JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. no.70 of 2022
National Highway Authority (NHA)
Versus
M/s Sardar Muhammad Ashraf D. Baloch (Private) Limited and another

Appellant by:	Mr. Muhammad Hassan Alam, Advocate
Respondents by:	M/s Babbar Ali Khan and Jawad ur Rahim Malik, AdvocateS
Date of Hearing:	**13.02.2023**

Sardar Ejaz Ishaq Khan, J: In this appeal under section 39 of the Arbitration Act 1940, the appellant National Highway Authority (**NHA**) appeals from the impugned order dated 25.03.2022, whereby the learned Civil Judge dismissed the appellant's objection petition under sections 33 and 30 of the Arbitration Act for setting aside the arbitration award dated 14.09.2021 and made the award the rule of the Court.

2 By way of brief background, NHA awarded a contract for rehabilitation of one of its national highways. Just about when the contract was completed, road rutting started to occur. NHA and the Contractor remained in disagreement as to whether the rutting was the result of design flaws and premature opening of the road by NHA, the risk for which per the construction contract was to carried by the NHA, or was the result of defective workmanship by the Contractor, the risk for which was to be carried by the Contractor. Eventually, the Contractor agreed to carry out the repair works for rutting, completed the rutting works, and raised a payment claim. The claim was rejected by the Engineer and also by the Dispute Adjudication Board (DAB), but was allowed by the learned Arbitrator along with late payment charges. The Contractor filed an application under section 14 of the Act for the award to be filed in Court along with a cam-scanner copy of the award, and NHA filed its objections thereto, but the objections were dismissed by the civil Court for being barred by time. However, the impugned order making the award the rule of Court went on to examine the award and found it in order and hence made it the rule of Court. The (material) grounds of appeal raised before this Court are discussed below.

Dismissal of objections due to expiry of the limitation period

3 Learned counsel contended that the application under section 14 was filed on 02.11.2021. Notice was received by NHA on 17.11.2021 and it filed its objections on 07.01.2022. The civil Court applied article 158 of the Limitation Act 1908, which stipulates a period of limitation of 30 days for an application to set aside an award or to get an award remitted for reconsideration. The 30 days are to be calculated from the date of service of the notice of filing of award. Learned counsel for NHA contended that the learned civil Court fell in error in treating an application under section 14 of the Act asking the Court to direct the learned Arbitrator to file the award in Court as if the award had already been filed. He contended that under section 14 an award had to be signed and filed, and it was only thereafter that the 30 days limitation period were to commence, and an application for the Court to direct the learned Arbitrator to file the award could not be equated with the filing of the award.

4 Learned counsel for the respondent Contractor contended that on 29.11.2021, the entire record of the arbitration including copies of the signed award were filed by the learned Arbitrator with the Court, and even then the NHA's reply filed on 07.01.2022 was late by 8 days for being filed on the 38th day after the signed award was filed by the learned Arbitrator in the Court. To this learned counsel for NHA responds that no fresh notice was issued by the civil Court and the earlier notice of the Contractor's application for the award to be filed did not satisfy the requirements per article 158 of the Limitation Act. He referred to section 14(2) of the Act to submit that the notice contemplated for the purposes of section 14(2) could only be issued (by use of the word 'thereupon') after the award or a signed copy of it had been filed by the learned Arbitrator with the Court.

5 Learned counsel for NHA has a valid point. However, in the specific circumstances of this case, the award stood filed within 12 days of the notice received by NHA on 17.11.2021, and it would be putting a hyper-technical gloss on the matter by considering that the time was at large because NHA did not receive a fresh notice after filing of the award on 29.11.2021. As the arbitrator had filed the award on 29.11.2023, and NHA was all along on notice, it filed its objections with reference to an award the existence of which it did not deny at any time. However, in my view NHA suffered no prejudice

because, as noted above, the civil Court went on to scrutinize the award before making it a rule of Court.

6 Above all, the purpose of arbitration is to provide a swifter method of dispute resolution and it would defeat the purpose of the arbitration law if this appellate Court were to return this appeal on this ground for the civil Court to decide NHA's objections afresh by taking them to have been filed within limitation, which is what NHA contends. Learned counsel for NHA was therefore asked by this Court sitting in appeal to air those objections before the appellate Court, which he did per the memo of appeal, and to which I now turn as objections on the merits of the award.

The parameters for scrutiny of an award

7 But before I do so, I consider it appropriate to recount the settled parameters for the scrutiny of an award by the civil Court and, by extension, by the appellate Court. While the law in this regard is fairly scattered in terms of its principles, there is complete consensus that the Court is not to sit as an appellate authority over the award[1], and does not appraise the evidence in the same manner as an appellate Court would, rather, the scope is more akin to that of a revisional Court, whereby a material misreading of evidence or failure to consider relevant evidence or coming to a perverse conclusion on the basis of evidence are the narrower grounds on which the Court may disagree with the award *if the error is apparent on the face of the award*. The following paragraph from *M/s Joint Venture (supra)* summarizes these parameters quite succinctly:

> We may mention here that the Court while examining the validity of an award does not act as a Court of appeal. Therefore, a Court hearing the objection to the award cannot undertake reappraisal of evidence recorded by the arbitrator in order to discover the error or infirmity in the award. The error or infirmity in the award which rendered the award invalid must appear on the face of the award and should be discoverable by reading the award itself.

8 Another rendition of the same principle was laid down in the OGDCL case[2] that a presumption of correctness was attached to the award. Therefore,

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[1] *M/s Joint Venture KG/Rist vs. Federation of Pakistan* (PLD 1996 SC 108)
[2] *Oil and Gas Development Company Limited vs. M/s Marathon Construction Company and another* (2013 CLD 1483)

as long as the conclusions reached by the learned Arbitrator on appraisal of evidence presented before it could validly be reached, then the mere fact that an alternative conclusion was possible would not be sufficient for the Court to disturb the award[3]. It is within these parameters that I proceed to consider NHA's objections in this memo of appeal and at the bar. I also observe that the award is a detailed and very well-reasoned one with meticulous attention to the various items of evidence.

Scope of Clause 20.1 of the Construction Contract

9 The next ground of appeal was that the learned Arbitrator extended the scope of clause 20.1 of the contract by accepting as valid a claim filed by the Contractor beyond the 28 days stipulated in clause 20.1, and by accepting the Contractor's 'fully substantiated claim' filed beyond the 42 days stipulated in the same clause. Clause 20.1 of the contract deals with the timelines for the Contractor's claims. It is NHA's case that the 'fully substantiated claim' was not submitted by the Contractor within 42 days after his notice of intent to claim was served, and that the learned Arbitrator therefore ought to have dismissed that fully substantiated claim just as it was done by the Engineer and the DAB.

10 This ground is dealt with at pages 9 and 10 of the award in much detail. I have reviewed that reasoning with reference to the evidence cited therein, and find no error apparent in the reasoning and analysis therein. It is common ground that the notice of intent to claim under clause 20.1 was given on 09.06.2015, which was within 28 days following the firm instructions by NHA to the Contractor in the meeting held on 19.05.2015 to proceed with the repair works. The fully substantiated claim was submitted by the Contractor on 06.11.2015, which NHA contends was beyond the 42 day timeframe stipulated in clause 20.1, but has been adequately answered in the award by holding that the works were ongoing after the notice of intent to claim was served, the requests for inspection of works were regularly sent by the Contractor to NHA from October to November 2015 for the purposes of certifying the completion of rectification works (so that the requisite payment certificate could be issued) and, hence observed the learned Arbitrator as follows:

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[3] *Mian Corporation vs. M/s Lever Brothers of Pakistan Limited* (PLD 2006 SC 169)

> The contemporary record shows that the subject 8km stretch was worked upon by the Claimant, while the Respondent as well as the Engineer and Resident Engineer were kept fully abreast of the same on timely basis. The Claimant could not have done a better job in keeping all relevant parties informed, therefore, the spirit of Clause 20 is fully satisfied. Therefore, I hold that there was no requirement to file a substantiated claim within a period of 42 days from the notice of intent, especially when the rectification works had not been completed within 28 days of the notice of intent to claim dated 9 June, 2015 … Lastly on this count I am also not in agreement with the Respondent's stance that failure to file the substantiated Claim within time leads to the disentitlement, as the language of Clause 20.1 makes a marked distinction between the failure to file timely notice of intent to claim and the substantiated claim. As such it is the failure to file the notice of intent to claim within 28 days that leads to disentitlement of the claim, however failure to file the substantiated claim does not lead to disentitlement altogether in my opinion. While there is a contractual bar on the Claimant's claim in case it had not filed the notice of intent to claim within the 28 day time limit, there is no such indication in case of failure to file substantiated claim within timeframe provided.

11 I have reviewed clause 20.1 in its entirety and find no error in this interpretation of clause 20.1 and, therefore, I am unable to agree with the submission of learned counsel for NHA that the fully substantiated claim time limit had been violated. I add that it would be an absurd construction of clause 20.1 to require submission of a fully substantiated claim within 42 days of the notice of intent to claim when the works to which the claim was to relate were still being undertaken in that timeframe. Accordingly NHA's aforesaid objection stands rejected.

Interest or Mark-up

12 NHA urged that the learned Arbitrator did not have the power to grant interest prior to the date of the award. This submission is incorrect on record. The learned Arbitrator did not award interest per se, but awarded 'financing charges' at the annual rate of 3% above the discount rate of the State Bank of Pakistan in terms provided in the contract. NHA's counsel's reliance on the judgments that an arbitrator does not have the power in view of section 29 of the Arbitration Act 1940 to grant interest for any date before the award is defeated by those very judgments, because the exception of the contract providing otherwise is recognized therein. An arbitrator can award interest or late payment charges both before and after the date of the award if it is permitted by express or implied agreement between the parties. That express agreement is encapsulated in clause 14.8 of the contract. The contract in this

case is a FIDIC Contract[4]. This form of contract is used worldwide, and has generated numerous treatises and commentaries by construction law practitioners around the world and by FIDIC itself. Clause 14.8 in so for as material reads as follows:

> If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of its sub-paragraph (b)) of the date on which any interim Payment Certificate is issued.
>
> Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, or if not available, the interbank offered rate, and shall be paid in such currency.
>
> The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy.

13 The predominant consensus of commentators is that the entitlement of the contractors under clause 14.8 to the payment of the financing charges 'during the period of delay' for being not dependent on any formal notice or certification translates into a compensatory clause for the Contractor when a dispute resolution forum, be that the Engineer, the DAB, or the arbitrator, comes to the conclusion that the Contractor ought to have been paid from a prior date but was not so paid. To quote one such commentary[5]:

> The new clause 14.8 makes the point clear beyond doubt, by expressly providing that the Contractor need make no claim for accrued financing charges (or give any notice or statement) before becoming entitled to receive them.

14 NHA's related argument that the financing charges under clause 14.8 are dependent on a payment certificate being issued by the Engineer for payment being due in accordance with clause 14.7 is also without substance. Clause 14.7 requires an interim payment certificate to be issued by the Engineer, but where the Engineer declines to issue the payment certificate for whatever reason, genuine or not at the time, but is later found by the DAB, the arbitrator,

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[4] Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, Multilateral Development Bank Harmonised Edition, June 2010.

[5] William Godwin QC, Wiley, Blackwell, 2020

or even by the Court, to have been wrong in withholding the payment certificate, then the payment for the purposes of clauses 14.7 and 14.8 is to be taken as due from the date when it should have been issued. For any other interpretation would mean that the Contractor is to carry the financing costs for the duration a dispute with the Employer lingers. Not only would such construction run against the spirit and intent of clauses 14.8 and 14.7 read together, it would, in my humble view, be such a major stipulation as to require express statement in the contract. The point that obtaining a payment certificate is neither a condition precedent for a Contractor to be entitled to payment nor that the absence of such a certificate bars the right of payment stands expressed in emphatic terms as follows[6]:

> It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the engineer's decision is not binding, it can be reviewed by an arbitrator (if there is an arbitration clause which permits such a review) or by the court. If the arbitrator or the court decides that the engineer ought to have issued a certificate which he refused to issue, or to have included a larger sum in a certificate which he did issue, they can, and ordinarily will, hold that the Contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum.

15 I therefore find that the learned Arbitrator's similar reasoning at page 25 of the award for payment of the financing charges from the date when the Engineer ought to have issued the payment certificate is sound, and does not amount to an error apparent on the face of the award for this Court to take a different view.

Other Misconduct

16 The objections under this heading in the memo of appeal are rather rambling and serve more the purpose of filling up the pages of the appeal than disclosing any substantive grounds for setting aside the award. The only ground meriting an answer is in relation to issue no. 2 in the award on the question whether the rutting was the consequence of the Contractor's defective workmanship and failure to manage the traffic which, per NHA's stance, was the Contractor's responsibility, or, as contended by the Contractor, was the

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[6] *Henry Boot Construction Ltd vs. Alstom Combined Cycles Ltd* [2005] 1 W.L.R. 3850 at 3861 CA

result of premature taking over of the works by the NHA and opening the road for two-way traffic which caused the asphalt to be placed under undue stress before it had cooled down.

17 This question is dealt with in much detail at pages 13 to 20 of the award and constitutes the bulk of the award. The learned Arbitrator has analysed the evidence meticulously and concluded that the works were taken over by NHA prematurely, that the traffic was diverted by the motorway police on to the road just rehabilitated by the Contractor, which was the primary cause for the rutting to occur and was not the result of faulty workmanship by the Contractor. It is to be kept in view that the contract version in question is one for 'Building and Engineering Works designed by the Employer' and, therefore, the design responsibility in such contracts rests on the Employer. The award after proper appraisal of the evidence comes to the conclusion that the rehabilitation works were performed according to the design given by NHA, and any fault in the design if at all was not the responsibility of the Contractor, and that the early taking-over of the works by NHA constituted "Employer's risks" for the purposes of allocation of risk and responsibility under clauses 17.3 and 17.4 of the contract. I find the appraisal of the evidence not to suffer from any infirmity, and I do not identify any error apparent on the face of the record in this respect. The learned Arbitrator summarized this point while determining the relief the Contractor was entitled to under issue no.6 as follows:

> In my opinion as already expressed in the previous issues, the entitlement flows from Clause 17.3(f) and (g) read with Clause 17.4 for the reason that the rutting occurred for reasons beyond the control of the Contractor. The rutting occurred due to design issues as it did not cater to the extraordinary stress put on the road. The design was not meant for diverted two way heavy traffic, which was exceeding design ESALS, nor was this section of the road meant for slow speed congested traffic that would apply frequent breaks. As such, the traffic from the opposite side of the road should have been diverted elsewhere and not onto the freshly laid asphalt. There is sufficient evidence on record which depicts that traffic was allowed to ply on the freshly laid asphalt in hot weather. It could have been easily avoided through prompt intervention of the respondent with National Highways and Motorways Police, which the claimant kept asking for. Clause 17.4 clearly provides that in the event that these rectification works are undertaken by the Contractor, it will be reimbursed for cost plus profit.

Conclusion

18 I conclude by an unhesitant expression of dismay at the National Highways Authority's poor decision-making in contesting the claim before the arbitrator and then before the Courts. In any decent organization responsible for contracting at the scale that NHA does, and the number of arbitrations it has to deal with, good practices would dictate that NHA has sufficient and adequate in-house legal expertise rendering opinions and memoranda on the probability of success of a challenge to a claim or to an award, and that the members of the NHA ought to go on record in their minutes of meetings as to why they chose to differ from the legal advice if it recommended accepting the award without further contest. Such accountability becomes all the more important where the award stipulates ongoing late payment charges that keep on accumulating until they are paid, and NHA only makes matters worse for itself by frivolous contests to the awards for years to come. If NHA had paid the award on time, it would not have incurred 3% above the bank rate accumulating to a substantial sum. There is no accountability of the 'Authority' of the NHA on this score, which causes needless misery for the contactors, apart from being a drain on NHA's finances. In any private organization, the board of directors could have been fired for ignoring legal advice against contest to an award if such advice was given, and not obtaining such advice would itself be a negligent act, for the directors are meant to act on expert legal advice and not pretend to be legal experts themselves where their ignorance can translate into tens of millions of public money being paid out as late payment charges. It also burdens the Courts with disputes that, in view of settled law, should never have reached the Courts in the first place[7].

19 I find this appeal to be quite frivolous and dismiss it with costs of Rs.100,000/-.

20 A copy of this decision is to be sent to all the members of the NHA and to the Public Accounts Committee with specific reference to paragraphs 18 to 20 of this judgment, with the aim for a reform of NHA's decision-making process in litigation matters, introducing, inter alia, the need to record reasons for disregarding professional opinion from reputable counsel, and also for it to

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[7] The last point has been the lament of the Courts on several occasions, see *Lahore Development Authority vs. Khalid Javed Co.* (1983 SCMR 718), reiterated in *Defence Housing Authority, Islamabad vs. Multi-National Venture Development Private Limited* (2019 CLD 566).

be shielded against audit paras that are usually raised by auditors who are neither lawyers nor carry any relevant qualification to gauge the prospects of litigation, and which the Court is informed are usually the reason for NHA (and other public organizations) to take frivolous matters right up to the apex Court.

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on **03.10.2023.**

Judge

Imran

Approved for reporting