# IN THE HIGH COURT OF SINDH
# AT KARACHI

**SUIT NO. 1553 OF 2012**

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| Plaintiff | : | Abdul Sattar Mandokhel, through Chaudhry Atif Rafiq, Advocate |
| Defendant | : | Karachi Development Authority, through Mahmood Khan Yousafi, Advocate |
| Date of hearing | : | 30.01.2024 |

**JUDGMENT**

**YOUSUF ALI SAYEED, J -** This Suit stems from an Award made on 19.10.2012 by the late Justice (R) Saiduzzaman Siddiqui, as the sole arbitrator appointed by this Court in the matter of a dispute between the Plaintiff and the City District Government Karachi ("**CDGK**") vide an Order dated 05.03.2010 made in Suit No.638 of 2008, with the nomenclature of the Defendant since being changed for purpose of this Suit to the Karachi Municipal Corporation and then the Karachi Development Authority.

2. The attendant circumstances giving rise to and underpinning the dispute as well as the pith and substance of the claims advanced have been meticulously articulated in the Award, the relevant excerpts of which read as follows:

> "The dispute relates to the contract of construction of bridge at the intersection of Gulshan Chowrangi, Gulshan-e-lqbal, Karachi awarded to the Claimant by the Respondent. The bids for the proposed intersection were invited by the Respondent in January 2007. The Claimant was one of the bidders who were prequalified for the Contract. The Contract was awarded to the Claimant and the Work Order was issued on 10.9.2007. According to the Contract, the value of the work was stated to be Rs. 410,003,984 and the time for completion of the Contract was (4) months. According to the documents, mobilization advance was to be issued equal to 20% of the Contract Price, upon furnishing of a Guarantee either of a scheduled bank or by an insurance company acceptable to the

employer. The mobilization advance was to be paid in two installments. The first installment was to be paid within 14 days of the signing of the Contract, or upon receipt of the Engineer's notice to commence the work whichever was earlier. The second installment of the mobilization advance was to be paid to the Claimant within 42 days from the date of payment of the first installment subject to the satisfaction of the Engineer as to the state of mobilization of the Contractor. The mobilization advance was to be recovered in installments. The first installment was to be recovered at the expiry of the third month after the date of payment of the first part of the mobilization advance and the last installment was to be recovered two months before the date of completion of the work, as stated in Clause 43 of the Contract.

The case of the Claimant is that he submitted required security for issuance of the mobilization advance in the shape of two insurance bonds of Rs. 41,000,398/- each in favour of the Respondent. It is alleged that the mobilization advance was not released as provided in the Contract. The first running bill (IPC-1) was submitted by the Claimant on 16.11.2007. This bill was paid after recovery of a sum of Rs. 16.4 million towards the mobilization advance. The Claimant submitted the second 1PC (IPC-2) on 13.1.2008 which was not paid. The Claimant also submitted a bill for escalation on 19.3.2008 amounting to Rs. 40,575,739 which was also not paid. It is alleged that along with IPC-2, the Claimant submitted a claim for Rs. 56,661,855 in respect of the additional / extra items of work executed by them, which was not covered in the BOQ. It is the case of the Claimant that these extra items of work were the result of the revision of the design of Project. According to the Claimant, the girders for the Project were precast and were placed at the location shown in the drawings supplied by the Respondent. It is alleged that after the placement of these girders, they showed usual negative sag. The Claimant states that he pointed out these defects to the Engineer appointed by the Respondent and a request was made to take necessary decision. According to the Claimant, this was the result of the design fault on the part of the Respondent. It is alleged that instead of remedying the defect pointed out by the Claimant, the site was taken over by the Respondent and he was expelled from the Project. The claimant attempted to have the dispute resolved through amicable settlement and on its failure referred the dispute for the Engineer's decision under Clause 67.1 of the GCC vide letter dated 12.3.2008, but the Engineer made no response to this letter. The Claimant, therefore, invoked the arbitration clause and filed Suit no. 638/2010 seeking referral of the dispute specified in the application to the Arbitrator. This was allowed by the Court vide its Order dated 5.3.2010 by pointing the undersigned as the Sole Arbitrator in the dispute.

It is the case of the Claimant that during the pendency of Suit No. 638 / 2010, the Claimant filed an application under Section 41 of the Arbitration Act, 1940 for evaluation and measurement of the work already executed by them. The High Court of Sindh vide Order dated 2.5.2008 appointed the Official Assignee to prepare a detailed inventory of the work done by the Claimant and in compliance of the said order, the Official Assignee submitted his report on 1.9.2009 along with the inventory. The further case of the Claimant is that the Project was taken over by the Respondent and remaining work was allotted illegally to another contractor and in this process a very valuable equipment, namely Concrete Batching Plant (CBP), installed by the Claimant at the site for carrying out the work of the Project was illegally taken over by the Respondent. The Claimant alleges that from time to time they requested the Respondent to release the CBP illegally taken over by the respondents but the Respondent paid no heed to it. The Claimant, therefore, notified the Respondent that in case the CBP is not released, the Claimant will be entitled to claim rental for the said equipment. The case of the Claimant is that the Batching Plant taken over by the Respondent was used during the construction work by the other contractor appointed by the Respondent and as a result thereof, it was considerably damaged. As the Batching Plant was not returned to the Claimant, he moved an application before the High Court of Sindh (J.M. 38 / 2010) for release of the Concrete Batching Plant (CBP). The J.M. was allowed by the Court vide its order dated 15.11.2010, where after the Official Assignee was appointed to get the said CBP released under his supervision. The CBP was finally released by the respondents under the supervision of the Official Assignee of the High Court of Sindh on 12.01.2011. The Claimant has made the following claims in the Statement of Claims filed in the arbitration proceedings against the Respondent:-

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| (a) | Unpaid amount of IPC # 2 | Rs.34,078,522/- |
| (b) | Claim of Escalation (EPC # 01) | Rs.40,575,739/- |
| (c) | Rental of Concrete Batching Plant | Rs.75,375,000/- |
| (d) | Loss suffered on account of reduction in scope of work | Rs.90.000,000/- |
| | | Rs.240,029,261/- |

The Respondent in reply denied the above claims of the Claimant and claimed a sum of Rs.44,62,38,815/- against the Claimant by way of counter claim. The details of the counter claim made by the respondent are as under:-

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| 1) | Recovery of paid mobilization advance | Rs.6,56,00,638/- |
| 2) | Secured advance paid against procurement of steel | Rs.98,39,200/- |
| 3) | Recovery of amount paid for steel girders | Rs.95,68,622/1 |
| 4) | Amount of work executed at risk & cost of Claimant | Rs.42,07,395/- |
| | Total A: | Rs.8,91,15,855/- |
| 5) | Watch & Ward charges for Batching Plant (B) | Rs.1,80,00,000/- |
| 6) | Mark up @ 18% of on (A) for 3 years | Rs.4,81,22,562/- |
| 7) | Liquidated damages @10% of Contract Price | Rs.4,10,00398/- |
| 8) | Damages of reputation of CDGK | Rs.25,00,00,000/- |
| | G Total | Rs.44,62,38,815/- |

The Claimant in reply to the counter claim denied each and every item of counter claim of the Respondent."

3. Upon examination of the competing claims, the learned Arbitrator, framed the following Issues:

(i) Whether after award of Project to the Claimant by the Respondent as a result of change of Design scope of work to the extent of 70% work was reduced causing loss to the Claimant? if so, to what extent?

(ii) Whether Claimant is entitled to the claims or any part thereof under the facts and circumstances of the cases?

(iii) Whether the Respondent failed to release mobilization advance to the Claimant as per timelines given in the Contract Documents? If so, to what extent?

(iv) Whether the Respondent is entitled for counterclaim or any part thereof?

(v) Whether the Claimant is entitled to rentals on account of illegal retention of concrete batching plant? If so, to what extent?

4. Following examination of the two witnesses produced from Plaintiff's side and the sole witness of the Defendant, and after hearing the submissions of counsel appearing in the matter, the learned Arbitrator was pleased to decide Issue No. (i) against the Plaintiff for a failure to discharge the burden of proof that lay on him in that regard, whereas Issue No. (iv) was decided against the CDGK on the basis that its counterclaim had not been made out on merit and was even otherwise not maintainable as it had not been referred to the Engineer in terms of Clause 67.1 of the General Conditions of the Contract, being a *sine qua non* for it to be raised in the arbitral proceedings. While rendering a finding in favour of the Plaintiff on the remaining issues, the learned Arbitrator was pleased to make the Award, holding that the Plaintiff was entitled to recover Rs.3,114,918 against IPC-2, Rs. 40,575,739/- as Escalation Charges, and Rs.75,375,000/- as rental charges for the concrete batching plant, as well as recover the sum of Rs.1,500,000/- paid towards the arbitration fee.

5. The Award was then filed in Court on 14.11.2012, and came to be met by certain Objections from the side of the Respondent under Sections 30 of the Arbitration Act, 1940, asserting that the learned Arbitrator had erred in rejecting the counterclaim and had also failed to consider that the Plaintiffs claim was not properly made out as per the terms of the contract and that proof of rental charges of the concrete batching plant had not been furnished. Proceeding on those Objections, learned counsel for the Defendant mechanically reiterated the same during the course of his submissions, but could not bolster the contention through any material to substantiate the same or identifying any misreading of Clause 67.1 or non-reading of any piece of evidence presented by the CDGK in support of its counter-claim.

6. Conversely, learned counsel for the Plaintiff endorsed the correctness of the Award and sought that the same be made a Rule of the Court. He pointed out that all arguments raised on behalf of the CDGK had been considered by the learned Umpire and addressed in terms of the Award in a reasoned manner. He submitted that a presumption of correctness is to be attached to an award, which ought not to be disturbed for merely technical reasons that do not materially affect the findings on merit, and while addressing objections and dealing with the question of making the award a rule of the Court, the Court would not sit as an appellate forum so as to minutely scrutinize the same for discovering any latent error, and interference would only be justified where it is necessary, upon there being an error apparent on the face of award. He relied on the judgment of the Supreme Court in the case reported as Gerry's International (Pvt.) Ltd v. Aeroflot Russian International Airlines 2018 SCMR 662, and submitted that in the instant case, the Award was unexceptionable and interference by the Court was unwarranted.

7. Having examined the Award and considered the arguments advanced at the bar, it merits consideration at the outset that the principles circumscribing the scope of challenge to an arbitral award under Sections 30 and 33 of the Act were delineated by the Apex Court in the case of Gerry's International (Supra) as follows:

> "7. It is a settled principle of law that the award of the arbitrator who is chosen as Judge of facts and of law, between the parties, cannot be set aside unless the error is apparent on the face of the award or from the award it can be inferred that the arbitrator has misconducted himself under sections 30 and 33 of the Arbitration Act. While making an award the Rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like the post office and put its seal on it but has to look into the award and if it finds patent illegality on the face of the award, it can remit the award or any of the matter(s) referred to arbitrator for reconsideration or set aside the same. However, while doing so, the Court will not try to find out patent irregularity, and only if any patent

irregularities can be seen on the face of award/arbitration proceedings like the award is beyond the scope of the reference or the agreement of arbitration was a void agreement, or the arbitrator awarded damages on black market price, which is prohibited by law, or the award was given after superseding of the arbitration, etc., can the same be set aside.

8. The principles which emerge from the analysis of above case-law can be summarized as under:-

(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.

(2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.

(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.

(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.

(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.

(6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.

(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 malafide 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;

(ii) 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. Under the circumstances, it is apparent from the Award that the learned Arbitrator has been meticulous in his approach towards adjudicating the underlying dispute, with the Award being well-reasoned and unimpaired by any patent error of a material nature, with no case for interference thus being made out. That being said, the Objections are dismissed and the Award is hereby made a rule of the Court, with the Suit being decreed accordingly along with mark-up at the prevailing bank rate from the date of the decree till final settlement, with the parties being left to bear their own costs in respect of the Suit.

JUDGE

Karachi
Dated _____