ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
Suit No. 1239 of 2008

Dated:	Order with signature of Judge(s)

1. For orders on CMA No. 14284/2023.
2. For hearing of objection to Main Award.

Plaintiffs	:	Through Mr. Arshad M. Tayebally, Advocate
Defendants	:	Through Mr. Hassan Ali, Advocate
Date of Hearing	:	20 September 2023, 28 September 2023, 2 October 2023, 4 October 2023, 5 October 2023, 10 October 2023 and 2 March 2024.
Date of Judgement	:	4 February 2025

J U D G E M E NT

MOHAMMAD ABDUR RAHMAN, J. The Suit emanates from an Award dated 21 August 2008 passed by Chief Justice of Pakistan Mr. Justice (R) Ajmal Mian, who had pursuant to the provision of Sub-Section (2) of Section 14 of the Arbitration Act, 1940 read with Sub-Rule (1) of Rule 282 of the Sindh Chief Court Rules (O.S) sent a copy of the award passed by him to be made a rule of the Court.

2. The Pakistan Defence Officers Housing Authority (hereinafter referred to as the (hereinafter referred to as the "Defence Housing Authority") is a statutory body constituted under Presidential Order 7 of 1980 (hereinafter referred to as the "Order,1980") and which is *inter alia* responsible for the development of an area known as the Pakistan Defence Officers Housing Authority (hereinafter referred to as the "DHA") in Karachi. Pursuant to powers conferred to it in under Order 1980 the Defence Housing Authority had planned various Zones in Phase-VIII of the Pakistan Defence Housing Authority, Karachi marked as Zone A to G. In this regard and so as to develop one of the zones, the Defence Housing Authority had on 30 June 2004 entered into a Memorandum of Understanding with the Plaintiff to develop the "Water Front Zone" (hereinafter referred to as the "Project") on Plot No. HR-1, Coastal Avenue, Pakistan Defence Officers

Housing Authority, Phase VIII admeasuring 10.00 acres (hereinafter referred to as the “Said Property”).

3. The Memorandum of Understanding advanced into an agreement as between the Plaintiff No.1 and the Defendant No. 2 and which was executed on 8 October 2004 (hereinafter referred to as the “Agreement”). Clause 3.2 of the Agreement read as hereinunder:

> “ … *DHA hereby agrees to transfer title of the Land/grants Sub-Lease of the Land to ePlanet, free from all encumbrances, together with marketable/transferable title of the developments on the Land under a title document ("the Sub-Lease Deed") within 60 days of signing of this Agreement in consideration of the initial payment of US $2 million (United States Dollar Two million) on execution of the Sub-Lease Deed. The total consideration for the Sub Lease Hold Rights ("Sub-Lease") of the Land is US $ 22.5 million (United States Dollar Twenty Two Million and Five Hundred Thousand) as per schedule given in Annex I (also refer to clause 2.2).*"

4. The Plaintiff No.2, in compliance with an obligation contained in Clause 4.1.5 of the Agreement, was incorporated in Pakistan and described as a Special Purpose Vehicle in Pakistan to implement the project. On its incorporation, the Plaintiff No.1 requested the Defence Housing Authority for the execution of a Sub-lease in favour of the Plaintiff No.2. The Defence Housing Authority then sought to redefine the obligations as it had entered into with the Plaintiff No. 1 and clarified that prior to permitting the assignment of any rights under the Agreement and the Sub-Lease to the Plaintiff No. 2, it was necessary for the Plaintiff No. 1 to guarantee that at all times, during the execution of the Project, it would remain a majority shareholder in the Plaintiff No. 2. This request was acceded to by the Plaintiff No. 1 and which culminated in an Addendum to the Agreement being executed on 19 May 2005 and by which it was agreed that at all times, until the completion of project, the Plaintiff No.1 would be a 51% shareholder in the Plaintiff No.2. On this basis the Defence Housing Authority agreed and assigned rights in the Agreement and under the Sub-lease in favour of the Plaintiff No.2.

5. There were initial delays in the implementation of the Project and which finally culminated in the Defence Housing Authority handing over possession of the Said Property to the Plaintiff No.2 through a demarcation letter dated 21 July 2005. While various obligations accrued to the Plaintiffs to pay certain amount of consideration to the Defence Housing Authority, the Plaintiffs however withheld such payments on the ground that the Defence Housing Authority was not permitting the construction height of the

building to exceed 300 feet and was also not sanctioning the removal of a Karachi Electric Supply Corporation Sub-Station each of which were impacting its obligation regarding the amount of sellable built up area that it construct in the Project and consequentially the feasibility and marketability of the Project. This deadlock led to a notice dated 7 August 2006 being issued by the Defence Housing Authority Advocate, purportedly under Clause (7) of the Agreement dated 8 October 2004, seeking the cancellation of the Agreement in terms thereof and which was subsequently followed by a further notice seeking the termination of Agreement.

6. The notices were responded to by the Plaintiffs' Advocate in a letter dated 20 August 2006 and by which they requested for a further fifteen (15) days' time i.e., 12 September 2006 to rectify the alleged breaches. As alleged by the Defence Housing Authority the breach having not been rectified, a notice dated 21 September 2006 was served by the Defence Housing Authority on the Plaintiff No.1's Advocate and pursuant to which the Agreement was terminated by them and which was followed by another notice dated 22 September 2006 and pursuant to which the Sub-lease Deed executed in respect of Said Property was also terminated.

7. The termination of the Agreement led to the Plaintiffs' Advocate serving notices seeking to arbitrate the dispute. After some correspondence Suit No. 4 of 2007, being an application under Section 20 of the Arbitration Act, 1940, was presented before this Court and whereafter on 10 January 2007 with the consent of all, Chief Justice of Pakistan Mr. Justice (R) Ajmal Mian was appointed as a Sole Arbitrator to arbitrate the dispute as between the Plaintiffs and the Defence Housing Authority.

8. The Plaintiffs maintained their claim alleging that the Defendant had committed a breach of the Agreement inasmuch as the Defendant has failed to give a no objection to the building height of the project to being maintained at 470 feet despite the Plaintiffs securing no objection certificates from the Civil Aviation Authority Karachi and the Air Head Quarter Islamabad to construct well above that height, as well as to the removal of Sub-Station of KESC and which they alleged was the sole reason for delay of the Project. On this basis the Plaintiffs maintained a claim as hereinunder:

> " … *a) Set aside the unilateral cancellation of the Main Agreement dated 8.10.04, Addendum dated 19.5.05 and Lease Deed dated 19.5.05 by the Defendant;*
>
> *b) Award a sum of Rs.5,622,696,863/- to the Claimant against the Defendant as per the following break-up;*

c) Mark-up at State Bank rates with quarterly rests, on Rs.5.622.696.863/- from the date of the award till payment,

d) Award a further reasonable sum by way of costs of these arbitration proceedings to the Claimant,

e) Such other relief as may be deemed fit in the circumstances of the case"

9. The Defence Housing Authority conversely denied any breach on their part and contended that the Plaintiff actually had breached the agreement inasmuch as the development of the Project on the Said Property had not been completed in terms of the agreement dated 8 October 2004. It was contended that the obligation on the part of Defence Housing Authority to grant an extended building height at 470 feet deviated from the Master Plan of the Pakistan Defence Officers Housing Authority and for which the Plaintiffs were seeking an exception to be made and which had been declined. On account of the Plaintiffs failing to construct on the Said Property within the time stipulated in the Agreement, they stated that they have every right to terminate the Agreement and the Sub-Lease and maintained a Counter-Claim seeking compensation for the following consequential loss as follows:

“ ...	*a.*	*Profit and Opportunity Cost*	*Rs.261.22 Million*
	b.	*Additional amount (para 1.d ante)*	*Rs.261.22 Million*
	c.	*In terms of Value Added Constructed Area*	*Rs.3200 Million*
	d.	*Proportionate Cost of Utilities Catered for ePlanet Project*	*Rs.500 Million*
	e.	*Delays in Mobilization & Revenue from Other Projects*	*Rs.2000 Million*
	f.	*Non Utilization of Open DHA Land.*	*Rs.9.075 Million*
	g.	*Devaluation of Adjacent DHA Lands and loss of revenue*	*Rs.1000 Million*
	h.	*Damage to Reputation / Good Will*	*Rs.1000 Million*
	i.	*Cost of Litigation/consultation*	*Rs.5 Million*
		Total	*Rs.8236.515 Million"*

10. The Plaintiffs defended the counter claim by stating that in fact they were being discriminated against by the Plaintiffs as permissions for building heights for over 300 feet had been granted to other development in the DHA in the same Zone.

11. The following Issues were framed on this basis and after recording evidence and hearing the parties the Chief Justice of Pakistan Mr. Justice (R) Ajmal Mian gave the following findings:

1. *Whether there was any alleged material breach of the agreement / sub lease on the part of the defendant to hand over the vacant possession which had allegedly delayed the finalization and the launching of the proposed High Rise Residential Complex.*

   It was found that there was no delay that had been caused by the defendant in respect of the handing over of the vacant possession of the Said Property and hence the Defence Housing Authority were not responsible for the delay in either the finalization or the launce of the Project.

2. *Whether the defendant allegedly committed any breach of the agreement / sub-lease by not issuing NOC for the proposed High Rise Residential Complex of the height more than 300 feet.*

3. *Whether the finalization and launching of the aforesaid High Rise Residential Complex was delayed because of the claimants' own acts of omissions / commissions as alleged by the defendant.*

4. *Whether the claimants have committed any alleged breach of the agreement / sub-lease by delaying the finalization and the launching of the above High Rise Residential Complex.*

   Consolidated findings: It was found that the Defence Housing Authority had not breached any term of the Agreement or any term of the Sub-lease and which were in fact attributable to the Plaintiffs and who on account of failing to construct the Project in terms of the Agreement and Sub-lease had breached the terms thereof.

6. *Whether the tender of the second installment of the lease money by the claimants through their letter dated 18th Septembr 2006 was in accordance with the terms of the agreement / sub-lease and whether this tender was accepted by the defendant.*

   It was found that the tender of the lease money by the Plaintiffs was not in accordance in terms of the Agreement/Sub-lease and the tender was correctly not accepted by the Defendant.

7. *Whether the claimants in terms of the agreement / sub-lease were under obligation to furnish a bank guarantee referred to in the defendant's letter dated 19th Marchi, 2005.*

   The Plaintiffs were not obliged to furnish a bank guarantee in terms of the Defence Housing Authority letter dated 19 March 2005

5. *Whether the defendant's action of terminating the agreement/ sub-lease was warranted in terms of the agreement/sub-lease in the circumstances of the case*

   That in the facts and circumstances the Defence Housing Authority did not have a right to terminate the agreement/sub-lease.

8. *Which of the parties has committed the breach of the agreement/ sub-lease.*

   The Plaintiffs had breached the agreement by not commencing construction within the time frame indicated in the Agreement and the Defence Housing Authority have breached the agreement as they have incorrectly exercised their right to terminate the Agreement/Sub-Lease.

9. *Whether the claimant is entitled to an award of the reliefs prayed for in the Memo of Claim.*

10. *Whether the defendant is entitled to the various items of counter claim mentioned in their reply*

    Consolidated findings: The Plaintiffs were liable to pay the Defence Housing Authority a sum of US $ 2,000,000 within interest thereon from the due date on 31 March 2006 till the payment as detailed in Annex A1.3 if Annex I to the Agreement and also to pay a 3rd installment from 18 August 2006 within interest thereon from

the due date as detailed in Annex A1.3 if Annex I to the Agreement excluding a two year period and in addition were liable to pay premium and the ground rent up to date less the above two year period.

The height of the project would be a maximum of 300 feet

The Defence Housing Authority were to restore possession of the Said Property to the Plaintiffs against receipt of the sum of US $ 2,000,000 within interest thereon from the due date on 31 March 2006 till the payment as detailed in Annex A1.3 if Annex I to the Agreement and also to pay a 3rd installment from 18 August 2006 within interest thereon and the premium and the ground rent as detailed in the order within a 60 day period.

All other obligations to be completed in terms of the Agreement within two years.

12. Mr. Arsahd Tayebally entered appearance on behalf of the Plaintiffs and stated that an objection had been raised that the Defendant No. 1 had been wound which was not correct as the documents appended by the Defence Housing Authority related to a different company and not the Plaintiff No. 1. He next contended that he had maintained objections as against the award but which he is not pressing and simply seeks that the award be made a rule of court. On merits he contended that the jurisdiction of this Court to consider objections made as against arbitration awards was, in terms of Section 30 of the Arbitration Act, 1940, very limited. Relying on a judgement of the Supreme Court of Pakistan reported as ***Gerry's International (Pvt) Ltd vs. Aeroflot Russian International Airlines***[1] he contended that the grounds on which this Court has right to set aside an award have been categorised as hereinunder:

> " … *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*

[1] 2018 SCMR 662

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 an 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."*

He also relied on the decisions reported as ***Injum Ageel versus Latif Muhammad Chaudhary***[2] wherein it was stated that it was not the duty of the Court to review the award, reexamine the evidence or to reappraise the adjudication on merits. He also relied on similar findings of the Supreme Court of Pakistan reported as ***National Highway Authority versus Messrs Sambu Construction Co. Ltd***[3] and ***National Construction Co. versus the West Pakistan Water and Power Development Authority***.[4] Regarding the main contention of the Defence Housing Authority that time being essence of the contract they were entitled to terminate the Agreement

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[2] 2023 SCMR 1361
[3] 2023 SCMR 1103
[4] PLD 1987 Supreme Court 461

and the Sub-Lease, he placed reliance on the decision of the Supreme Court of Pakistan reported as ***Sandoz Limited and another vs. Federation of Pakistan and others***[5] in which while interpreting Section 55 of the Contract Act, 1872, while discussing when time would be considered the essence of a contract, it was held as hereinunder:

> *" … 20. From the above-quoted passages from the above well-known treatises, it is evident:*
>
> *(i) The parties to a contract may make time for the performance of their contract as the essence by expressly providing that "time is of the essence"' or by using any other words which may manifest that the intention of the parties is that the time shall be of essence of the contract.*
>
> *(ii) That the intention of the parties as to the factum, whether the time for the performance of the contract is of the essence or not may be ascertained by the nature of the contract or the circumstances of the case. If the nature of the contract is such that non-performance of the same within the stipulated period rendered the contract for the promisee useless or of no benefit, the time for the performance shall be construed as of the essence.*
>
> *(iii) That if non-performance of the contract within the stipulated period does not cause any loss or injury to the promisee, time is not regarded as of the essence of the contract even when a date for completion of the contract is specified.*
>
> *(iv) The rule of the common law was that time for performance of a contract was always considered as the essence and non-performance of the same within the agreed time used to render a promisor to be sued inter alia for damages, but with 'the passage of time, the above rule stands modified/negated inter alia by statutory provisions, like section 10(2) of the English Sale of Goods Act, 1893, which provides that stipulations as to the time of payment are not deemed to be the essence of the contract of sale, subject to a contrary express I agreement.*
>
> *(v) When under the terms of the contract both the parties have undertaken to do certain acts, in other words, they have made reciprocal promises, the party who brings an action against the other party will have to prove that he had performed his part under the contract or that he had done everything that was in his power to do before he could bring such an action."*

Placing reliance on the judgement it was contended that to make time the essence of the contract it was necessary for a term to expressly provide that time was the essence of a contract, failing which the contrary will be assumed. He submitted that as no such clause existed in the Agreement or the Sub-lease to this effect, time was not essence of the Agreement and that being the case the award passed was in consonance with law and liable to be made a rule of the Court. He concluded by referring to directions that were passed in this Suit for depositing of certain amounts as directed under the award but against which HCA No. 263 of 2008 was maintained and which was disposed of recording the statement of the counsel for the Defence Housing Authority that the amount would not be required to be deposited with this Court until the award was made a rule of the court.

13. Mr. Hassan Ali entered appearance on behalf of the Defence Housing Authority and contended that the Plaintiff No. 1 had been wound up and therefore no longer existed. In this regard he referred the Court to

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[5] 1995 SCMR 1431

certain documents but which referred to another company incorporated in a different jurisdiction to the Plaintiff No. 1. After reiterating the facts as narrated in the award, he maintained the following objections to the award:

(i) that time was the essence of the contract and a specific issue having not been framed by the arbitrator rendered the award as deficient;

(ii) that as the Plaintiffs had not complied with the specific provisions in the Agreement regarding the time for payment, time being the essence of the contract, the Defence Housing Authority was legally entitled to cancel the Agreement;

(iii) that as the Plaintiffs had not complied with the specific provisions in the Agreement regarding the time period for construction and time being the essence of the contract, the Defence Housing Authority was legally entitled to cancel the Agreement;

(iv) that the Defence Housing Authority should have been awarded consequential relief, in the form of damages, as claimed by it;

(v) the time period for performance of the Agreement was extended for two years without any basis.

He relied on the judgements reported as ***Abdul Ghani vs Abrar Hussain,***[6] ***Mubarak Ali vs. Tula Khan alias Sadullah Khan***[7] and ***Muhammad Abdur Rehman Qureshi vs. Sagheer Ahmad*** [8] in support of his contentions.

14. I have heard Mr. Arsahd M. Tayebally and Mr. Hasan Ali and have perused the record.

15. The grounds for setting aside an award are contained in Section 30 of the Arbitration Act, 1940 and which is reproduced as hereinunder:

> *" … 30. Grounds for setting aside award.*

[6] 1999 SCMR 348,
[7] 1985 SCMR 236
[8] 2017 SCMR 1696

> *An award shall not be set aside except on one or more of the following grounds, namely:*
>
> *(a) that an arbitrator or umpire has misconducted himself or the proceedings;*
>
> *(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;*
>
> *(c) that an award has been improperly procured or is otherwise invalid."*

The Supreme Court of Pakistan has recently clarified the application of this section in the decision reported as ***National Highway Authority versus Messrs Sambu Construction Co. Ltd***[9] and wherein it was held as hereinunder:

> *" … We are also mindful of the fact that there is a limited scope of judicial review of the 'Award' announced by an Arbitrator. An arbitration Award is a final determination of the dispute between the parties. The grounds for challenging an Award are very limited. There are three broad areas on which an arbitration Award is likely to be challenged i.e. firstly, jurisdictional grounds (non-existence of a valid and binding arbitration agreement); secondly, procedural grounds (failure to observe principles of natural justice) and thirdly, substantive grounds (arbitrator made a mistake of law). The review of an arbitration Award cannot constitute a re-assessment or reappraisal of the evidence by the court. An over-intrusive approach by courts in examination of the arbitral Awards must be avoided. The court is not supposed to sit as a court of appeal and must confine itself to the patent illegalities in the Award, if any. The jurisdiction of the Court under the Act is supervisory in nature. Where two findings are possible the Court cannot interfere with the Award by adopting its own interpretation. Interference is only possible if there exists any breach of duty or any irregularity of action which is not consistent with general principles of equity and good conscience. The arbitrator alone is the judge of the quality as well as the quantity of the evidence. He is the final arbiter of dispute between the parties. He acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight. By applying the aforenoted principles of law on the subject and considering the petitioner's objections within the limited scope of court's jurisdiction in testing the validity of Award this court is not supposed to sit as a court of appeal and make a roving inquiry and look for latent errors of law and facts in the Award. The arbitration is a forum of the parties' own choice its decision should not be lightly interfered by the court, until a clear and definite case within the purview of the section 30 of the Act is made out. We do not find any jurisdictional, procedural or substantive error patently floating on the record that could justify interference by this Court."*

There being no allegation of lack of jurisdiction or of a violation of the principles of natural justice, it would seem that the sole basis that has been raised by the Defence Housing Authority is that the arbitrator made a mistake in applying the law and hence the award was liable to be set aside

16. The first allegation of an incorrect application of the law, that has been taken by the Defence Housing Authority is that no issue as to time

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[9] 2023 SCMR 1103

being essence of the contract was framed by the arbitrator and even if it had been the provisions of Section 55 of the Contract Act, 1872 as settled by this Court had been incorrectly applied by the arbitrator. Regarding the failure to frame an issue, it is be noted that issue no. 4 specifically deals with the issue as to whether the delay committed by the Plaintiffs has resulted in breach of the Agreement and which reads as hereinunder:

> *" … 4. Whether the claimants have committed any alleged breach of the agreement / sub-lease by delaying the finalization and the launching of the above High Rise Residential Complex"*

Interestingly enough, this issue was actually decided in favour of the Defence Housing Authority in the following terms:

> *" … Since the Plaintiffs insisted upon not constructing HRRC of 300 feet height and insisted upon having a height of at least 471 feet against the above factual and legal position, they had delayed the finalization and launching of the above HRRC by their own acts/omissions/commissions in terms of above quote Issue No. 3 as the Plaintiffs have refused to construct the buildings as per Agreement. They have committed a breach of the Agreement / Sub-Lease and therefore, aforesaid quite Issues 3 and 4 are also decided against the Plaintiffs and, they are answered in the affirmative."*

The finding being in support of the Defence Housing Authority, It would seem that their real grouse of the Defence Housing Authority is with the fact that having come to a conclusion that the Plaintiffs had in fact breached the terms of the Agreement as to how Issue no. 5 i.e., "*Whether the defendant's action of terminating the agreement/ sub-lease was warranted in terms of the agreement/sub-lease in the circumstances of the case"* was decided in favour of the Plaintiffs. This was answered by the arbitrator by reading two clauses of the Agreement i.e. Clauses 7.1 and Clause 5.1.10 together and which having detailed an obligation as between the parties in the face of disagreements to resolve their disputes amicably, as per the learned arbitrator, coupled with the absence of an express termination clause would not entitle the Defence Housing Authority to terminate the Agreement. The simpliciter delay not entitling the Defence Housing Authority to terminate the Agreement or the Sub-Lease, it was further clarified that the circumstances that would entitle the Defence Housing Authority to terminate the Agreement or the Sub-Lease would be *"facts of the magnitude which may constitute repudiation of the Agreement/Sub-Lease"* and resort to which could only be made after making an attempt to resolve the dispute. Personally, I cannot see any fallacy in the application of the law. It is quite correct to state that where a term of a contract specifically deals with the consequence of a breach of an Agreement that term, being premised on the intention of the parties must be given effect. One can only refer to the classic expression of the law as used by Lord Tomlin in the decision of the

House of Lords reported as ***WN Hillas & Co Ltd v Arcos Ltd*** [10] wherein it was held that:

> " … *Commercial documents prepared by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reason of their inartificial forms confront the lawyer with delicate problems.*
>
> *The governing principles of construction recognised by the law are applicable to every document and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document.*
>
> *On the one hand the conveyance of real estate presenting an artificial form grown up through the centuries and embodying terms of art whose meanings and effect have long since been deter mined by the courts, and on the other hand the formless document the product of the minds of men seeking to record a complex trade bargain intended to be carried out both fall to be construed by the same legal principles and the problem for a Court of Construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective and that the law may not incur the reproach of being the destroyer of bargains."*

The principle is well followed here by the arbitrator and I am loath to disagree with it. The interpretation and the application of the law in this regard is therefore correct and it follows that there being no question of the termination of the agreement the question of any illegality on the part of the arbitrator to refuse to grant consequential relief as claimed by the Defence Housing Authority in their Counter Claim must also fall by the side.

17. The remaining issue as to whether the arbitrator had the right to extend the period for the performance of the obligations on account of the wrongful termination of the Agreement and the Sub-lease has clearly been dealt with by the arbitrator on the principles of equity in as much as the delay caused by such wrongful termination has been adjusted and I must admit that in such circumstances I would have given the same finding. This contention of the Mr. Hasan Ali is therefore also rejected.

18. For the foregoing reasons, the objections to the award maintained by the Defendant Housing Authority are dismissed and the Award dated 21 August 2008 is made of a rule of the court subject to the time period for completing the Project as detailed in the award being extended by the exclusion of the time that these proceedings have taken to adjudicate this *lis*. The Suit stands decreed in terms thereof with directions to the office to draw up the decree in two weeks and with the parties being left to bear their own costs.

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[10] [1932] UKHL 2

J U D G E

(Mohammad Abdur Rahman,J)

Karachi dated 4 February 2024

ANNOUNCED BY

J U D G E

(Muhammad Jaffer Raza,J)