 ibid is not to invalidate all such Agreement(s), but to protect public revenue. There is a complete mechanism within the Stamp Act, as to how such defects could be cured, therefore, merely for this assertion, at this stage of the proceedings, no benefit can be availed of by the Defendant. Accordingly, this objection is overruled. The

Honorable Supreme Court in the case reported as ***Union Insurance Company of Pakistan Limited v Hafiz Muhammad Siddique*** **(PLD 1978 SC 279)** has been pleased to observe as follows, which has settled this issue and reads as under;

> I would now examine section 35 in some detail. It prescribes that no instrument, which is not properly stamped, shall be admitted in evidence for any purpose . . . or shall be acted upon. . . " Now merely because an instrument cannot be admitted in evidence for any purpose as because it cannot be acted upon by the persons specified in the section, does not mean that such an instrument is invalid, and it is not irrelevant to observe here that the words which I have quoted have to be construed strictly, because they are to be found in a provision of a penal nature Therefore, it would be against all cannons of construction to enlarge the meaning of these words, so as to render invalid instruments which fall within the mischief of the section. After all, instruments, which are not duly stamped, are executed every day, but I venture to think that most persons, who incur obligations under such instruments, honour their liabilities under such instruments, regardless of the provisions of section 35. In any event, this section is attracted only when an instrument is produced before the persons specified in the section. But, for example, an instrument would be produced in evidence only when there is a dispute about it, therefore, if the intention of the Legislature had been to render invalid all instruments not properly stamped, it would have made express provision in this respect, A and it would also have provided some machinery for enforcing its mandate in those cases in which the parties did not have occasion to produce unstamped instruments before the persons specified in the section.
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> Additionally, I find nothing in the section which would support the appellant's plea that an instrument becomes invalid, if it falls within the mischief of the section. After all, if an instrument is invalid, it must be invalid for all purposes, but proviso (d) to the section expressly saves unstamped instruments in most criminal proceedings, whilst the other provisos to the section enable the parties to overcome the disabilities attached to an instrument not properly stamped by paying the requisite duty together with a penalty, therefore, this would suggest that the object of the section is to protect public revenue. Again, if an instrument is invalid, it should not be admissible in evidence, and it is so stated in section 35. But the next section prescribes that if an instrument has been admitted in evidence, howsoever erroneously, its admissibility cannot be questioned at any stage thereafter, and even the appellate Court's powers to entertain an objection about the admissibility of documents have been removed by section 61, which instead empowers the appellate Court to collect the duty payable on the unstamped instrument together with a penalty. These provisions as well as other provisions in Chapter IV of the said Act, such as sections 33, 38, 39 and 40, can only lead to the conclusion that the object of the Legislature in enacting the said Act was to protect public revenues and not to interfere with commercial life by invalidating instrument vital to the smooth flow of trade and commerce.

6. The other issue which needs to be addressed first is in respect of reliance by the learned Counsel for the Defendant on the case of ***Gerry's International*** (supra) and the objections of the learned

Counsel for the Plaintiff on the very applicability and validity of this judgment, as it is the case of the Plaintiff's Counsel that the Hon'ble Supreme Court while passing this judgment of ***Gerry's International*** (supra) (which is by a three members bench) has failed to appreciate the dicta already laid down by a four members bench of the Hon'ble Supreme Court in the case of ***National Construction*** (Supra); hence it is not a good law, and a judgment *per in-curium*, therefore, not binding on this Court. However, I am not in agreement with the contention so raised by the learned Counsel for the Plaintiff as such objection has been ably responded to, by the learned Counsel for the Defendant inasmuch as the Hon'ble Supreme Court while rendering the judgment in the case of ***Gerry's International*** (supra) has considered the earlier judgment of the four member bench given in the case of ***National Construction*** (Supra). Secondly, and again as rightly contended by the learned Counsel for the Defendant that the issue in hand in the case of ***National Construction*** (Supra) was of a period when the provision of Section 26A of the Arbitration Act, 1940, was not on the statute book as it was inserted by Arbitration Amendment Ordinance, 1981 and gazetted on 11.5.1981, whereas, the case of ***National Construction Company*** pertains to an order of the Lahore High Court dated 4.3.1974 and there was no occasion for the Hon'ble Supreme Court to dilate upon the impact and effect of the provision of Section 26A ibid which requires the Arbitrator to state in the Award the reasons in sufficient detail to enable the Court to consider any question of law arising out of the Award. It is not in dispute that when the judgment was delivered by the Hon'ble Supreme Court on 8.6.1987, s.26A had been legislated and was on the statue book; but naturally, the appeal pertained to an earlier period; hence, it was not required to be considered by the Hon'ble Supreme Court in that very case. It is also pertinent to note that the Hon'ble Supreme Court in the judgment of ***Gerry's International*** (supra) has dealt with the case of ***National Construction Company*** (supra) at Page 680 of the report; hence the question of subsequent judgment in the case of ***Gerry's International*** (supra) of being *per in-curium* does not arise. In these circumstances, the objection of the learned Counsel for the Plaintiff as to examining the Award in question on the basis of the dicta laid down in the case of ***Gerry's International*** (supra) is misconceived and is hereby repelled. The judgment in the case of ***National Construction Company*** (supra) will not override the

view taken in the case of ***Gerry's International*** (supra) merely on the ground that it is a judgment of four member bench; hence binding and overruling, but can only be considered on its own with the application of the relevant law prevailing at that point of time and duly considered.

7. In the case reported as ***Gerry's International (Pvt.) Limited v Aeroflot Russian International Airlines (2018 SCMR 662)***, the Hon'ble Supreme Court recently, after tracing out the entire history and case law on the interpretation of Sections 30 & 33 of the Arbitration Act, 1940, and so also the powers of the Court in interfering with the Awards passed in Arbitration proceedings, has once again reiterated the same principle that Courts normally do not sit in appeal against the award; that it had no power to re-examine and reappraise the entire evidence to hold that the conclusion drawn by the Arbitrator was wrong or needs to be substituted on the ground that another view is also possible, whereas, it could only confine itself to an error apparent on the face of the award, or determine the misconduct of the Arbitrators in the course of Arbitration proceedings. The Hon'ble Supreme Court after a threadbare examination of and discussion on the entire case law available in the Pakistani and Indian jurisdiction, at Para 8 of the said opinion has further elucidated the following principles which read as under;

> 8. The principles which emerge from the analysis of above case-law can be summarized as under:-
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> *(1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.*
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> *(2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.*
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> *(3) 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 that the reasons are not inconsistent and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court.*
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> *(4) A dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Such dispute would fall within the Arbitration clause.*
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> *(5) The test is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction.*
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> *(6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.*
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> *(7) The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part but it may tantamount to mala fide action and vitiate the award.*

*(8) If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally.*
*(9) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the Arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award.*
*(10) The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise.*
*(11) It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong.*
*(12) Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation.*
*(13) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd.*
*(14) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.*
*(15) The only exceptions to the above rule are those cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award, which one can say is erroneous.*
*(16) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.*
*(17) It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.*
*(18) The Court does not sit in appeal over the award and should not try to fish or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect.*
*(19) The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record.*
*(20) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not do so he can be set right by the Court provided the error committed by him appears on the face of the award.*
*(21) There are two different and distinct grounds; one is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the Arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.*
*(22) An error in law on the face of the award means that one can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous.*
*(23) A contract is not frustrated merely because the circumstances in which the contract was made are altered.*
*(24) Even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only.*
*(25) While making an award rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like a post office but must subject the award to its judicial scrutiny.*
*(26) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not misconduct on the part of the arbitrator to come*

> *to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence.*
> *(27) Misconduct is of two types: "legal misconduct" and "moral misconduct". Legal misconduct means misconduct in the judicial sense of the word, for example, some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.*
> *(28) The arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party.*
> *(29) some of the examples of the term "misconduct" are:*
> *(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;*
> *(ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference;*
> *(iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and*
> *(iv) if there has been irregularity in the proceedings.*
> *(30) Misconduct is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator.*

8. The Hon'ble Supreme Court has been pleased to dilate upon the incorporation of s.26A ibid, and has observed that 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 that the reasons are not inconsistent and contradictory to the material on the record. According to the Hon'ble Supreme Court the Arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. It has been further observed that the authority of an arbitrator is derived from the contract and is governed by the Arbitration Act, and a deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part; but it may tantamount to mala fide action and vitiates the award. According to the Hon'ble Supreme Court the Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record. And finally the Hon'ble Supreme Court has gone to the extent that even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record, whereas, while making an award rule of the Court, in case parties have not filed objections, the

Court is not supposed to act in a mechanical manner, like a post office but must subject the award to its judicial scrutiny. While making conclusion it has been held that the Arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party and has also elaborated as to the examples of the term *"misconduct"*. In view of hereinabove discussion and the observations of the Hon'ble Supreme Court the argument of the learned Counsel for the Plaintiff does not seems to be based on true appreciation of law and the binding precedent of the Hon'ble Supreme Court. In fact learned Counsel has not even bothered to assist the Court on the merits of the Award itself except the legal objections, and it seems that (though not in express words) his view is that this Court has just to affix its stamp on the Award and make it a Rule of the Court. I am afraid the learned Counsel is completely misdirected in this context and has failed to appreciate the basic issue that if his contention is correct and justified, then there is no justification of hearing any objections to the award. This would defeat the very purpose of law, whereas, it is but natural that when the Court is hearing objections to an award, it has to go through the award and the findings recorded and then make out its mind as to whether the Arbitrator has committed a mistake which is floating on the face of the award, and or, has misconducted himself in violation of his authority as interpreted by the Hon'ble Supreme Court.

9. In fact in addition to the aforesaid judgment in the case of ***Gerry's International*** (Supra), there are many other judgments of the Hon'ble Supreme Court as well as this Court, wherein, the objections have been considered by the Courts and the awards have been set-aside and or modified. His argument that this Court cannot set-aside an Award on the ground that a different conclusion can be drawn, nor can it appreciate the evidence for such purposes, may be correct to a certain extent, and perhaps to this, I am of the view that there is no cavil, as 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, at the same time there is an exception to this rule as well. If the error or infirmity in the award rendering it invalid is

appearing on the face of the award and is discoverable by reading the award itself, then the same can be looked into for either setting aside or modifying it. It can also be interfered with in certain exceptional circumstances when the finding of the Arbitrator is not based on the evidence on record. 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. Again in the case of ***Allah Din & Company V. Trading Corporation of Pakistan*** **(2006 SCMR 614),** 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.
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> **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.**

11. 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 no 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.

12. Now coming to the Award itself and the issues settled by the learned Sole Arbitrator. It would be advantageous to refer to the issues settled which reads as under:-

"1) Whether ASML and Etimaad performed their respective obligations diligently, property and in accordance with the terms of the EPC Trunkey Contract (the "**Contract**").

2) Which of the two parties, ASML or Etimaad, vialed their respective contractual obligations and to what extent.

3) Whether ASML was contractually obliged to arrange availability of OEM Technology Supplier / Vendor personnel to start up and prepare the Cold Roll Complex. If so, were such obligations complied with. If not, the effect thereof.

4) Whether Etimaad received payments from ASML in accordance with the terms, conditions and timelines of the Contract.

5) Whether ASML was justified in delaying or withholding payments due to Etimaad.

6) Whether Etimaad was overpaid from the commencement of the Contract / contractual work; if so, were the Work Stoppage Notices and demands for additional funds justified.

7) Were the Work Stoppage Notices dated 20-11-2008 in accordance with the terms of the Contract.

8) Whether ASML admitted / acknowledged on various dates between January 2010 and December 2010 that Etimaad had unpaid dues; what was the quantum of such dues and were such dues over settled.

9) Whether ASML suffered resource idling costs during November 2009 and December 2009.

10) Whether Etimaad was justified in abandoning the project site.

11) Whether either party suffered loss of business profit on account of delay attributable to the other party.

12) What was the effect of the encashment by ASML of the mobilization advance guarantee furnished by Etimaad.

13) Whether either party is entitled to damages / compensation on account of any acts of the other party.

14) Whether ASML made alternative arrangements for execution of the scope of works envisaged by various change orders. If so, the effect.

15) What should the award be."

13. At the very outset it may be observed that on examination and reading the Award itself, it appears to me that though numerous issues were framed by the learned Arbitrator for passing of the award; however, for me Issue Nos.1 & 2 ought to be the crux of the matter as they pertain to the very responsibility of each party as to performance of their respective obligations diligently in accordance with the Agreement in question. Now for me the answer to these Issues (if properly appreciated) would have resolved the entire dispute, as in that event for deciding other issues no further deliberations were needed and it was only the quantum which would have remained in dispute. It appears that learned Sole Arbitrator has decided both these issues together as they relate to the performance of the contractual obligations by the parties and at Para 18(d) a conclusion has been drawn to the effect that, *there is nothing to suggest in the evidence as produced by the parties that Etimaad did not performed its obligations diligently, properly and in accordance with the terms of the EPC Turnkey Contact*. This is the most crucial finding which required examining and scanning of the entire evidence, to arrive at the conclusion that as who is in default; however, surprisingly, the learned Sole Arbitrator has not referred as to *what evidence produced by the parties* has led the learned Sole Arbitrator to arrive at this conclusion and answering both these issues in favour of the Plaintiff. It is also pertinent to observe that once a finding is arrived at that Defendant or Employer was at fault and failed to perform its obligations diligently, then it covers the entire dispute referred to him and answers to other issues then remains ancillary. But the learned Sole Arbitrator while deciding this issue has failed to refer to any part of the evidence (which he has very conveniently referred to while deciding other issues). Why this issue was decided in this manner is nothing but an act of misconduct within the contemplation of S.30 & 33 of the Arbitration Act, 1940, and as held by

the Hon'ble Supreme Court in the aforesaid judgment of ***Gerry's International*** (Supra). Notwithstanding this, it is also against the mandate of s.26A ibid, which requires the Arbitrator to state reasons for the award in sufficient details. While disputing and objecting the answers to these issues, learned Counsel for the Defendant has read out the relevant cross examination in this regard which is available at Page 257 of Part 9 wherein, in response to a question that as the Grid Station has fully been installed, it was replied that, *"no it was not fully installed and this invoice was also for partial installments"*. Again in response to a question that any of the invoice mentioned above from 1 to 7 have any of them been installed, the answer was. *"that some of them were installed"*. Moreover, The Claimant vide its letter dated 03.11.2009 admitted quality shortfalls and stated that *"we believe that there are indeed shortfalls in the quality acceptable by Eitmaad standards…"*. The witness of Plaintiff was asked a question (at Serial No.30) that "*during the project work while it was going on, were there any complaints made by the Employer on the quality of the work? And the answer is yes"*. In these circumstances it is not understandable as to in what manner such a conclusion could have been drawn by the learned Arbitrator without making any reference to the evidence in this regard, and come to the conclusion that Defendant has failed to perform its part of the obligations diligently.

14. Insofar as Issue No.4 is concerned again the learned Sole Arbitrator after reproducing the evidence has failed to give his own reasoning for answering this issue in favor of the Plaintiff. In fact the evidence reproduced in the form of questions and its answers in respect of this issue reflect a completely different and contrasting picture and perhaps if any reasons of his own were recorded, the Court would have been able to see that whether his findings pass the test of being not falling into an error on the face of it or for that matter falling outside the scope of misconduct as alleged by the Defendant. In respect of issue No.4 while awarding the same in favor of the Plaintiff again the learned Sole Arbitrator has fallen in error, as he has been pleased to observe that "*the financial viability of Etimaad is not as important an issue as the viability, financial or otherwise, of ASML. It has been admitted that no representations and warranties were projected by Etimaad with regard to skill, experience, knowledge and resources*." Now this needs to be appreciated that finding of this issue was related to the performance of the Plaintiff in executing its

commitments timely, and then claiming bills for timely payments. Nothing has been discussed or dilated upon on this issue, whereas, it has come on record through the award that the work was suspended for a considerable period of time, negotiations were going on for reconciliation, and so also on default of the Plaintiff, the guarantee furnished by it against mobilization advance was also encashed. Issue No.12 was framed in this context and it has come on record that against the encashment notices the Plaintiff approached the Senior Civil Judge, at Lahore, and vide judgment dated 16.11.2011, their plea for a restraining order was dismissed. And learned Sole Arbitrator has been pleased to observe that *"it is difficult to agree with the contention that the encashment of the bank guarantee was illegal"* and despite this finding has decided the issue in favor of the Plaintiff and has given award in its favor as well. This finding of the learned Sole Arbitrator appears to be against a judicial finding and will definitely fall within the definition of *misconduct* as laid down by the Hon'ble Supreme Court. It is not disputed that upon award of a contract, the Employer pays mobilization advance before commencing of works; but at the same time obtains a Bank Guarantee for such amount as if the work is not started or delayed, it can be encashed by it. An encashment of a Bank Guarantee duly upheld and adjudicated by a Court of law, would at least draw a negative inference against the Plaintiff and all its assertions are to be looked into with care and detail; but this has not been done and in fact in a careless and abrupt manner all the claims of the Plaintiff have been awarded without any supporting evidence or discussion. Then, last but not the least, the Award itself has irrelevant discussion and observations which are unwarranted and have been made in a cursory manner and do not reflect upon appreciatively insofar as the stature of the learned Arbitrator is concerned. With utmost respect I may observe that in these proceedings such irrelevant discussion and observations are to be discouraged and deprecated. Learned Arbitrator has gone to the extent that perhaps Etimaad (Plaintiff) was ill advised in dragging into litigation by filing two petitions under Section 305 of the Companies Ordinance, 1984, before this Court for liquidation of Defendant. He has then observed that such advice was not proper and "*I am constrained to say that misconceived legal proceedings did delay the project*." Now firstly this was not at all relevant and required. And secondly, if such legal advice was a cause of delay in the project, then how come the

Defendant be penalized and asked to pay for damages and compensation. This is quite opposite and contrary and completely out of context besides being preposterous. Not only this the learned Sole Arbitrator for such wrong advice and proceedings has in fact penalized the Plaintiff and has deducted an amount of Rs.75,000,000/- (Rs.75.0 Million) from the awarded amounts. How this was done is again not clear and is without any support and reasoning. While deciding issue No.14 he has been pleased to hold that Defendant was fully justified in making alternate arrangements for completing the project. Now in view of this finding, there has to be, and is a must that a finding be given that default was on the part of the Plaintiff and therefore, the Defendant was justified in making such alternate arrangements. It can't go in both ways. It has to be in favor of either. Moreover, in that situation either the Defendant ought to have been compensated; or in the alternative, some finding was required to be given for deduction of such amount from the claims of the Plaintiff. This has not been done; hence, even after answering the said issue in favor of the Defendant, no relief has been granted. This is clearly an act of the Arbitrator warranting interference by this Court while hearing the objections to the award and making a decision as to whether the same be made as a Rule of the Court or not. Lastly while granting the quantum of award, the learned Sole Arbitrator has again committed gross misconduct as he has failed to give any reasoning as to how these figures were arrived at. It is not his whim and desire which matters, nor it is his prerogative to give figures and amounts on his own. They must come from the contract and the claims and for that some discussion ought to have been made before any award could be passed and sustained. The figures and the amount awarded appears to be completely out of pleading and claims, are unjustified, baseless and are not supported by the evidence which may have been considered. For example cancellation charges have been awarded; whereas, the engagement of another contractor for completion of works has been justified and decided in favor of the Defendant. Similarly, these kind of liquidated damages are to be proved on the basis of actual evidence and support; but the learned Arbitrator has not referred to any such material. It is also a matter of record that both parties had lodged their claims with the learned Arbitrator; however, there is no discussion or mention of the claim of the Defendant in the entire award as to how it was dealt with and dismissed. There are

numerous other errors floating on the face of the award and resultantly it is a case wherein the learned Arbitrator has misconducted himself in passing the impugned award in favor of the Plaintiff which under the given facts and circumstances and the discussion made hereinabove cannot be sustained by this Court and is liable to be set aside.

15. Accordingly, the objections of the Defendant are sustained and the award of the learned Arbitrator is hereby set-aside.

**Dated: 15.04.2019**

**J U D G E**

ARSHAD/