JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. No.35 of 2021
Pakistan Medical Commission
Versus
Construction Experts (Pvt.) Limited and another

Dates of Hearing:	10.03.2022 & 07.09.2022
Appellant by:	Mr. Taimoor Aslam Khan, Advocate
Respondents by:	Sardar Muhammad Qadeer Hussain, Advocate along with Mr. Fawad Butt, C.E.O. for respondent No.1 Sardar Zafar Ullah Khan, Legal Advisor for respondent No.2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 39 of the Arbitration Act, 1940 (**"the 1940 Act"**), the appellant, Pakistan Medical Commission, impugns order dated 07.01.2021 passed by the Court of the learned Civil Judge, Islamabad, allowing respondent No.1's application under Section 20 of the 1940 Act praying for the disputes and differences between the appellant and respondent No.1 to be referred to arbitration. Furthermore, the contesting parties were called upon to submit the list of the proposed arbitrators. Vide order dated 27.01.2021, the learned Civil Court appointed Engineer Lt. Gen. (Retd.) Shahid Niaz as the sole arbitrator and required him to submit the award within a period of four months.

2. The record shows that after a competitive tender bidding process, the Pakistan Medical and Dental Council (**"P.M.&D.C."**) awarded the contract for the Construction of Extension to the Headquarter Building of P.M.&D.C. at G-10/4, Islamabad (**"the Contract"**) to respondent No.1 for a contract price of Rs.32,325,678/-. The Letter of Acceptance was issued by P.M.&D.C. on 22.02.2005 and works under the contract were required to be completed by 31.01.2006. A formal contract was executed between P.M.&D.C. and respondent No.1 on 29.03.2005. National Engineering Services Pakistan (Pvt.) Ltd. (**"NESPAK"**) was appointed by P.M.&D.C. as the Engineer.

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3. Clause 2 of the Contract shows that General Conditions Part-I (**"GC Part-I"**) and Conditions of Particular Application Part-IIA (**"CPA Part-IIA"**) and Conditions of Particular Application Part-IIB (**"CPA Part-IIB"**) were included in the contract documents.

4. The scope of works under the Contract had been enhanced which caused the Contract to be completed on 31.12.2009. The building in question has been in the occupation of P.M.&D.C. since that date. The defects liability period was completed a year later, on 31.12.2010.

5. After the award of the Contract, P.M.&D.C. had required respondent No.1 to carry out additional works for an amount of Rs.76.179 million without resorting to any tender bidding process. The additional works, not being part of the original Contract, were said to have been completed and handed over to P.M.&D.C. on 31.12.2012.

6. Respondent No.1 had submitted Interim Payment Certificate (**"IPC"**) No.28, dated 07.06.2012 for Rs.3,722,624/- and IPC No.29, dated 22.10.2012 for Rs.1,727,296/- to the Engineer. Respondent No.1 has also submitted its final bill including claims to the Engineer. The Engineer verified and approved payment of Rs.3,722,624/- against IPC No.28 vide letter dated 07.06.2012, and Rs.1,727,296/- against IPC No.29 vide letter dated 22.10.2012. P.M.&D.C., however, did not make payment to respondent No.1 against the said IPCs.

7. The matter regarding the award of additional work to respondent No.1 for an amount of Rs.76.179 million was examined by the Finance and Audit Committee of P.M.&D.C. and investigated by the National Accountability Bureau (**"N.A.B."**). It was alleged that the award of the additional work for an amount of Rs.76.179 million to respondent No.1 without a competitive tender bidding process was irregular and in violation of Rule 42 of the Public Procurement Rules, 2004. N.A.B. had recommended the recovery of Rs.2.73 million from respondent No.1's outstanding dues of Rs.5.57 million, which was the cumulative amount of IPC Nos.28 and 29 in addition to the retention money. The Finance and Audit Committee of P.M.&D.C. endorsed the said recommendation of N.A.B. and

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directed that after recovery of Rs.2.73 million, the balance amount of IPC Nos.28 and 29 be released to respondent No.1. This decision was also approved by the Council, in its 196th Session, held on 18.05.2019. Consequently, the position taken by P.M.&D.C. in its reply to respondent No.1's application under Section 20 of the 1940 Act is that *"on the recommendations of N.A.B."* payment has already been made to respondent No.1 after recovery of Rs.2.73 million.

8. Letter dated 25.01.2017 from N.A.B. to NESPAK shows that an investigation had been conducted by N.A.B. against Dr. Ahmed Nadeem Akbar, Ex-Registrar of P.M.&D.C.; Imran Taj, General Manager NESPAK; Aftab Ahmad, Associate Engineer NESPAK; Fawad Butt, Proprietor of respondent No.1; and others in case No.231119-Khi. This letter also shows that N.A.B. had required NESPAK to recalculate and revise the cost of extra items and variation works from IPCs submitted by respondent No.1 with respect to the contract and to intimate the remaining payable amount to Mr. Errol Phillip Wingson, Senior Investigation Officer, N.A.B.

9. Vide letter dated 30.01.2017, NESPAK informed P.M.&D.C. that IPC Nos.28 and 29 had been *"recalculated, revised and adjusted as per the directions of the National Accountability Bureau."* This letter also shows that various extra items and variations had been worked out by N.A.B. on the basis of Pak PWD schedule and Bureau of Statistics Bulletins for the years 2008-2012 and had been taken into account while determining the amount due to respondent No.1 under the said IPCs. Consequently, NESPAK revised and verified IPC No.28 to Rs.1,156,729/- and IPC No.29 to Rs.1,628,221/-. NESPAK recommended that the said amount against the revised IPCs be released to respondent No.1. It was also stated that these revised IPCs supersede earlier recommendations of NESPAK for payment of Rs.3,722,264/- against IPC No.28 vide NESPAK's letter dated 07.06.2012, and Rs.1,727,296/- against IPC No.29 vide letter dated 22.10.2012.

10. Vide subsequent letters dated 27.04.2017, 04.08.2017, 20.12.2018 and 08.01.2019, N.A.B. pressed P.M.&D.C. for the

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recovery of Rs.2.73 million from respondent No.1's outstanding dues against IPC Nos.28 and 29.

11. On 20.04.2019, respondent No.1 filed an application under Section 20 of the 1940 Act praying for the disputes arising from and related to the Contract to be referred to arbitration. Respondent No.1 also sought payment against IPC Nos.28 and 29 as well as its final bill up to 31.12.2018 and the release of the balance retention money. This application was contested by P.M.&D.C. by filing a written reply. In the written reply, P.M.&D.C. has strongly relied on the recommendations of N.A.B. to recover Rs.2.73 million from respondent No.1's outstanding dues. Be that as it may, vide order dated 07.01.2021, the learned Civil Court allowed respondent No.1's application under Section 20 of the 1940 Act, and vide order dated 27.01.2021 appointed Engineer Lt. General (Retd.) Shahid Niaz as the sole arbitrator.

12. The appellant's grievance against the impugned order is only to the extent that reference of the disputes between the parties could not have been made by the learned Civil Court to Engineer Lt. Gen. (Retd.) Shahid Niaz or any other person other than the Engineer named in the Contract, i.e. NESPAK.

13. Apparently, Lt. Gen. (Retd.) Shahid Niaz had refused to conduct the arbitration proceedings. Respondent No.1 has also filed an application before the learned Civil Court seeking the appointment of a new arbitrator.

14. Learned counsel for the appellant submitted that the GC Part-I stood amended by the CPA Part-IIA, which in turn was amended by the parties through CPA Part-IIB; that under the amended clause 67.1 contained in CPA Part-IIB, the assessment, decision, certification, determination, judgment, or opinion of the Engineer is final and binding on respondent No.1 unless the latter disputes the same and refers it for the decision of the Engineer; that clause 1.1(a)(iv) of CPA Part-IIA provides that the Engineer is NESPAK; that the dispute qua any certification etc. by the Engineer could only be referred to the Engineer and no one else; that if the learned Civil Court were to refer the disputes to an arbitrator other than the Engineer, it would amount to re-writing the contract between the

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parties; and that the appellant would have no objection if the order allowing the application under Section 20 of the 1940 Act is sustained but the disputes are referred to the Engineer as provided in clause 67.1 of CPA Part-II B. Learned counsel for the appellant prayed for the orders dated 07.01.2021 and 27.01.2021 to be modified by referring the disputes for the decision of the Engineer named in the contract.

15. On the other hand, learned counsel for respondent No.1 submitted that NESPAK, as the Engineer, had already acted under the pressure and dictates of N.A.B. by revising respondent No.1's IPC No.28 from Rs.3,722,624/- to Rs.1,156,729/- and IPC No.29 from Rs.1,727,296/- to Rs.1,628,221/-; that NESPAK's letter dated 30.01.2017 clearly shows that IPC Nos.28 and 29 were recalculated and revised *"as per directions of the National Accountability Bureau";* that NESPAK was expected to act impartially and strictly in accordance with the law and the provisions of the Contract; that instead the NESPAK revised downward his already certified and verified IPC Nos.28 and 29; and that respondent No.1 does not expect NESPAK to act as an impartial adjudicator since in the past it has revised respondent No.1's already verified IPC Nos.28 and 29 on the directions of N.A.B. Learned counsel for respondent No.1 prayed for the appeal to be dismissed and for the disputes agitated by respondent No.1 to be referred to an impartial arbitrator.

16. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 13 above, and need not be recapitulated.

17. Clause 1.1(a)(iv) of the GC Part-I defines an "Engineer" to mean the person appointed by the Employer to act as Engineer for the purposes of the contract and named as such in Part-II. Clause 1.1(a)(iv) of the CPA Part-IIA provides that the "Engineer" is NESPAK or any other competent person appointed by the Employer and notified to the Contractor to act in replacement of the Engineer.

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18. Clause 67.1 to 67.4 of the GC Part-I set out the mechanism for settlement of disputes between the parties to the Contract. Clause 67.3 of the General Conditions provided for disputes in respect of which the decision of the Engineer had not become binding on the parties, and an amicable settlement had not been reached between the parties, to be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules.

19. Clause 67.3 of the CPA Part-IIA substituted the words *"Rules of Conciliation and Arbitration of the International Chamber of Commerce"* in Clause 67.3 of the GC Part-I with the words *"the provisions of the Arbitration Act, 1940."*

20. Clauses 67.1 to 67.4 in CPA Part-IIA were replaced in their entirety with clause 67.1 in CPA Part-IIB, which is reproduced herein below:-

> ***"Wherever in the contract, provision is made for any question, arrangement, amount, matter or thing being settled, decided, certified or determined by the Engineer or the Engineer's Representative or resting upon or being governed or controlled by or submitted to the judgment or opinion of either of them, his assessment, decision, certificate, determination, judgment or opinion shall be final and conclusive for all purposes and shall be binding on the Contractor unless within fourteen (14) days of the receipt thereof the Contractor by notice in writing disputes and refers the same for the decision of the Engineer in accordance with para 67.2 hereof."***

21. It is not disputed that CPA Part-IIB are additions, deletions and amendments to GC Part-I and CPA Part-IIA. This is explicitly set out in the preamble to the CPA Part-IIB. Since Clause 67 of CPA Part-IIB deleted clauses 67.1 to 67.4 in their entirety and replaced them with clause 67.1 set out in CPA Part-IIB, the only remedy available to the contractor / respondent No.1 on being dissatisfied with any assessment, decision, certification, determination, judgment, or opinion of the Engineer or the Engineer's representative was to seek a reference within a period of fourteen days to the Engineer. The CPA Part-IIB, being additions, deletions and amendments to GC Part-I and CPA Part-IIA, are to be taken into consideration while interpreting or construing the Contract.

22. The basic concept at the root of arbitration under the 1940 Act is an "arbitration agreement." Section 2(a) of the 1940 Act

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defines an "arbitration agreement" to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. The definition itself is simple and clear enough. All that is required is that it should be in writing and provide for differences between parties to be referred to arbitration. Such an agreement is the foundation of every proceeding under the Act, and where there is no such agreement, or no differences between the parties, an arbitration cannot take place. An agreement to arbitrate is not required to be stated in any particular form or wording and the use of the technical or formal words such as "arbitration" and "arbitrator" is not required. The essential requirement is that the parties should intend to make a reference or submission to arbitration and should be *ad idem* in this respect. In order to determine whether or not a particular clause in a contract is an arbitration clause, the Court has to look at its substance and not its form.

23. An arbitration agreement is primarily an agreement and, therefore, to be construed as any agreement. Although Clause 67.1 in CPA Part-IIB makes no mention of the words "arbitration" or "arbitrator," it does provide for the contractor's dispute regarding any question, arrangement, amount, matter, or thing being settled, decided, certified, or determined by the Engineer or the Engineer's Representative to be "referred" for the "decision" of the Engineer. It is our view that the said clause fulfills the requirements of an arbitration agreement as defined in Section 2(a) of the 1940 Act. In holding so, reliance is placed on the following case law:-

(i) In the case of Shan Muhammad Vs. Nawab (PLD 2001 Lahore 239), the Hon'ble Lahore High Court held that a *"tehkeemnama"* in the said case had the essential ingredients of an arbitration agreement within the meaning of Section 2(a) of the 1940 Act as it provided for present or future differences between the parties to be referred for a decision by Darbar Sial Sharif, District Sargodha, whereas *"hukam sharai"* passed on a reference was held to be an award within the meaning of Section 2(b) of the said Act.

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(ii) In the case of Punjab State Vs. Dina Nath (2007 (5) SCC 28), after making reference to Section 2(a) of the 1940 Act, it was held that omission of the words "arbitration" and "arbitrator" from a dispute resolution clause in a contract cannot be a ground to hold that the said clause was not an arbitration agreement, and that essential requirements are that the parties have intended to make a reference to an arbitration and treat the decision of the arbitrator as final. Furthermore, it was held as follows:-

> ***"A bare perusal of the definition of arbitration agreement would clearly show that an arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if any dispute arises between them in respect of the subject matter of the contract, such dispute shall be referred to arbitration. In that case such agreement would certainly spell out an arbitration agreement. (See Rupmani Bai Gupta v. Collector of Jabalpur AIR 1981 SC 479) However, from the definition of the arbitration agreement, it is also clear that the agreement must be in writing and to interpret the agreement as an 'arbitration agreement' one has to ascertain the intention of the parties and also treatment of the decision as final. If the parties had desired and intended that a dispute must be referred to arbitration for decision and they would undertake to abide by that decision, there cannot be any difficulty to hold that the intention of the parties to have an arbitration agreement; that is to say, an arbitration agreement immediately comes into existence."***

(iii) In the case of K.K. Modi Vs. K.N. Modi (1998 (3) SCC 573), the Indian Supreme Court had laid down the test as to when a clause in a contract can be construed to be an arbitration agreement. In paragraph 17 of the said judgment, it was *inter alia* held that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law; and that the agreement must contemplate that the tribunal will make a decision upon a dispute, which is already formulated at the time when reference is made to tribunal.

(iv) In the case of Bihar State Mineral Development Corporation Vs. Encon Building (2003 (7) SCC 418), the Indian Supreme Court held that *"there is no dispute with regard to the proposition that for the purpose of construing an arbitration agreement, the term "arbitration" is not required to be specifically mentioned therein."*

(v) In the case of Girdhari Lal Bansal Vs. Bhakhra Beas Management Board (AIR 1985 Punjab and Haryana 219), it was held that where a clause in a works contract speaks of disputes between parties and for reference of the same to the Superintending Engineer, and though the words arbitration and award were not mentioned in the clause but the clause was clear enough to show that the dispute which was to arise had to be referred to the Superintending Engineer, it could not be said that there was no arbitration agreement between the parties.

(vi) In the case of State of U.P. Vs. Sardul Singh Kulwant Singh (AIR 1985 Allahabad 67), it was held that where the substance of a clause in a contract was that all disputes between the parties will be referred to arbitration by a named person and his decision was to be final and legally binding on the parties, the clause was an arbitration clause.

(vii) In the case of Prahraj Partners Vs. State of Orissa (AIR 1981 Orissa 104), it was held that no particular form was needed to bring into existence an arbitration agreement, nor was it necessary that words like "arbitrator" or "arbitration" need be mentioned in an arrangement where parties had really intended to submit their differences or disputes to arbitration.

24. Now, the vital question that must be answered is whether it was obligatory on the learned Civil Court to have referred the disputes between the appellant and respondent No.1 to arbitration by the Engineer (i.e., NESPAK) or could any other arbitrator have been appointed.

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25. Clause 67.1 of CPA Part-IIB gives the contractor the right to dispute the decision, certification or determination etc., of the Engineer or Representative of Engineer in a reference before the Engineer. The Engineer is the forum named in the Contract to whom disputes under clause 67.1 of CPA Part-IIB can be referred to. One would wonder how a decision of an Engineer made under any of the provisions of the contract can be disputed before the same Engineer and expect him to come to a different conclusion from the one taken earlier. But the scheme of a FIDIC (Federation International Des Ingenieurs-Counseils) standard form contract, on which the contract in the case at hand is based, envisages the role of the Engineer under the dispute resolution clause (i.e., clause 67) to be that of adjudicator, to sit in judgment over his own assessment, decision, certificate, determination, judgment, or opinion given under different provisions of the contract. The Engineer, while deciding a dispute under Clause 67.1 in CPA Part-IIB, can come to a conclusion different from the one taken earlier by him. The Engineer, while sitting in an adjudicating capacity, is not bound by his earlier decisions given under different provisions of the contract. Even though the Engineer is employed and paid by the employer he is expected to act impartially while deciding a dispute referred to him under said clause. An obligation to act impartially between the parties is required as part of the general duty imposed on arbitrators. Failure to observe this fundamental requirement may lead to the removal of the arbitrator on the grounds of actual or apparent bias.

26. In the case of Pak. U.K. Association (Pvt.) Ltd. Vs. The Hashemite Kingdom of Jordan (2017 CLC 599), the applicant / contractor had alleged bias against the Engineer as a justification for not referring disputes to him under clause 67.1 of the contract. This position was dealt with by this Court in the following terms:-

> ***"30. It must be borne in mind that in this case the matters in dispute between the applicant and the respondent have not been referred for the Engineer's decision under Clause 67.1 of the contact. There is only an apprehension of bias lurking in the mind of the applicant. The question, whether the named or selected Engineer is likely to act in a biased or unfair manner is always a question of fact which must be answered with reference to the facts and circumstances of each case. In this case, the allegations***

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made by the applicant against the Engineer are not, in my view, sufficient to relieve the parties from their bargain and nullify Clause 67.1 of the contract.

31. FIDIC stands for Federation Internationale Des Ingenieurs-Conseils, which is an association of national associations of Consulting Engineers. FIDIC have produced standard forms of contracts for civil engineering projects. The contract dated 16.06.2010 between the applicant and the respondent is one such contract. "The Engineer" plays a significant role in the execution of such a contract. The Engineer is intended to act both as agent of the Employer in the process of obtaining for the Employer the project required, and as an independent person for the administration of the contract and for the settlement of disputes. The Engineer is required to make certifications and other determinations independently of the Employer and impartially as between the parties. Clause 2.6 of the contract places an express obligation upon the Engineer to act impartially as between the parties. The Engineer performs the functions of a designer, quality controller, valuer and certifier, and that of an adjudicator under clause 67.1 of the contract. The Engineer is required to consult with the parties under several clauses prior to granting extensions of time, fixing rates, or making an award of costs.

32. More often than not, the Engineer's certifications, valuations, determinations and decisions are subjected to challenge under Clause 67.1 of the contract. The Engineer is, therefore, called upon to judge whether his own actions were correct or not. The mere fact that the Engineer has taken a certain position on a certain matter does not disqualify him from sitting in an adjudicating capacity over that matter under clause 67.1 of the contract. In exercise of his adjudicatory powers, the Engineer can review, modify, uphold or reverse his certifications, valuations, determinations or decisions which have been subjected to challenge under clause 67.1 of the contract. The Engineer sits in a different capacity when settling disputes as an independent adjudicator.

33. In the case of Muhammad Ishaque Qureshi v. Azad J&K. Government (PLD 1962 Azad J&K 1), it has been held by the Hon'ble Supreme Court of Azad Jammu and Kashmir as follows:-

> *"I am of the opinion that where the parties have entered into an agreement with their eyes open knowing fully well that the Arbitrator agreed upon is an employee of one party and that as executive head of the department he is likely to make certain orders they cannot be allowed to resile from this agreement simply on the suspicion that the said officer would stick to his decisions taken or opinion formed while acting as such executive officer. When a party accepts an employee of the other party as an Arbitrator he accepts him as a gentleman who has an open mind and also a judicious mind."*

34. The mere fact that the Engineer had, in the past, given decisions against the applicant or had expressed a view/opinion adverse to the applicant regarding his performance as contractor, cannot be made a ground for avoiding the contractual obligation of referring disputes to the Engineer in terms of clause 67.1 of the contract."

27. The GC Part-I places an obligation upon the Engineer to act impartially between the parties. Clause 2.6 titled *"Engineer to act impartially"* provides *inter alia* that whenever, under the Contract, the Engineer is required to exercise his discretion by giving his decision, opinion or consent etc., he shall exercise such discretion impartially within the terms of the contract and having regard to all the circumstances. There are a host of decisions which the Engineer takes in his independent capacity. For instance under clause 67.1 of the CPA Part-IIB, a dispute can be referred by the employer or the contractor to the Engineer for his decision. Under the said clause, the Engineer is called upon to judge whether his own opinion, instruction, determination, certification, or evaluation was correct or not.

28. The basic idea of arbitration is the settlement of disputes by tribunals chosen by the parties themselves whose decision is to be accepted as final between themselves. Due weight has to be given to the arrangement made by the parties themselves relating to the personnel and machinery for the settlement of their disputes. It is settled law that in the case of a named arbitrator, reference has to be made to him and a party is precluded from approaching the Court for appointing an arbitrator other than the named arbitrator. Once a party enters into an agreement with eyes wide open, it cannot wriggle out of the situation on the claim that the designated person would not be impartial or objective. However, if at the conclusion of the arbitration proceedings respondent No.1 feels that the arbitrator had not acted independently or impartially or had suffered bias while rendering the award it will always be open to it to take this as a ground in its application under Section 30 of the 1940 Act for setting aside the award. Additionally, during the course of the arbitration proceedings, if the arbitrator proceeds with the reference in a manner as to give reason to respondent No.1 to believe that he is misconducting the proceedings, he can file an application under Section 5 of the 1940 Act to revoke the authority of the arbitrator or an application under Section 11 of the said Act for the removal of the arbitrator. In paragraphs 5-52 of Russell on Arbitration (22nd Edition), it is stated that *"an arbitrator*

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must also appear impartial and if there are justifiable doubts as to his impartiality this will provide a ground for his removal by the court."

29. The Court should adhere to the terms of the arbitration clause except in exceptional cases for reasons to be recorded or if the named person is not available or cannot be appointed, or where both parties agree on an arbitrator other than the one named or designated in the agreements. It was bearing this principle in mind that this Court asked the learned counsel for the appellant if the appellant would agree to this Court nominating an arbitrator other than the Engineer. Learned counsel for the petitioner, after taking instructions, submitted that the appellant insists upon reference of disputes to the arbitrator named in the Contract, i.e. NESPAK, and no one else. Sans the parties' consent, the Court cannot re-write the Contract between the parties by substituting the Engineer with any other arbitrator. In the case of S. Rajan Vs. State of Kerala (1992 (3) SCCC 608), the Indian Supreme Court was called upon to interpret Section 20(4) of the 1940 Act, which reads thus:-

> ***"(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court."***
> **(Emphasis added)**

The Court considered the scope of Section 20(4) of the 1940 Act and held as follows:-

> ***"Sub-section (4) of Section 20 says that the reference shall be to the arbitrator appointed by the parties. Such agreed appointment may be contained in the agreement itself or may be expressed separately. Where the agreement itself specifies and names the arbitrator, it is obligatory upon the court, in case it is satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It is not open to the Court to ignore such an arbitration clause of the agreement and to appoint another person as an arbitrator. Only in cases where the arbitrator specified and named in the agreement refuses or fails to act or where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appoint an arbitrator. Since in the present case the agreement specified and named the arbitrator, there was no occasion or warrant for the court to call upon the parties to submit panels of arbitrators. The court was bound to refer the dispute only to the arbitrator named and specified in the agreement."***

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30. Additionally, in the case of Government of A.P. Vs. Mastan Rao (1995 Supp. (4) SCC 528), the agreement between the parties provided for settlement of a dispute by three persons holding the post of Chief Engineer of the project, Deputy Secretary to Government, Finance Department, and the Director of Accounts of the project. On the petition made by the contractor, the subordinate judge removed the panel of three arbitrators and appointed a retired Chief Engineer as the sole arbitrator to adjudicate the dispute. That Court, after taking into consideration the terms of the agreement, set-aside the order passed by the subordinate judge and directed that the arbitration matter should be entrusted to the incumbents of the three posts mentioned in the agreement.

31. The correspondence between the Engineer, P.M.&D.C. and N.A.B. referred to in paragraphs 8 to 10 herein above shows that but for the repeated recommendations of N.A.B. to make recoveries from respondent No.1, the Engineer might not have revised downward the already certified IPCs No.28 and 29. In the case of Hormusji & Daruwala Vs. District Local Board, Karachi (AIR 1934 Sind 200), it was held that although the Court was bound to start with a strong bias in favour of maintaining the special bargain between the parties, it must at the same time consider all the circumstances of the case with vigilance to see that it was not driving either of the party to a tribunal where there was a likelihood of his not getting substantial justice.

32. Now, the mere fact that earlier the Engineer revised respondent No.1's IPC No.28 from Rs.3,722,624/- to Rs.1,156,729/- and IPC No.29 from Rs.1,727,296/- to Rs.1,628,221/- on the directions of N.A.B., it would, at this stage when the Engineer has not even entered upon reference, be premature to hold that the Engineer while conducting the arbitration proceedings would still be under the influence of N.A.B. and render an award against respondent No.1. This Court cannot re-write the contract between the parties by referring the disputes to a person other than the one chosen by the parties in clause 67.1 of CPA Part-IIB. This Court

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assumes and shall continue to assume that NESPAK, while taking a decision on the disputes referred to it by respondent No.1, would act impartially and would not in any manner be influenced by the views or directions of N.A.B.

33. Vide judgment dated 23.09.2020 passed in writ petition No.3886/2015 titled "M/s Moin Sons (Pvt.) Ltd. Vs. Capital Development Authority," the Division Bench of this Court set-aside a letter issued by the Capital Development Authority whereby the petitioner in the said case had been directed to deposit Rs.4.271 million solely on the basis of a letter from N.A.B. requesting to make recoveries from the petitioner. Paragraphs 13 to 17 of the said judgment are reproduced herein below:-

> ***"13. The authority of N.A.B. to investigate allegations of corruption and corrupt practices during the execution of the contract for the construction of Parliament Lodges is not disputed. N.A.B. may well have carried out investigation in the matter and its findings may well have been that recoveries should be affected from the petitioner or that departmental action should be taken against employees of C.D.A. However, the investigation carried out by N.A.B. did not culminate in the filing of a reference against the petitioner or the employees of C.D.A. After having given findings in the inquiry report, there was nothing preventing N.A.B. from filing a reference against the petitioner and/or the employees of C.D.A. Instead N.A.B., vide letter dated 06.04.2006, requested the Chairman, C.D.A. to recover the loss from the petitioner and to take necessary action against the officials of C.D.A. Solely on the basis of the said letter, C.D.A., vide letter dated 23.08.2006, directed the petitioner to deposit Rs.4.271 million with C.D.A. within a period of seven days failing which the recovery would be affected from the petitioner's dues under other projects and the balance amount would be recovered through the Collector/Special Magistrate, C.D.A. under the Land Revenue Act.***
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> ***14. The learned counsel for C.D.A. admitted that till date, no departmental proceedings has been initiated against any of the officials of C.D.A. on the basis of N.A.B.'s letter dated 06.04.2006. He also admitted that no claim had been submitted by C.D.A. against the petitioner in accordance with the provisions of the contract executed between the said parties.***
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> ***15. Learned counsel for C.D.A. could not point out any provision in the N.A.O. which authorizes N.A.B. to call upon a statutory body to affect recoveries from a contractor only on the basis of N.A.B.'s findings in its investigation report. Unless the findings of N.A.B. in an investigation or an inquiry report are proved in an adjudicatory process by an Accountability Court in accordance with the provisions of N.A.O., the persons against whom such findings are given would be presumed to be innocent.***
>
> ***16. At best, N.A.B.'s letter dated 06.04.2006 could be treated as provision of information and material to C.D.A. so that the latter could apply its mind and initiate a process in accordance with the***

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provisions of the contract and the law for the determination of its claims and the recovery of the amount so determined in its favour. C.D.A. without having filed a claim against the petitioner in accordance with the provisions of the contract and without having determined such a claim in its favour could not have directed the petitioner to deposit Rs.4.271 million. Inquiry or investigation reports of N.A.B. alone cannot be treated as conclusive proof of guilt or liability of persons with whom findings in such reports are given. As mentioned by N.A.B. in its letter dated 14.09.2020, it did not make any direction to C.D.A. and the letter dated 06.04.2006 was issued to the Chairman, C.D.A. with the request to take necessary action "at its own end" regarding the loss to the national exchequer. Since the relationship between the petitioner and C.D.A. was governed by the provisions of contract for the construction of Parliament Lodges, the action for the determination of C.D.A.'s claims and the recovery of the determined amount from the petitioner was to take place in accordance with the provisions of the said contract.

17. In view of the above, the instant writ petition is allowed and the letter dated 23.08.2006 from C.D.A. to the petitioner is set-aside. Before parting with this judgment, it may be observed that C.D.A. shall be at liberty, subject to law, to initiate a process of having its claims against the petitioner determined and recover the determined amount, if any, from the petitioner in accordance with the provisions of the contract."

34. The Engineer, while verifying or certifying an IPC, acts in discharge of his responsibility to administer the Contract. However, while deciding a dispute between the appellant and respondent No.1, he is to act as an adjudicator. If N.A.B. were to interfere with the Engineer's duties as an arbitrator, as it did while the Engineer revised his already certified IPCs No.28 and 29, it would not just amount to perversion of the course of justice but would also be an actionable wrong. Similarly, where the Engineer lets himself be influenced by such a rank outsider to the contract while rendering an award, it would amount to "misconduct" not just as is understood in the arbitration parlance but also in the true sense of the word, i.e. wrongdoing. The very essence of impartial adjudication is defeated where an adjudicator allows his mind to be influenced by a third party who does not have any statutory power or contractual authority to administer the contract. The adjudicator must not let himself be coerced into deciding a claim one way or the other.

35. In view of the above, the instant appeal is partly allowed; the order of the learned Civil Court referring the disputes between the appellant and respondent No.1 to arbitration is maintained; the

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order of the learned Civil Court to the extent of appointing Engineer Lt. Gen. (Retd.) Shahid Niaz as the sole arbitrator is set-aside; and the disputes between the said parties are referred to the Engineer in terms of clause 67.1 in CPA Part-IIB. The Engineer is expected to decide the disputes between the appellant and respondent No.1 totally uninfluenced by N.A.B.'s overtures. There shall be no order as to costs.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 08/09/2022

(JUDGE) **(JUDGE)**

Qamar Khan

APPROVED FOR REPORTING

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