# IN THE HIGH COURT OF SINDH AT KARACHI

**SUIT No. 2338 / 2015**

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| **Plaintiff/ Claimant:** | **China Harbour Engineering Company (CHEC) & PEMCON GEO Engineering (Pvt) Ltd. (PGEL) Joint Venture through Mr. Rehanuddin Khan Golra Advocate. Assisted by Mr. Lin Jian Ping representative of Plaintiff.** |
| **Defendant:** | **Karachi Port Trust through Mr. Badar Alam Advocate.** |
| **Date of hearing:** | **21.02.2018, 24.04.2018, 16.10.2018, 14.11.2018, 27.02.2019, 22.03.2019.** |
| **Date of judgment:** | **06.05.2019.** |

## J U D G M E N T

**Muhammad Junaid Ghaffar, J.** Through this judgment the objections to the Award of Umpire dated 28.11.2015 under Section 30 of the Arbitration Act, 1940 are being decided as to whether the objections are to be sustained or the Award is to be made as Rule of the Court. The Award in question has been passed by the Umpire on a Reference dated 23.4.2015 addressed to him by the two Arbitrators appointed by the Plaintiff and Defendant as they had differed in their awards. For ease of reference the Contractor (claimant) is referred to as "Plaintiff" whereas, the Employer (Respondent) as "Defendant".

2. Precise facts are that Defendant floated a tender for marine protection work at Pakistan Deep Water Container Port (PDWCP) in the year 2009. In response to this tender notice, four companies participated and the Plaintiff as a joint venture was found to be the lowest and the Engineer in question issued notice dated 6.2.2010 to the Plaintiff to commence work which was to be completed within a period of 130 weeks. In the said project execution Core Locs of various sizes were to be used, whereas, after commencement of the work and award Letter dated 8.4.2010, the Chief Resident Engineer informed the Plaintiff about change in drawings and the bill of quantities (BOQ). The present dispute is in respect of one of the Core Locs i.e. 6.2 $m^3$ for which initially the quantity in the contract was 378, but was revised

insofar as its design and quantity is concerned to 9923. The gist of the dispute between the parties is the price of these Core Locs. The contract price for 378 units of the original design was Rs. 1,55,562.97, whereas, after the change in design and quantity, the Plaintiff had claimed the same price, whereas, it is the case of the Defendant that the revised price determined by the Engineer was Rs. 118,737.62. In between the process of negotiations it appears that the Plaintiff had agreed to a price of Rs.123,865.59, from which they subsequently withdrew; however, the Umpire has agreed with the above price of the Plaintiff and now the Defendant is aggrieved by this award of the Umpire.

3. Learned Counsel for the Defendant while objecting to the Award has contended that the learned Umpire has misconducted the proceedings inasmuch as he has travelled beyond the Reference and dispute referred to him; that the leaned Umpire has failed to appreciate the relevant clauses of the Contract governing the issue in hand including Clauses 51.1, 51.2, 52.1 and 52.2; that the Defendant's Engineer never approved the claimed price of the Plaintiff for the revised Core Locs; that the Engineer only approved Rs.118,737.62 pursuant to clause 67.1 of the general conditions of the Contract which could not have been altered by the Umpire and determine a new price of his own; that the learned Umpire has failed to appreciate the admitted documents on record and has drawn an adverse inference by misreading that there is some categorical offer and acceptance on record which could be termed as an agreement in respect of the revised price of Core Locs; hence, the findings are perverse, arbitrary and liable to be set aside; that even the factual position of the continuing work pursuant to the Contract have also been mis-appreciated and mis-interpreted by the learned Umpire rendering the Award as a nullity; that as per the terms of the Contract the price determined by the Engineer is final and is not subject to any amendment or for that matter negotiations; hence, could not have been altered through the Award of the Umpire; that the finding to the effect of non-commencement of work without Engineer's certification regarding variation order is also incorrect which resultantly renders the Award as invalid; that reliance on some correspondence including purported emails between the parties cannot be termed as a Contract, whereas, the Plaintiff itself after offering a certain price, withdrew from it which has been termed as an agreement by the learned Umpire, which finding is not only perverse;

but is misreading of facts as well as law; that the learned Umpire was only required to appreciate the two different opinions of the Arbitrators on which they had differed and not beyond that; that an offer which admittedly was withdrawn by the Plaintiff cannot be termed and called as a new or valid contract between the parties, whereas, the reference to the learned Umpire did not require him to give his decision and arrive at a new price or rate which he has done; therefore, the Award is without lawful authority and jurisdiction and must be set aside by this Court. In support of his contention he has relied upon the cases reported as ***Muhammad Farooq Shah V. Shakirullah (2006 PSC 1708), Messrs Millat Tractors Ltd. V. Messrs Millat Tractor House, A partnership Firm, Registered under the partnership Act Kutchery Road, Sargodha (1999 YLR 295), Messrs Barisons (Pak) Ltd. Karachi V. Pakistan through Secretary Ministry of Industries and Natural Sources and another (1980 CLC 470), Fauji Foundation V. Messrs Chanan Din and Sons and others (PLD 2014 LAHORE 424), Water & Power Development Authority and another V. Messrs Ice Pak International Consulting Engineers of Pakistan and another (2003 YLR 2494), House Building Finance Corporation V. Shahinshah Humayun Cooperative House Building Society and others (1992 SCMR 19), Ghulam Abbas V. Trustees of the Port of Karachi (PLD 1987 SC 393), Province of Sindh and 4 others V. Waseem Construction Co. (1991 CLC 66)*** and ***A. Qutubuddin Khan V. Chec Millwala Dredging Co. (Pvt.) Limited (2014 SCMR 1268).***

4. On the other hand, Learned Counsel for the Plaintiff has contended that the rate to be paid to the Plaintiff in respect of the variation order is the crux of the matter in this case inasmuch as the rate of the Plaintiff was Rs. 155,562.97 which stands reduced to Rs. 123,865.59 by the Award of the Umpire and the Plaintiff as a gesture of goodwill, by not filing any objection to such determination of the price has reluctantly accepted the Award of the Umpire, and therefore, no case is made out by the Defendant; that the meeting held on 14.11.2011 discussed the entire issue between the parties and the rate was agreed upon after consensus; therefore, no objection could be raised now by the Defendant; that in the Award of the learned Umpire there is nothing which could be called and termed as misconduct within the meaning of the Arbitration Act, 1940; hence the objections under Section 30 ibid are liable to be dismissed; that the Award is proper and

perfect, whereas, no error is on the face of the Award which could warrant any interference or correction by this Court; that the issues framed in the matter have been discussed properly and decided and there is no reason compelling this Court to modify and or set aside the Award; that the learned Umpire has gone through the entire proceedings and the conflicting Award of the two Arbitrators; that both parties had agreed not to lead any evidence and had proceeded in the matter on the basis of admissible documents; hence, there could not be any case of misreading of the evidence or conducting the proceedings in any illegal manner; hence, the Award be made Rule of the Court by dismissing the objections of the Defendant. In support he has relied upon the case reported as ***Messrs Hafiz Construction Company V. Messrs Javedan Cement Ltd. (1989 CLC 885).***

5. I have heard both the learned Counsel and perused the record. The facts have been briefly stated hereinabove and it appears that the Contract in question was awarded to the Plaintiff who was directed to commence work, whereas, thereafter, according to the Chief Resident Engineer some changes were required in drawings and so also in BOQ's. These facts are not in dispute and for the present purposes, the dispute is in respect of one of the items i.e. Core Locs 6.2 $m^3$, for which the initial quantity required was 378; but was thereafter, increased to 9923 along with some changes in the design. The Plaintiff at the time of filing its bid had quoted an amount of Rs.1,55,562.97 for this item and when the design was changed along with the quantity, a dispute arose in respect of the value of this item. The claim of the Plaintiff was that there is no provision for change in the price and it will remain the same as quoted at the time of filing the bid and award of the tender. Record further reflects that after various negotiations the Plaintiff had offered an amount of Rs.123,865.59, whereas, according to the Engineer the price of this item should be Rs. 118,737.62. Insofar as the price offered by the Plaintiff after change in design and quantity is concerned; firstly it is an admitted fact that it was withdrawn subsequently; whereas, it is the case of the Defendant that it was never accepted by them. It further appears that pursuant to Clause 67.3 of the conditions of the Contract both parties appointed one Arbitrator each and matter was referred for Arbitration. It further appears that the Plaintiff opted not to lead any evidence except placing reliance on admitted documents already available and exchanged between the parties. After conclusion of the

Arbitration proceedings, one of the Arbitrator gave his Award in favour of the Plaintiff to the extent that the terms and conditions of the Contract never permitted any revision in the price; notwithstanding the increase in the quantity and came to the conclusion that Plaintiff is entitled to be paid the original price of Rs.1,55,562.97 as per the original bid, whereas, the other learned Arbitrator gave his award in favour of the Defendant to the extent that the Engineer has already determined a fair price Rs.118,737.62 which is in conformity with the terms and conditions of the Contract; hence the claim of the Plaintiff was dismissed. Thereafter, matter was referred to the learned Umpire who in fact has not agreed with either of the two Awards of the learned Arbitrators; but has come to the conclusion that the offered / revised price quoted by the Plaintiff (Rs.123,865.59) was impliedly accepted by the Defendant; hence, the Plaintiff is entitled for the difference of the amount on pro rata basis for the enhanced quantity. It is an admitted position that insofar as Plaintiff is concerned, they were not aggrieved by the Award of the Umpire, which in essence and substance, has modified and reduced the Award given in their favour by one of the learned Co-Arbitrators. It is only the Defendant who is aggrieved by the Award of the Umpire and has filed its objection to the said Award under Section 30 and 33 of the Arbitration Act, 1940.

6. During the Arbitration proceedings there were 8 issues which were framed on 26.06.2013 by consent of the parties. The first two issues i.e. Issues No. 1 & 2 were in fact in respect of the status of the Plaintiff which is a joint venture to carry out construction business in question or not and whether the concerned person was duly authorized to act on behalf of the said joint venture and both these issues have been decided by one of the Co-Arbitrators and the learned Umpire in favour of the Plaintiff, whereas, Counsel for Defendant has not pressed these two issues; therefore, no further discussion is required. Insofar as the other issues are concerned, the same read as under:-

> "3. Whether the Claimant unconditionally complied with the instructions issued by the Engineer under clause 51.1 (Variations) and clause 51.2 (Instructions for Variations) for General Conditions of Contract (GCC) and participated in the process of due consultation by the Engineer with the Respondent / Employer and the Claimant / Contractor, as provided Clause 52.1 (Valuation of Variations) and Clause 52.2 (Power of the Engineer to fix Rate), before fixing the rate of carried work of 6.2 cubic meter Core Loc Units, if so its effect?

4. What is effect of Claimant offer to the Engineer and the Respondent in Dubai meeting dated 12.11.2011 to fix rate of Rs. 1,23,865/- per unit of varied works of 6.2 cubic meter Core Loc Units, confirming the said offer through E-mail dated 14.11.2011 & later on withdrawing the same?

5. Whether due to increase in quantity, the Engineer can change a rate of 6.2 m³ Core-loc Units having same specification and the price already fixed in the Contract BoQ duly accepted by the contracting parties?

6. Whether the Engineer ever elaborated the reason / character / condition which prompted him to reduce the Contract BoC rate of 6.2 m³ Core-loc Units as inappropriate and inapplicable other than the increase of the quantity of the aforesaid item?

7. Whether the Engineer is under obligation to issue notice stating his intention to reduce the Contract BOQ rates of 6.2 m³ Core-loc Units vide Clause 52.2 of the Contract?

8. What should be the Award?"

7. The crux of the matter before this Court is twofold. The first and foremost is to the effect that can the Umpire pass his award independently and without considering the essence of the Reference made to him after difference of opinion had arisen amongst the two Arbitrators appointed by the parties. And secondly, that whether an offer whereby Plaintiff had quoted a revised rate, which was subsequently withdrawn, can be termed as duly accepted and amounts to an agreement. Learned Counsel for the Defendant has vehemently argued that this was beyond the mandate of the learned Umpire and he was only required to give his Award on the reference as well as the difference of opinion amongst the two Co-Arbitrators. And his argument is based on the fact that since one of the leaned Co-Arbitrators came to the conclusion that the terms and conditions of the contract do not provide any provision and authority to the Engineer to determine a revised price after award of the contract; and consequently the learned Co-Arbitrator awarded the original price quoted by the Plaintiff in respect of the amended quantity as well. The said learned Arbitrator also came to the conclusion that in fact there was no change in the design of the Core Locs and it was only in respect of increased quantity. Insofar as issue No.3 is concerned, the learned Co-Arbitrator who gave his Award in favour of the Plaintiff came to the conclusion that though the claimant i.e. Plaintiff had participated in the process of consultation by the Engineer; but the Plaintiff never agreed to the rate fixed by the Engineer. Insofar as issue No.4 is concerned, which perhaps, is the crux of the matter, the said Co-Arbitrator came to the conclusion that the offer (of the Plaintiff) had no legal effect, as it was withdrawn before it was acted upon or accepted. Insofar as issue No.5 is concerned, the

said learned Co-Arbitrator, came to the conclusion that there is no provision in the agreement between the parties or the bid documents which could authorize the Engineer to change the rate of Core Locs 6.2 $m^3$ on account of increase in quantity. Insofar as issue No.6 is concerned, again the said learned Co-Arbitrator decided the same in negative by holding that no valid reason was given by the Engineer for reduction of the rates. In respect of issue No.7 the learned Co-Arbitrator answered the same in affirmative, and finally in respect of issue No.8 as to what should the Award be, he came to the conclusion that the Engineer could not change the rate of item in question having same specification and the price having been already fixed in the Contract and duly accepted by the contracting parties. It may be of relevance to observe that first of all the Award of the said learned Co-Arbitrator is premised on the fact that it was only the change in the quantity of Core Locs which had occurred after Award of the contract; whereas, according to him there was no change in the specification. On the face of it, this observation appears to be incorrect as admittedly there was a change in the design as well. There is enough correspondence on record, including that initiated by the Plaintiff and addressed to the Engineer as well as the Defendant / Employer in respect of making changes in the design of this Core Locs; whereas, to arrive to a conclusion that it was only a change in the quantity of the Core Locs, and not in respect of the design of the same, the learned co-Arbitrator has not dealt with or dilated upon any such material on record to substantiate and justify this assertion. In fact it appears from the bare reading of his Award that it was proceeded with the presumption that the issue is only in respect of the change in the quantity and not of design. I am afraid such findings of fact which is not supported by any material on record, and is so also in contrast to the finding of the other Co-Arbitrator as well as the Umpire, is not only perverse, but also amounts to misconduct. Moreover, it is also a matter of fact that no evidence was ever led by the Plaintiff; hence, even otherwise, the documents speak for itself and cannot be read in isolation or otherwise, in contrast to the actual facts and the happenings in reality. As to the award of the other learned Co-Arbitrator it may be observed that all issues including the issue of competence to proceed in the matter were answered in favor of the Defendant. However, since thereafter, the matter was referred to the learned Umpire, who has given the Award in

favor of the Plaintiff (though somewhat different from the other Co-Arbitrator), no further discussion is necessitated as now it is the Award of the learned Umpire which is before the Court.

8. As to the objection of the learned Counsel for the Defendant regarding jurisdiction and authority of the learned Umpire that he could not have acted beyond the reference and the difference of opinion referred to him by the two Arbitrators is concerned, the same does not appear to be correct and justified. It is settled law that when an Umpire enters upon difference arising between Arbitrators, all matters referred to Arbitration should be decided save where Arbitrators have made Award on some matters and referred others on which they had disagreed. As a general rule, where an umpire enters upon the differences between the arbitrators, all the matters referred to arbitration are to be decided and not merely the matters on which the arbitrators have disagreed but there might well be cases where arbitrators might make an award on some matters and refer the others on which they have disagreed to the umpire. In such a case, the scope of the jurisdiction of the umpire will be confined to the matters, which have been referred to him[1]. Here in this matter it is not so, as the two Arbitrators have differed on all issues and have thereafter made a reference to the learned Umpire for his decision; hence, the learned Umpire could have dealt with, and has done so, with the entire case and has given his Award on all matters before him. To this extent the objection being misconceived, as well as put to naught by the Hon'ble Supreme Court, is therefore, overruled.

9. Now adverting to the Award of the Umpire. It may be noted that it is primarily in respect of issue No. 4 on which a conclusion has been drawn by the learned Umpire that the purported revised rate of Rs. 123,865.59 per unit for the Core Locs offered by the Plaintiff at some point of time, amounts to an agreement as well as acceptance on the part of the Defendant; hence, entitling the Plaintiff to be compensated for the additional quantity of Core Locs. It is interesting to observe that insofar as offer and its acceptance is concerned, the learned Co-Arbitrator who gave his award in favour of the Plaintiff and came to the conclusion that in fact there was no such offer in field and it stood

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[1] Messrs A. Z. Company v Government of Pakistan [PLD 1973 SC 311]

withdrawn. At the same time the learned Umpire has come to the conclusion that there was an offer which stood accepted by the Defendant and must be acted upon by awarding the said amount to the Plaintiff. Now it needs to be appreciated that insofar as the Plaintiff is concerned, they are not aggrieved by this finding of the learned Umpire, which is in fact has, modified the Award of the learned Co-Arbitrator given in their favour by virtue of which the Plaintiff was supposed to be entitled to the original price even in respect of increased quantity of the Core Locs. Therefore, the moot question (in absence of any evidence led by the Plaintiff) is to be decided on the basis of material on record and the conditions of the contract between the parties. It is the case of the Defendant that the learned Umpire has completely failed to appreciate the true intent as well as the consequence of the variation clause as mentioned in the conditions of the Contract duly signed and agreed by the Plaintiff. Hence, it would be advantageous to refer to the said provisions which reads as under:-

| | Alteration, Additions and Omissions |
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| Variations 51.1 | The Engineer shall make any variation of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following:<br><br>(a) increase or decrease the quantity of any work included in the Contract,<br>(b) omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor),<br>(c) change the character or quality or kind of any such work,<br>(d) change the levels, lines, position and dimensions of any part of the Works,<br>(e) execute additional work of any kind necessary for the completion the Works, of<br>(f) change any specified sequence or timing of construction of any part of the Works,<br>No such variation shall in any way vitiate or invalidate the Contract, but the effect, if any, of all such variations shall be valued in accordance with Clause 52. Provided that where the issue of an instruction to vary the Works is necessitated by some default of or breach of contract by the Contractor or for which he is responsible, any additional cost attributable to such default shall be borne by the Contractor. |
| Instructions for 51.2 Variations | The Contractor shall not make any such variation without an instruction of the Engineer, Provided that no instruction shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction given under this Clause, but is the result of the quantities exceeding or being less than those stated in the Bill of Quantities. |
| Valuation of 52.1 Variations | All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52. (for the purposes of this Clause referred to as "varied work"), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until |

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| | such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on account payment to be included in certificates issued in accordance with Clause 60. |
| Power of Engineer 52.2 to Fix Rates | Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rates or price contained in the contract for any item of the Works is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion appropriate and shall n notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on account payments to be included in certificates issued in accordance with Clause 60.<br><br>Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either;<br><br>(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or<br>(b) by the Engineer to the Contractor of his intention to vary a rate or price. |

10. Perusal of the above variation Clause 51.1 reflects that the Engineer shall make any variation of the *form, quality or quantity* of the Works, or any part thereof that may, in his opinion, be necessary. He shall have the authority to instruct the contractor to do so and the contractor shall increase or decrease the quantity of any work; omit any such work; change the character or quality or kind of any such work; change the levels, lines, position and dimensions of any part of the Works; execute additional work of any kind necessary for the completion of the Works; change any specified sequence or timing of construction of any part of the Works. It further provides that no such variation shall in any way vitiate or invalidate the Contract, but the effect, if any, of all such variations *shall be valued in accordance with Clause 52* of the conditions of the contract. Clause 52.1 provides for the valuation of such variations and states that all variations referred to in Clause 51 shall be valued at the rate and price set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. Whereas, if the contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. It further provides that, *in the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall*

*notify the Contractor accordingly, with a copy to the Employer*. It also provides that until such time rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable part payments to be included in certificates issued in accordance with Clause 60 of the conditions of the Contract.

11. From a bare reading of the aforesaid clause(s) it very clearly reflects that firstly there can be a variation not only in respect of the quantity but so also in respect of the works and the design as well. Notwithstanding and even otherwise, it is not the case of the Plaintiff that it is only the quantity which has been varied but admittedly so also the design of the Core Locs has also been changed. Now with respect, I may observe that the learned Umpire as well as the learned co-Arbitrator who gave his Award in favour of the Plaintiff have failed to appreciate and dilate upon this clause of the conditions of the Contract. The learned Umpire in his Award has even made reference to this clause of the contract; but has failed to give his finding as to why the price determined by the Engineer in this case would not apply, and the offered price of the Plaintiff will prevail. The clause, though provides that price of a varied work or design is to be worked out in consultation with the contractor and the employer which should be premised on the basis of the rates and prices fixed in the Contract as far as may be reasonable; however, *in the event of disagreement* it is the Engineer who has to fix the price and value of such variation. There is no other interpretation possible of the clause as above. It is a matter of fact that the Engineer fixed the price of Rs.118,737.62, whereas, the claim of the Plaintiff and as awarded by the learned Co-Arbitrator was at the original price of the Contract i.e. Rs.1,55,562.97, but surprisingly, when the matter came up before the learned Umpire, with respect, he has only dilated upon some revised offer of the Plaintiff of Rs. 123,865.59 which in fact stood withdrawn by their letter as well as conduct. However, notwithstanding this withdrawal, learned Umpire has given his finding in favour of the Plaintiff and it would be appropriate to refer to the relevant part which reads as under:-

> Para-13....."As regards the above Issues Nos. 3 & 4, it has been urged by Mr. Muhammad Owais learned counsel for the Claimant that in view of, inter alia, clauses 11.2, 11.3 and 11.4 of the Preamble of the Tender documents any variation in quantity of any of the items of Core loc did not need any variation order or change in the price provided for in the Bill of Quantity *and that the offer of the Claimant in the meeting held on 14.11.2011 at the Site after Dubai Meeting and not in Dubai wrongly*

*mentioned in the above Issue No.IV* ***for Rs.1,23,865.59 for Core-Loc of 6.2 $m^3$ was lawfully withdrawn***. *It may be pointed out that prior to it* ***the Claimant prima facie accepted Rs.118555.62 as the rate*** *for the above Core Loc $m^3$ as mentioned in the Engineer's Email* (at page 134 R/26 of the Respondent's Reply) and then as mentioned in Royal Hiskoning letter dated 08-12-2011 in the annexures attached to I, which reads as follows:…….

Whereas, it has been urged by Mr. Badar Alam, learned counsel for the Respondent that in view of clauses 51.2, 52.1 and 52.2 of the conditions of the contract, the Engineer was competent to fix the price on account of variation order because of change in the design of the Project by Royal Haskoning UK one of the Co-Engineer for the varied quantity in the absence of the agreement between the Claimant and the Respondent. The above Clauses reads as under:-

51.2……

52.1……

52.2……

(14) There is a voluminous documentary evidence on record to indicate that in fact the Claimant participated unconditionally in the process of due consultation by the Engineer with the Respondent for valuation of varied work on account of change in design under the above quoted clauses 51.1, 52.1 and 52.2. It will not be out of context to point out that above quoted Clause 52.2 speaks of change in the "nature" and "amount". The word "amount" would cover a case, where quantity of an item of BOQ has been increased more than 26 times as the case is in the instant case. My above view is supported by the dictionary meaning of the word "amount" inter alia is given in The Concise Oxford Dictionary new Edition (Sixth Impression 1978) which reads as follows "v.i Be equivalent (in total value, quantity, significance etc..)". It may also be pointed out that the scope and object of above quoted Clauses of the Tender Preamble and of the above Clauses of conditions are different. Whereas former cover a case where quantity of an item in BOQ is increased or decreased without any Variation Order, and the latter cover a case where increase is on account of a Variation Order. The Claimant also admitted the fact that they could not commence the execution of the work without issuance of a variation order by the Engineer. In this regard, it may be pertinent to reproduce the Claimant's email dated 14th November 2011 "R-24 at page 125 and Annexure at page 126 of the Respondent's reply which reads as follows:-……..

(16) ***I am inclined to hold that under the above quoted Clauses 51.2, 52.1 and 52.2 the Engineer was competent to fix the price of the varied quantity in respect of Core Loc of 6.2 $m^3$ in the absence of an agreement between the parties***. On 13.04.2011 Chief Resident Engineer (i.e. ACRE) to the Claimant and to the Engineer sent a proposal for fixing rate of Cor Loc 6.2 $m^3$ Rs. 97939.74, which is indicated by the Engineer by Letter dated 28.05.2012 (at page 160 in the Respondent's reply). After that the Engineer by letter dated 8th December 2011 (at page 195 of the Claimant's file) addressed to the Claimant quoted hereinabove, which inter alia stats that "The said annexure contains nine pages containing the proposed rates arrived in consultation with you". ***It may further be pointed out that at Page 201 of the said file, the breakup of the price of the varied item is given the total of which comes to Rs. 1,18,738.62.*** The above agreement arrived at the site meeting on 12.11.2011 for Rs. 123865.59 quoted hereinabove. In any case if this was not agreement and was an offer as now alleged, it shows that the above rate was reasonable and the Claimant were willing to accept as stated by me in Para 15. But factually this was not an offer from the Claimant, it was agreement arrived by them with the Engineer as evident from the Claimant Email dated Monday 14th November 2011 addressed to the Engineer which with annexures attached to it at pages 125 to 126 of the Respondent Reply reads as follows:-……..

> It may be observed that the Claimant attempted to wriggle out from above agreement by their Email dated 28.11.2011 addressed to the Engineer inter alia stating that "Your decision to reduce e the rate is therefore commercial and unacceptable to us" (At Page 136 of the Respondent's reply).
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> 18) In my humble view, the above citations are not directly relevant in presence of the above quoted Clauses 51.2, 52.1 and 52.2. I am also of the view that the change of original quantity from 378 to 9923 which is more than 26 items of the original quantity has changed the complexion of the above item and as pointed out hereinabove in Para 14 that Clause 52.2 speaks of "nature" and "amount" and in the instant case the increase of the item in question is more than 26 times and therefore, it is covered by the above Clause. The above citations also cannot apply to the instant case as the Claimant had agreed earlier twice at the price of Rs. 118555.62 and then in the meeting held at the site on 14.11.2011 the price of Rs. 1,23,865.59. I am, therefore, inclined to hold that in the instant case the Claimant are entitled to receive for the increased quantity of Core Loc 6.2 $m^3$ at Rs. 1,23,865.59 namely 9545 i.e. 9923-372-9545 and for the original quantity of 378 the original rate of Rs. 155562.97 would be applicable. This appears to be to me reasonable and just price. It may again be pointed out that the price of Rs. 97939.74 was only proposal as stated hereinabove in Para 16 and it was not a price fixed / determined in terms of the above Clauses 52.1 and 52.2 of the CoC quoted hereinabove in Para 13."

12. Perusal of the aforesaid relevant observations and the findings of the learned Umpire reflects that time and again the learned Umpire came to the conclusion that insofar as the Plaintiff is concerned, attempt was made to wriggle out from the revised offer and despite this the learned Umpire went on to hold that the revised offer of the Plaintiff stood accepted by the Engineer and was therefore, an agreement entitling the Plaintiff to claim the said price for the enhanced quantity of the Core Locs. However, with respect I am completely unable to agree with such findings of the learned Umpire inasmuch as it needs to be appreciated that the Plaintiff, as noted earlier, never led any evidence so as to justify and establish the correctness of its price and value for the varied works as against the price and value determined by the Engineer. The conditions of Contract (52.2) very clearly provides that, in the event of disagreement (which is established from the record) the Engineer shall fix the rate or price as is in his opinion appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Now as is reflected from the above findings of the learned Umpire as well as reading of the Award itself, that there was no agreement or consensus as to the price offered by the Plaintiff. Rather the same stood withdrawn, and perhaps much stress was laid on behalf of the Plaintiff before the learned Umpire in this regard, as by that time they had an award of one of the Co-Arbitrators in their favor holding thereby that the Plaintiff was entitled to the original quoted price. And any such admission or concession as to their offer, would have definitely reduced

their claim before the learned Umpire. It is not understandable as to from where, and why, the learned Arbitrator has ruled that this offer was accepted and became an agreement, whereas, the Plaintiff itself in its pleadings and well as stance in Arbitration has resiled from it. There appears to be no occasion for such a finding by the learned Umpire. Notwithstanding, even otherwise, the offer of the Plaintiff was always subject to acceptance by the Engineer as well as the Defendant / Employer as provided in the conditions of the Contract. However, there is nothing on record to suggest any categorical acceptance of the offer of the Plaintiffs. Rather at one place the learned Umpire has himself observed that the Plaintiff / Claimant had even accepted a much lesser price / value of the varied product. Moreover, when the Plaintiff has chosen not to lead any evidence to establish and justify the correctness of the price being claimed by it due to change and variation in the order, then there was no occasion to discard the determined price / value of the Engineer as against the price offered by the Plaintiff. In terms of clause 67.3 of the conditions of contract, though Arbitrators or the Umpire could vary or alter the determination of the Engineer; however, for that there ought to have been some cogent evidence before them, whereas, the Plaintiff never led any evidence to justify its price as against the price determined by the Engineer. In such a situation, I am afraid, even in terms of clause 67.3 of the conditions of contract, the learned Arbitrator or the Umpire were also not competent from disagreeing with the determination of the price by the Engineer. And lastly, it may be observed that even after the Dubai Meeting, the Engineer kept on asking the Plaintiff to justify their revised quoted price with evidence and material, and it appears that thereafter, the Plaintiff itself withdrew from their offered price, and in fact went back and insisted on its price quoted in the Tender and also wrote letters and email to the Defendant as well as the Engineer to this effect. In these circumstances it could never have been the case of the Plaintiff to consider their revised offer in the manner as it has been done by the learned Umpire.

13. It is also a settled proposition of law that the Arbitrators are supposed to act in accordance with law and are bound by the terms of the Agreement between the parties. Though no objection has been raised on behalf of the Plaintiff regarding jurisdiction and authority of this Court to examine the Award of the learned Umpire; but for the sake

of clarity it may be observed that these objections have been filed in terms of Section 30 of the Arbitration Act, 1940, and if the conduct of the learned Umpire falls within 'misconduct' then this Court has the jurisdiction to examine the Award and give its decision. Even otherwise, even if there are no objections before the Court, it is not that the Court will make the Award as a rule of Court without going through the same; rather it is the onerous duty of the Court to examine the same and arrive at a just and fair conclusion as to whether the same shall be made as rule of the Court or not. To me if the Award has been passed in negation to the very conditions of the Contract between the parties, then this would amount to misconduct within the contemplation of s.30 ibid; hence, this Court will have jurisdiction to examine the Award and give its findings accordingly. Here in this matter, to me it appears that the error and infirmity in the Award is floating on the face of the Award and bare reading of the same leads this Court to the conclusion that not only the learned Umpire's finding falls within 'misconduct'; but so also is a case of error apparent on the face of the Award, and being perverse and inconsistent, as well as against the material considered by the learned Umpire; this Court is not denuded from taking note of it, and can set-aside the same in terms of s.30 of the Arbitration Act, 1940. A learned Division Bench of this Court in the case reported as ***Province of Sindh v Waseem Construction Co.*** (**1991 CLC 66**) has been pleased to hold that when provisions of the contract documents have not been properly appreciated and considered, it amounts to an error apparent on the fact of the award. In the case reported as ***Ghee Corporation of Pakistan (Pvt.) Limited v Broken Hill Propriety Company Limited*** (**PLD 1999 Karachi 112**) a learned Single Judge of this Court while following this case has been pleased to hold that if the relevant contract between the parties had not been properly appreciated and considered by the Arbitrator or the Umpire, that would amount to an error apparent on the face of the Award.

14. In view of hereinabove facts and circumstances of the case and the discussion made thereof, I am of the view that the objections of the Defendant must sustain and accordingly the Award of the Umpire is hereby set-aside.

Dated: 06.05.2019 **J U D G E**