JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

F.A.O. No.119 of 2020

M/s SGEC-AMC JV

Versus

National Highway Authority through its Chairman

Appellant by	:	Barrister M. Saad Bhuttar and Tahir Hussain Anchanan, Advocates.
Respondent by	:	Barrister Asghar Khan, Advocate.
Dates of Hearing	:	26.01.2022, 01.02.2022, 10.02.2022, 24.02.2022, 10.03.2022, 29.03.2022, 08.04.2022, 19.04.2022, 11.05.2022 and 20.05.2022

ARBAB MUHAMMAD TAHIR,J.:- Through the present appeal under Section 39 of the Arbitration Act, 1940 (hereinafter referred to as "**the Act**") the appellant, M/s SGEC-AMC Joint Venture, calls in question the order dated 06.11.2020, passed by the Court of the learned Additional District Judge-West, Islamabad, whereby the application filed by the respondent/National Highway Authority ("hereinafter referred to as **"the NHA")** under Section 34 of the Act, was allowed and the proceedings in the suit for Specific Performance, Declaration, Permanent, Mandatory and Temporary Injunction instituted by the appellant, were stayed. Additionally, an ad-interim injunctive order already issued on 04.08.2020 directing status-quo to be maintained, was also vacated through the said impugned order.

2. Succinctly the facts forming the background of the present appeal is that the appellants being in Joint Venture between a Chinese company by the name and style of *"Sichuan*

Province Geological Engineering Complex" and *"M/s A.M. & Company"* duly registered with Pakistan Engineering Council. In response to the advertisement issued by the NHA inviting bids for the project namely, Construction of Additional Carriageway from Petaro to Sehwan N-55 Section-I (64 KM) Package-1C (KM 40+000 to KM 64+000) (hereinafter referred to as **"the Project"**), the appellant submitted its technical and financial bids. In the evaluation process, the appellant emerged as a successful bidder and it furnished performance guarantee as well as maintenance bonds amounting to Rs.358,863,772/- and Rs.179,431,886/-, respectively. Having satisfied all the pre-requisites, the Contract in question was awarded to the appellant. A Contract Agreement was executed between the appellant and the NHA on 19.11.2019. Clause 67.1 of the General Conditions (Part-I) (hereinafter to be referred to as the **"General Conditions"**) set out in the said Contract Agreement provided a comprehensive mechanism for resolution of the contractual disputes/differences between the said parties through reference to arbitration. After certain disputes and differences developed between the appellant and the NHA, the appellant on 04.08.2020 instituted a suit for Specific Performance, Declaration, Permanent, Mandatory and Temporary Injunction against the NHA before the Court of the learned District Judge, Islamabad, with the following prayer:-

> *"It is therefore respectfully prayed that a decree to the following effects may kindly be passed in favor of the Plaintiff and against the Defendant with costs:*
>
> *i. A declaration to the effect that the Plaintiff is entitled to payment under the Contract Agreement dated 19.11.2019.*
>
> *ii. A declaration that the Defendants are not entitled to wrongful and illegal termination of the Contract Agreement dated 19.11.2019 and that no adverse order be passed by Defendants against Plaintiff.*
>
> *iii. Mandatory injunction to the effect that the Defendant may kindly be directed to provide all the necessary*

materials including design/construction drawings traverse data, clearance of construction site etc in order for the work to progress

iv. *Any acts done under political influence and collusion with others be declared illegal.*
v. *Be permanent restrained from wrongful or illegal termination and/or adverse action against the Plaintiff.*
vi. *Any other relief which this Hon'ble Court may deem fit and proper be also awarded to the Plaintiffs."*

3. The said suit was later on entrusted to the Court of the learned Additional District Judge-West Islamabad for adjudication. The trial Court while issuing a *status-quo* order dated 04.08.2020, restrained the NHA from terminating the contract in question. Simultaneously, the learned trial Court vide order of even date, appointed a Local Commission with the mandate to inspect the site in order to ascertain the actual position at the site and submit a report before the Court on the next date of hearing. On 13.08.2020, *Vakalatnama* (power of attorney) on behalf of the NHA was filed. Along with the said power of attorney, an application under Section 34 of the Act was also filed with the following prayer:-

> *"In view of the above submissions and response, it is respectfully prayed that on account of having agreed for settlement of disputes by way of arbitration, the proceedings pending vide the instant Suit may kindly be stayed in accordance within the meaning, scope and effect of Section 34 of the Arbitration Act, 1940."*

4. By contesting the said application, apparently, on 01.09.2020, the appellant filed a reply to the NHA's said application under Section 34 of the Act. In the said reply, the appellant took a plea to the effect that ***"the defendant has no intention of going into the arbitration,*** *they simply intend to award the contract to their own blue eyed, this can be further seen from the fact that even though the Stay has been granted by this Honourable Court, the Defendant is not letting Plaintiff to*

perform on the Contract." Furthermore, it was pleaded in the said reply that *"in case the Stay is vacated, the subject matter of the Suit will be lost, contract shall be terminated, the guarantees shall be encashed and further actions shall be taken against the Plaintiff to malign its legacy and cause irreparable damage."*
(Underline is mine for emphasis)

5. Moreover, in reply to Para-6 of the said application, the appellant goes on to say as under:-

> *"That the content of Para 6 are denied vehemently, the Plaintiff has approached this Honourable Court as there was no other efficacious remedy available,* ***the Defendant being an Authority are forcing the Plaintiff out of business, instead of following the clauses mentioned above, and trying to resolve the matter amicably or to resolve the dispute between the parties, they have issued a notice of termination****, they have made several attempts to seize the work site, they have used their powers as an Authority and used the local police to coerce the Plaintiff's workers and staff officers, even made illegal arrests without a complaint/FIR/Charge, etc. and that is after the Plaintiff was able to secure a Restraining Order from this Honourable Court. Therefore when the conduct of the Defendant is so toxic, discriminatory, unfair and illegal, the Plaintiff had no other option but to approach this Honourable Court for the redressal of their grievance.* ***Even now the conduct of the Defendant can be seen from the fact that even though the Defendant filed an application under S.34 of the Act for the stay of proceedings, on the last date of hearing i.e. 13.08.2020,*** *their entire arguments revolved around only one notice i.e. to get the stay vacated in order for them to terminate the contract and award it to someone else. With such conduct, how can the Plaintiff even have an ioto of hope that the Defendant would try to resolve the matter amicably etc."*
> **(Underline is mine for emphasis)**

6. The learned trial Court while allowing the NHA's said application, stayed the proceedings in the suit instituted by the appellant vide order dated 06.11.2020 and vacated the *ad-interim* injunctive order dated 04.08.2020. Furthermore, the

learned trial Court directed the NHA to preserve the subject matter of the suit till 16.11.2020 and **it was further observed that in the meantime, the aggrieved party may approach to the concerned forum by referring the matter to the arbitration**, if so needed. The said order dated 06.11.2020 has been assailed by the appellant in the present appeal.

(Underline is mine for emphasis)

7. Mr. Saad M. Buttar, Advocate, learned counsel appearing on behalf of the appellant after narrating the facts leading to the filing of the present appeal, contended that the NHA through an illegal and discriminatory act, trying to terminate the contract in question; that it is the NHA, which caused the delaying in the commencement of the construction work; that the NHA has violated various provisions of the Contract in order to cause delay in the performance of the contract; that the learned trial Court has fell in error by not appreciating the fact that the appellant commenced the construction work according to the commencement order on 17.02.2019, but due to province-wise Covid-19 pandemic's lockdown, the same got delayed; that the NHA addressed letter to the appellant expressing its intention to terminate the contract; that the appellant just got two months to work on the project, whereas the contractual period of one year has not come to an end; that the learned trial Court has overlooked the fact that the appellant **has not opposed the initiation of arbitration proceedings, however, it has requested the protection of the subject matter of the arbitration which is a pivotal aspect for stay of the proceedings under Section 34 of the Act;** that the arguments advanced by the learned counsel for the appellant were not taken into account by the learned Court below while passing the impugned order dated 06.11.2020; that the learned trial Court has also ignored the report submitted by the Local Commission, which was based on ground realities; that since

overlapping issues of law and fact were involved in the matter, arbitration was not the proper mode for the resolution of disputes; that under Section 34 of the Act, the Court has discretion whether or not to stay the proceedings in the suit; the learned trial Court has acted against its vested discretion; that the respondent's application under section 34 of the Act was silent as to the disputes which were sought to be referred to arbitration; and that the law requires for such disputes to be set out with specificity in an application under Section 34 of the Act. Learned counsel for the appellant, however, admitted the fact that the said agreement contained an arbitration clause, and that the disputes between the parties arise from and are related to the terms of the said agreement; that the learned trial Court has also erred by not appreciating the important fact that the NHA has not followed the steps mentioned in the Contract Agreement prior to the termination of the contract in question encompassing the appointment and decision of the Engineer, amicable settlement as well as arbitration; that there had been inordinate delays in the construction work caused in receiving the construction drawings from the NHA; that some of the drawings were received as late as 14.07.2020 while there are many others, which are yet to be received; that the delay in the construction of the work was caused by none others but the NHA; and that there may have been certain temporary delays on the appellant's part in the construction work, but those were due to the negligence and malicious conduct of the NHA.

8. Furthermore, it was contended that vide letter dated 11.06.2020, it was informed by the NHA that the Surveyor of NESPAK adjusted the traverse data from KM 40+000 to KM 43+000 during his stay at project site meaning thereby the original project had been amended/changed; that in the said letter, it was further stated that the remaining traverse data

from KM 43+000 to KM 60+000 is required to be provided by the NESPAK's Surveyor at site; that at no material stage, was the said traverse data provided to the appellant; that without the traverse data i.e. construction plans having been provided for the construction of the carriageway, the work could not commence; that despite the said letter dated 11.06.2020, no progress was made in procuring the traverse data; that the Project Director of the NHA through reminder dated 14.07.2020, stating therein that due to the lockdown in the province of Sindh, another Surveyor could not be arranged; that the Project Director vide letter dated 17.07.2020 requested for the construction drawings, which was also a major factor in the delay of the completion of the project; that on certain construction sites, there were site encroachments by the locals including shops and houses, electricity polls, hotels, local kiosks and *dhabas*, which are the sole responsibility of the NHA to clear; that the delay caused in the construction work was beyond the control of the appellant; that despite all these impediments caused by the NHA as well as Covid 19 pandemic, the work is still being done at a good pace; that it is absolutely incorrect that the work is not being done on the site; that the learned trial Court has not appreciated that the value of the project has escalated exponentially and great difference in the value of the project occurred; that in the event, the contract in question is re-tendered it would cause massive losses to the Government exchequer; that the learned trial court has overlooked the fact that the ingredients of an injunction were fully satisfied; that the appellant being honest about its intention made several attempts to contact the NHA and to discuss the issues in hand in order to bring the contract agreement to its logical conclusion, but to no avail; that the NHA vide its letter dated 21.07.2020 showed its intention to terminate the contract agreement; that the NHA has failed to

appreciate that the appellant has mobilized its manpower, equipment, machinery, material and site camp office etc. showing its willingness to complete the work in time, but served no useful purpose due to the non-cooperation by the NHA. While making his submissions, learned counsel for the appellant placed reliance on the judgments reported as **"2019 YLR 427, PLD 2015 Sindh 319, 2013 MLD 1083, 2009 CLC 676, 2002 CLD 706, 1994 CLC 2000, PLD 1976 Karachi 644, 2011 CLC 157. 1990 CLC 609, 2003 CLD 407, 2016 CLC 1677, 2013 MLD 1499, 2020 CLC 1300 and 2020 CLC 1349."**

9. On the other hand, Barrister Asghar Khan, Advocate, learned counsel appearing on behalf of the NHA while opposing the arguments advanced by the learned counsel for the appellant contended that the NHA floated an invitation seeking bids for construction of the project; that the appellant submitted its technical as well as financial bids and it was picked up as a successful bidder; that the appellant was issued a Letter of Acceptance of bid on 23.05.2018; that thereafter, the parties were entered into a Contract Agreement dated 19.11.2018; that there existed an arbitration clause in the General Condition of the said Contract Agreement; that Clause 67 whereof specifically provided for settlement of any disputes/differences between the parties to be first referred to the Engineer and in case of any further dispute and dissatisfaction, to be referred to arbitration; that if any dispute is raised with regard to *inter alia* the Agreement or in connection with the Agreement, with regard to the execution of the works, certificates, or any instructions etc. shall be settled by the procedure provided in Clause 67 of the General Conditions; that nonetheless it was in the knowledge of the appellant that all the disputes arising out of FIDIC scheme of

contracts have this particular dispute resolution mechanism clause and the disputes or issues are resolved through means of arbitration; that the dispute raised by the appellant in the suit were related to and arising from the provisions of the Contract Agreement dated 19.11.2019; that although the appellant, in its suit, had leveled bald allegations *qua* delay in the completion of the project, but it failed to substantiate none of them; that the appellant, in its reply to the NHA's application under Section 34 of the Act, did not plead or allege the commission of fraud by the respondent; that the NHA did not apply for an adjournment to file a written statement; that an application under Section 34 of the Act was filed at an early stage of the suit; and that in the application under Section 34 of the Act, it has clearly been mentioned that the dispute raised by the appellant in its suit is liable to be resolved through arbitration as contemplated by the provisions of the said Contract Agreement; that there was no dispute as to the execution of the Contract Agreement dated 19.11.2019 between the appellant and the NHA; that the term 'arising out of or relating to the contract agreement" entered into between the parties is a term of wide import and encompasses all the disputes and differences developed between the parties, which, but for the said agreement, would not have arisen between the parties; that NHA is ready, willing and able to take all the necessary steps for proper conduct of the arbitration proceedings; that a Joint Venture Agreement signed between the appellant and AMC, was an un-registered JV; that Section 69(2) of the Partnership Act 1932 clearly provides that an un-registered JV cannot sue a third party; that the project in question had already expired; and that the learned trial Court correctly exercised its jurisdiction by allowing the NHA's application under Section 34 of the Act and staying the proceedings in the appellant's suit. Learned counsel for the

NHA prayed for the appeal to be dismissed with costs.

10. I have heard the contentions of the learned counsel for the parties and have perused the record with their able assistance. The facts leading to the filing of the present appeal have been discussed in detail in the preceding paragraphs and need not be reiterated.

11. Perusal of the record reveals that in connection with the construction of the Additional Carriageway from Petaro to Sehwan N-55 Section-I (64 KM) Package-1C (Km 40+000 to Km 64+000), the appellant entered into a Contract Agreement on 19.11.2019 with the NHA regarding fulfillment of the various conditions settled between the parties. Clause 41.1 of the said Contract Agreement provided that the Contractor shall commence the works as soon as is reasonably possible after the receipt by him of notice to this effect from the Engineer. Time for completion of the said Project/term of the Contract was 365 days from the date of the receipt of the Engineer's Notice to Commence. On 30.12.2019, the Engineer notified the appellant to commence the work with effect from 14.01.2020 and to proceed with due expedition and without delay.

12. Under this Contract Agreement, a dispute arose between the parties ultimately prompting the appellant to file a suit for Specific Performance, Declaration, Permanent, Mandatory and Temporary Injunction against the NHA on 04.08.2020. In pursuance of the process issued by the learned trial Court, *Vakalatnama* (power of attorney) on behalf of the NHA was filed 13.08.2020. Before the written statement could be filed by the NHA on the next date of hearing, on the very same day i.e. 13.08.2020, an application was moved by the learned counsel for the NHA in terms of Section 34 of the Act seeking reference

of the dispute to arbitration in terms of Clause 67.3 of the aforesaid Contract Agreement dated 19.11.2019 which was contested by the appellant by filing a reply to the said application. The said Contract Agreement also contains a comprehensive mechanism *viz* Clause 67.1 of the General Conditions set out in the said Contract Agreement for settlement of any disputes, issues and differences arising out of and relating to the said Contract or the execution of the Works, whether during the execution of the works or after their completion and whether before or after repudiation or other termination of the contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute, shall at the first place, **was to be referred in writing to the Engineer**, with a copy to the other party. Such reference shall to state that it is made pursuant to the said clause. **Furthermore, it was provided that if either the Employer (i.e. NHA) or the Contractor (the appellant) be dissatisfied with any decision of the Engineer or if the Engineer fails to give notice of his decision on or before the 84th day on which he received the reference, then either the Employer (i.e. NHA) or the Contractor (the appellant) on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration.** It would be advantageous to reproduced Clauses 67.1, 67.2 and 67.3 in their entirety:-

> ***"Settlement of Disputes.***
> ***67.1. Engineer's Decision.***
> *If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during*

the execution of the Works or after their completion and whether before or after repudiation or other termination of the contract , including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, ***in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause****. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.*

Unless the Contractor has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given. If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Employer, the said decision shall become final and binding upon the Employer and the Contractor.

67.2 Amicable Settlement.

Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 57.1, the parties shall attempt to settle such dispute amicabley before the commencement of arbitration. Provided that, unless

the parties otherwise agree, ***arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given,*** *even if no attempt at amicable settlement thereof has been made.*

67.3 Arbitration.

Any dispute in respect of which:-

(a) The decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) Amicable settlement has not been reached within the period stated in Sub-Clause 67.2,

Shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International chamber of commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s or any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works."

(underline is mine for emphasis)

13. Vide Particular Conditions of Contract Part-II, Clause 67.3 of the General Conditions stood amended and the relevant amendments are reproduced herein below:-

"in the sixth to eight lines, the works "shall be finally settled…. Appointed under such Rules" are deleted and substituted with the following"

"Shall be finally settled under the provisions of the Arbitration Act, 1940 as amended or any statutory modification or re-enactment thereof for the time being in force"

The following paragraph was added.

"The place of arbitration shall be Islamabad."

14. The only effect of the said amendments were that the arbitration has to be commenced in accordance with the Act and shall be conducted in Islamabad. Rest of the arbitration clause remained intact and unchanged.

15. Perusal of the record further evinces that on 21.07.2020, a termination letter was issued by the NHA to the appellant, wherein it has been stated as under:-

> *"Therefore, I Chairman, National Highway Authority, in the capacity of The Employer, hereby serve you 14 days Notice of Termination of your Employment, as Contractor, on Construction of Additional Carriageway from Petaro to Sehwan N-55 Section-I (64 KM) Package-1C (KM 40+000 to KM 64+000) pursuant to clause 63.1(d) of the contract, without releasing you from any of your obligations or liabilities under the Contract."*

16. In the said letter, it has also been mentioned that despite numerous warnings and instructions by the Engineer of the Project, the appellant has failed to perform on the Project as per the Conditions of the Contract. In the said letter, it has further been mentioned that the Engineer after repeated instructions has now issued a certificate, with a copy to the Contractor, pursuant to Sub-clause 63.1(d) of the Conditions of Contract. The operative part of the said certificate is reproduced below:-

> *"The Engineer hereby certify pursuant to Sub-clause 63.1(d) of the conditions of contract that in the Engineer's opinion the contractor , M/s SGEC-AMC Joint Venture, despite previous warnings from the Engineer, in writing is persistently/flagrantly neglecting to comply with his obligation under the contract without reasonable excuse".*

17. For the sake of ready reference, clause 63.1(d) of the General Conditions is reproduced as under:-

"Under clause 63.1
(a)….
(b)…
(c)…
(d) despite previous warning from the Engineer, in writing, is otherwise persistent or flagrantly neglecting to comply with the any of his obligations under the contract, or
(e) has contravened Sub-clause 4.1, then the Employer (i.e. NHA) may, after giving 14 days' notice to the contractor (i.e. the appellant), enter upon the Site and the Works and terminate the employment of the Contractor without thereby releasing the contractor from any of his obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the contract, and may himself complete the Works or may employ any other contractor to complete the Works. The Employer or such other contractor may use for such completion so much of the contractor's Equipment, Temporary Works and materials as he or they may think proper".

18. Now, I shall deal with the objection of the learned counsel for the appellant that no drawings were given by the NHA pertaining to the Project in question and due to Covid-19 pandemic, the Project in question could not be completed well within the time period stipulated under the said Contract Agreement. Clauses 6.4 and 6.5 deal with the question regarding the delay in the submission of the drawings either by the Contractor or the Engineer. The said Clauses of the General Conditions read in the following terms:-

"6.4. Delay and Cost of Delay of Drawings.
If, by reason of any failure or inability of the Engineer to issue, within a time reasonable in all the circumstances, any drawing or instruction of which notice has been given by the Contractor in accordance with Sub-clause 6.3, ***the Contractor suffers delay and/or incurs costs then the Engineer shall, after due consultation with the Employer and the Contractor, determine:-***

(a) Any extension of time to which the Contractor is entitled under Clause 44, and
(b) The amount of such costs, which shall be

added to the Contract Price, *and shall notify the Contractor accordingly, with a copy to the Employer.*

6.5 Failure by contractor to submit drawings.
If the failure or inability of the Engineer to issue any drawings or instructions is caused in whole or in part by the failure of the Contractor to submit Drawings, Specifications or other documents which he is required to submit under the contract, the Engineer shall take such failure by the Contractor into account when making his determination pursuant to Sub-clause 6.4.

19. From the above two conditions, it is manifest that if, by reason of any failure or inability of the Engineer to issue, within a time reasonable in all the circumstances, any drawing or instruction of which notice has been given by the Contractor in accordance with Sub-clause 6.3, the Contractor **suffers delay and/or incurs costs then the Engineer shall, after due consultation with the Employer and the Contractor, determine any extension of time to which the Contractor is entitled under Clause 44, and the amount of such costs, which shall be added to the Contract Price, and shall notify the (Contractor) accordingly,** with a copy to the Employer. Moreover, in case of special risks, the appellant was protected in terms of Clauses 65.1 and 65.2 (**Special Risk**). The said Clauses of the General Conditions cope-up with the risks that occur during the execution of the works. The said Clauses are reproduced herein below for ease of reference:-

"65.1. No Liability for Special Risk.
The contractor shall be under no liability whatsoever in consequence of any of the special risks referred to in Sub-clause 65.2, whether by way of indemnity or otherwise for or in respect of:-

(a) destruction of or damage to the Works, save to work condemned under the provisions of Clause 39 prior to the occurrence of any of the said special risks.
(b) Destruction of or damage to property, whether of the Employer or third parties, or
(c) *Injury or loss of life.*

65.2 Special Risks.

The special risks are:

(a) The risks defined under paragraphs (a), (c), (d) and (e) of Sub-clause 20.4, and

(b) The risks defined under paragraph (b) of Sub-clause 20.4 insofar as these relate to the country in which the Works are to be executed."

20. If at all the learned counsel for the appellant's objection *qua* delay in the completion of the Project due to Covid-19 pandemic, is taken into consideration even then, the appellant was under no liability whatsoever in consequence of the said risks. The appellant's interests were preserved/protected under the garb of the special risks and it could have availed the benefits under the said special risks by making claim under Special Risks, but it did not do so, for the reasons best known to the appellant. Furthermore, if there were any compelling and un-avoidable circumstances preventing the appellant from completing the Project in question well within the prescribed time, then the appellant could also have sought an extension in time for the completion of the Project in terms of Clause 44.1 of the General Conditions. The appellant instead of resorting to the procedure set forth in the said Contract Agreement regarding completion of the Project, blamed the NHA for causing the delay in the completion of the Project and took the shelter of the Covid-19 Pandemic. Clause 44.1 of the General Conditions reads as follows:-

"44.1. Extension of time for completion.

In the event of:

(a) The amount or nature of extra or additional work,

(b) Any cause of delay referred to in these Conditions,

(c) Exceptionally adverse climate conditions,

(d) Any delay, impediment or prevention by the Employer, or

(e) Other special circumstances which may occur, other than through a default of a breach of contract by the Contractor or for which he is responsible,

Being such as fairly to entitle the Contractor to an extension of

the Time for Completion of the Works, or any Section or part thereof, the ***Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to Employer."***

21. Had the appellant applied to the NHA for the extension of the time for completion of the Project and had the NHA and/or Engineer as the case may be, declined to accede to the genuine request of the appellant for the grant of an extension in time, then the appellant could have been in a good possible position to have blamed the NHA for causing undue delay and creating hurdles in the appellant's way towards the completion of the Project. In the absence of such resort *qua* seeking an extension in the completion period, the appellant has exposed itself to the unsavory consequences, for which the NHA cannot be held responsible.

22. Now, I would elucidate and dilate upon Section 34 of the Act in detail, it would be apt to reproduce Section 34 of the said Act:-

*"**34. Power to stay legal proceedings where there is an arbitration agreement.***
Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there in no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority, may make an order staying the proceedings."

23. It is apparent from the above that for invoking the provisions contained in Section 34 of the Act for an order staying the proceedings in a civil suit, it is mandatory that the following conditions ought to be fulfilled:-

> *i) The proceedings must have been commenced by a party to an arbitration agreement against any other party to the agreement.*
> *ii) The legal proceedings, which are sought to be stayed must be in respect of a matter agreed to be referred.*
> *iii) The applicant for stay must be a party to the legal proceedings and he must have taken no step in the proceedings after appearance. It is also necessary that he should satisfy the Court not only that he is, but also was, at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration.*
> *iv) The Court must be satisfied that there is no sufficient reason, why the matter should not be referred to an arbitration in accordance with the agreement.*

24. It goes without saying that Section 34 of the Act has been enacted to make the arbitration agreements effective and prevent a party from going to the Court contrary to his/its own agreement. Where the parties have agreed to refer the disputes to arbitration, the Court should as far as possible, give an opportunity for resolution of the disputes through arbitration rather than by judicial adjudication. The powers vested in the Court to grant stay under Section 34 of the Act are entirely a matter of discretion of the Court. However, the Courts must not ignore to see that the parties are held to their bargain and promote the sanctity of the contracts/agreements. Stay of the proceedings in a suit is a more expedient and proper course to follow where there is an arbitration clause in an agreement/contract. The moment an application under Section 34 of the 1940 Act is filed in a pending suit, further progress / proceedings in such a suit would automatically come to an end and the trial Court's power to act under the Code of Civil

Procedure, 1908, is suspended till a decision is rendered on such an application.

25. The Court has jurisdiction to entertain the suit, however, the Court in its discretion may stay the suit but the Court has to consider whether discretion should be exercised in a particular case or not. Section 34 does not make it obligatory on the Court to necessarily refer the dispute to arbitration and may exercise the discretion to stay the proceedings if it is satisfied that there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement.

26. An arbitration agreement is a contractual undertaking by which the parties agree to settle their dispute by way of arbitration rather than to proceed in Court. Whenever, any dispute or difference arises relating to and arising out of the arbitration agreement, any party to the agreement may apply for staying of the Court's proceedings by filing an application under Section 34 of the Act. A party who wishes to refer the disputes to arbitration has to apply without delay to the Court for the stay of the proceedings particularly in breach of agreement to arbitrate the dispute which arises between the parties must fall within the scope of arbitration. The word "dispute" has got wide meaning and scope and includes any claim which the other party admits under Section 34 of the Act. Admittedly, the Court has ample powers to exercise its discretion to stay the legal proceedings provided that there has been a valid arbitration agreement, the proceedings in Court have been commenced, the application is made by a party to the proceedings before filing the written statement and or taking any other step in the pending proceedings and such a party is ready and willing to do all the acts necessary for the proper conduct of the arbitration.

27. It may not be out of context to mention here that any party to an arbitration agreement or any person claiming under him if brings a civil suit against any other party to such an agreement who had in respect of the matter agreed to be so referred to arbitration, Section 34 of the Act empowers the Court taking cognizance thereof to make such reference in terms of the relevant clause of the said agreement if any party to such "legal proceedings" makes any application before a written statement is filed or any other step taken therein. The record is evident of the fact that the NHA on receiving notice of the pending suit, promptly filed an application under Section 34 of the Act before the filing of the written statement. It may further be observed that the competent forum/court if satisfied ordinarily has to refer the matter to the arbitration on having satisfied itself that no sufficient reason exists for not making such reference in accordance with the arbitration agreement particularly when a person making such application had always been ready and willing to perform his part of the agreement at the time when such legal proceedings are initiated.

28. The plain reading of Section 34 of the Act demonstrates its object which is meant for minimizing the agony of the parties from facing protracted litigation by referring the matter to the Arbitrator. However, the Court has to see if there are some reasons as to why the matter should not be referred to the arbitration in accordance with the agreement.

29. The arbitration clause in the Contract Agreement dated 19.11.2019 requires the parties to first refer the matters in dispute to the Engineer, before the dispute could be taken to arbitration. It is well settled that the Court, on an application under Section 34 of the Act cannot refer the disputes, which are

the subject matter of the suit, to arbitration. At best a Court can stay the proceedings leaving the parties to institute arbitration proceedings in accordance with the dispute resolution mechanism enshrined in the contract/agreement. In holding so, I am fortified by the law laid down in the case of case of **Messrs S.M. Qasim & Co. Vs. Messrs Ch. Azimuddin (PLD 1962 Lahore 95),** wherein, it was held as follows:-

> *"Section 34 of the Act merely provides that where any party to an arbitration agreement commences any legal proceedings against any other party to the agreement, such party may apply to the judicial authority before which the proceedings are pending to stay the proceedings, and if the judicial authority is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, then such authority may make an order staying the proceedings. It does not provide that the Court shall then proceed to enforce the arbitration clause in the agreement. It appears to me that the intention of the legislature is that in a case of this nature the parties should be left to pursue their own course to enforce the arbitration agreement in accordance with its terms. The parties can refer their dispute to an arbitrator in terms of the agreement without the intervention of the Court, or any of them may apply under section 20 of the Act to a Court having jurisdiction in the matter to which the agreement relates that the agreement be filed in Court, and then the Court shall have to follow the procedure laid down in that section."*

30. In the case of **Farid Virani Vs. Feroz Virani (PLD 2013 Sindh 386)**, it was *inter alia* held as follows:-

> *"Section 34 of the Arbitration Act, 1940 relates to stay of proceedings brought before the Court in the subsistence of valid agreement of arbitration.* ***This Section aims at to make arbitration agreement effective and to prevent a party from going to Court contrary to his own agreement. Whether the provisions of this Section are attracted, the court may stay the proceedings requiring the matter to be referred to the Arbitration. In order to stay the legal proceedings it is necessary that the proceedings must have been commenced by a party to arbitration agreement against any other party to the agreement, the legal proceedings which are sought to be***

> ***stayed must be in respect of a matter agreed to be referred****, the applicant for stay must be a party to the legal proceedings, the applicant must have taken no step in the proceedings after appearance, the applicant has to satisfy that he was not only at the time when the proceedings were commenced, but still ready and willing to do everything necessary for the proper conduct of the arbitration and the court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration."*

31. It is the view of this Court, that when the Court stays the proceedings in the suit instituted by either party to the agreement containing an arbitration clause, the parties are left whether to institute arbitration proceedings with the intervention of the Court (as provided under Section 20 of the Arbitration Act), or without the intervention of the Court (as provided under Chapter-II of the Arbitration Act). However, where the parties to the suit, who are also parties to an arbitration agreement executed prior to the institution of the suit, jointly apply for the matters in dispute between such parties to be referred to arbitration, the Court may treat such an application as an application under Section 20 of the 1940 Act, and refer the disputes to arbitration.

32. Perusal of the record reflects that on 04.08.2020, the learned trial Court had passed the following order:-

> *"In view of the preliminary arguments, contents of the plaint, affidavit and other documents appended herewith, the plaintiff/petitioner has got good prima facie arguable case in his favour.* ***Keeping in view the urgency of the matter, notice to the defendant/respondent is dispense (sic) with****. Status-quo regarding the subject matter of the suit be maintained till next date of hearing. Furthermore, the defendant/respondent is restrained to terminate the contract illegally and forcibly. However, this order is subject to notice and all just exceptions. It is to be noted that this injunctive order shall seize to exist on the next date of hearing if not specifically extended."*
>
> **Underline is mine for emphasis**

33. On 13.08.2020, Barrister Ashgar Khan, advocate had tendered appearance before the learned Civil Court and filed his power of attorney. Along with the said power of attorney, he filed an application under Section 34 of the Arbitration Act. On 16.09.2020, the Local Commission submitted his report and objections thereon were invited till the next date of hearing. Apparently, an application on behalf of the learned counsel for the appellant was filed for appropriate order contending therein that since the learned counsel for the appellant/plaintiff is on general adjournment until 10.10.2020, therefore, the case be also adjourned till the said date. The learned trial Court ordered for a reply to be filed to the said application too till the next date of hearing. In the said order dated 16.09.2020, the following observations were made by the learned Court below:-

> *"It has been observed that* ***learned counsel for the defendant has already advanced his arguments on the application under the The Actbut learned counsel for the plaintiff could not argue the said application due to one reason or the other****. Now the learned counsel for the plaintiff after obtaining the injunctive order has gone for a long adjournment due to some health issues."*
> **Underline is mine for emphasis**

34. In its reply to the application under Section 34 of the Arbitration Act, the appellant asserts that ***"the defendant has no intention of going into the arbitration, they simply intend to award the contract to their own blue eyed,*** *this can be further seen from the fact that even though the Stay has been granted by this Honourable Court, the Defendant is not letting Plaintiff perform on the Contract".* The appellant is not clear in its version since on one hand it asserts that the NHA is not ready to refer the dispute to arbitration and on the other hand, it objects the filing of the application by the NHA under Section 34 of the Arbitration Act. Had the NHA not been ready,

willing and able to refer the disputes to arbitration, it could not have filed the application under Section 34 *ibid.*

35. In the case of **Pakistan International Airlines Corporation Vs. M/s Pak Saaf Dry Cleaners (PLD 1981 SC 553),** the Hon'ble Supreme Court, after making reference to Section 34 of the Act has *inter alia* held as follows:-

> *"**The Legislature has, of course, clearly implied in the language used in the section that the arbitration clause should be respected**, but has also made it abundantly clear that the party seeking to avail of the provision of stay under this section must clarify his position at the earliest possible opportunity, so as to leave no manner of doubt that he wishes to have resort to arbitration proceedings. **If he hesitates in this regard, or allows the suit to proceed in any manner, that conduct would indicate that he has abdicated his claim to have the dispute decided under the arbitration clause, and to have thereby forfeited his right to claim stay of the proceedings in the Court,**"*
> **(Underline is mine for emphasis)**

36. Similarly, in the case of **Province of Punjab v. Ehsan Fazal & Company, Lahore (1986 CLC 2800),** it was held as follows:-

> *"6. As noticed earlier no request was made by the District Attorney for adjournment for filing written statement on behalf of the appellants. There is also no application filed by the District Attorney in the Court seeking adjournment to file written statement. The case was adjourned by the Court in routine for filing written statement by the defendants. **On the next date of hearing the appellants filed application under section 34 of the Arbitration Act. In the circumstances it cannot be said that the appellants had waived their right to invoke the arbitration clause of the agreement or they had taken any step in the proceedings before moving the Court under section 34 of the The Actfor staying proceedings in the suit.**"*
> ***(Underline is mine for emphasis)***

37. In the case of **M/s Associates Construction Limited v. WAPDA (1989 MLD 206),** the plaintiff resisting an application for stay of the proceedings in the suit under Section 34 of the Act, had contended that since the matter had been adjourned for filing of the written statement prior to the filing of the application under Section 34 of the Act, the defendant had taken *'a step in the proceedings'* disentitling it to seek a stay of the proceedings in the suit. The Hon'ble Lahore High Court held **that as the defendant had not made any request or filed an application for an adjournment to file the written statement, and the adjournment order had been passed by the Court in routine, inference could not be drawn against the defendant**. The Hon'ble High Court upheld the order passed by the learned Civil Court allowing the defendant's application under Section 34 of the 1940 Act and staying the proceedings in the suit.

38. Furthermore, in the case of **Haji Soomar Haji Hajjan v. Muhammad Amin Muhammad Bashir Limited (1981 SCMR 129),** the Hon'ble Supreme Court has held as follows:-

> *".... We feel that where ever the parties to an Agreement expressly chose, through an arbitration clause, a forum other than a Court of law, for the settlement of their dispute, neither of them should normally be allowed to avoid that forum. The sole purpose of the Act is to curtail litigation in Courts and to promote the settlement of the dispute amicably through persons in whom both the parties repose their trust. Therefore the course that the Courts should generally follow is to encourage the settlement of disputes by this method where ever the parties have themselves agreed to do so. That this was also the intention of the Legislature is evident from the manner in which Section 34 of the Act is worded. To allow one side to evade and wriggle out from the agreement merely by making allegations of fraud, even though the same may not ultimately be proved or even pressed, would amount to giving a handle to that party to circumvent the arbitration clause. The apprehension was also expressed by the Chancery Division in Russell's case in the*

following words:

> *"....if the mere making of a charge of fraud would entitle the person making it to call upon the Court, in the exercise of its discretion, to refuse to refer to arbitration, there would be a very easy way of getting rid of all these clauses of arbitration. I am satisfied that the mere making of a charge will not do that, even in a case where the Court ought to exercise its discretion by refusing to refer the case to arbitration...."*

39. In the judgment dated 22.04.2016 passed by this Court in F.A.O. No.59 of 2013, titled "Infospan (Private) Limited Vs. M/s Telecom foundation and another" this Court had the occasion to hold as follows:-

> "13. If a *defendant* files a written statement or takes 'a step in the proceedings' he is not entitled thereafter to seek a stay of the suit. The term, 'step in the proceedings' has been judicially interpreted to mean such a step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Where the counsel appearing for the party to the suit had sought adjournments specifically for the filing of a written statement and had obtained time on more than one occasion for such a purpose, subsequent application for stay of suit has been held to be not maintainable. The party, in such a case is said to have evinced an intention to have the matter adjudicated by the Court.

40. Furthermore, it has been held as under:-

> *19. It is my view that a distinction need not be made between a situation where an adjournment is sought on behalf of the defendant to file a written statement, and a situation where a Court adjourns the matter for the filing of a written statement in the presence of the counsel or a representative of the defendant albeit without an application for an adjournment. Both the situations stand on the same footing and entail the same legal consequences. When a case is adjourned on six occasions in the presence of a defendant or its counsel for the filing of a written statement, the defendant cannot assert that such adjournments are no consequence to the defendant simply because he had not applied for an adjournment for the filing of written statement.*

20. Once the defendant has gone through the suit, he must, at the earliest make up his mind whether or not to submit to the jurisdiction of the Court. He must not dilly-dally but take a position at the first available opportunity. ***Even if the matter has been adjourned by the Court in routine for the filing of a written statement, the defendant, if he wants to opt for the dispute resolution mechanism contained in the contract, take corrective steps and inform the Court, without any delay, about his intention to seek stay of the suit. There is nothing stopping a defendant from seeking an adjournment for the filing of an application under Section 34 of the 1940 Act****."*

41. The admitted fact of the instant matter is that 04.08.2020, after passing a *status-quo* order, the matter was adjourned without there being an order for filing of the written statement. It is the NHA, who on the next date of hearing with due diligence, promptly filed an application under Section 34 of the Act and had not filed the written statement meaning thereby it did not step in the proceedings and straightaway resorted to file the said application. It is my view that a single adjournment granted by the Court in routine, requiring the defendant to file a power of attorney and/or the written statement cannot be termed as *'a step in the proceedings'*. The date on which this order was passed was the first date of on which the learned counsel for the NHA had tendered appearance before the Court. The conduct of the NHA, in order to be termed as 'a step in the proceedings' must be such as would manifestly display an unequivocal intention to proceed with the suit and give up the right to have the matter disposed of by arbitration.

42. In the case of **Rachappa Guruadappa Bijapur v. Gurusiddappa Nuraniappa and others (AIR 1989 SC 635),** it was held that *"where a counsel appearing for a party to the suit had sought adjournments specifically for filing of the written*

statement and had obtained time on more than one occasion for such a purpose subsequent application under Section 34 of the Act for the stay of the proceedings in the suit would not be maintainable because the applicant had, by seeking such adjournments, evinced an intention to have the matter adjudicated upon by the Court".

43. As regards the reliance placed by the learned counsel for the appellant on the case laws, I find the said judgments to be distinguishable inasmuch every case has to be seen on its own peculiar facts and circumstances and no hard or fast rule can be applied in order to bring the case in hand in the purview/conformity with the cited case laws. Furthermore, it is normally not difficult to extract the cause of action from the contents of the plaint and thus, in effect, to identify the dispute that ought to be referred to arbitration. It is also to be noted that Section 34 of the Act does not, as such, require that the defendant must specify the dispute in his application. It follows therefore, that in my respectful view, the failure to exactly identify the dispute in the application under Section 34 of the Act ought not to be regarded as fatal.

44. It is also well settled that it is neither a statutory nor a mandatory requirement of the law that the application under Section 34 of the 1940 Act must specify the disputes arising between the parties. Mere non-mentioning of the disputes in the application under the said Act would not render the application bad *ipso facto*. Moreover, the Court can by itself perusing the arbitration clause in the contract and the claim raised in the suit, determine whether the claim brought in the suit, sought to be stayed or otherwise, comes within the submission to arbitration.

45. The learned trial Court in the impugned order dated 06.11.2020 has not just stayed the proceedings in the civil suit, but has also put the aggrieved party at liberty to approach to the concerned forum by referring the matter to the arbitration if so needed.

46. In the wake of what has been discussed above, I do not find the impugned order dated 06.11.2020 to be suffering from any legal infirmity, calling for interference by this Court. Consequently, the appeal in hand is **dismissed** leaving the parties to bear their own costs. Appeal fails.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in an open Court on 26.07.2022.

JUDGE

ISLAMABAD │26.07.2022
APPROVED FOR REPORTING.

***//Kamran//**