***JUDGEMENT SHEET***

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

**F.A.O No. 76/2022**

National Highway Authority through its Chairman
*Vs.*
M/s Sardar Muhammad Ashraf D Baloch Private Limited & another

| | |
|---|---|
| APPELLANT BY: | Barrister Muhammad Hassan Alam, Advocate. |
| RESPONDENT BY: | Mr. Jawad ur Rahim Malik and Mr. Babbar Ali Khan, Advocates. |
| DATE OF DECISION: | 11.01.2023. |

==========

***BABAR SATTAR, J.-*** The appellant is aggrieved by judgment dated 25.03.2022 passed by the learned Additional District Court (West), Islamabad, pursuant to which the award issued in favor of respondent No.1 ***("Respondent")*** dated 14.09.2021 has been made the Rule of Court.

2. The learned counsel for the appellant stated that the learned Additional District Court did not appreciate that the learned Arbitrator misconducted the trial by misapplying provisions of contract for Rehabilitation of Sarhad Bypass to Dharki Road (N-5) dated 25.04.2012 ***("Contract")*** in awarding late payment charges pursuant to Clause-14.8 of the General Conditions of the Contract, even though such late payment relates to a payment due to be made to a contractor under Clause-14.7 of the Contract and the claim in question had been raised by the contractor pursuant to Clause-20.1 of the General Conditions of the Contract. In terms of background, he contended that the National Highway Authority (NHA) had

Uncertified

awarded the Contract to the Respondent (i.e. Contractor). The Contractor sought extension of time as well as idling charges, which were granted by the learned Arbitrator. He submitted that the learned Arbitrator did not appreciate that the claim had not been filed within time in terms of Clause-20 of the Contract. He further submitted that the learned Arbitrator awarded interest to the Contractor, which could not have been awarded pursuant to the terms of the Contract as well as the law laid down by the superior Courts in ***K. F. Development Corporation Limited vs. Messrs Dawood Cotton Mills Limited (1999 MLD Karachi 2953)***, ***Dawood Cotton Mills Limited vs. K. F. Development Corporation Limited (2006 SCMR 1555)***, ***A. Qutubuddin Khan vs. CHEC Millwala Dredging Co. Private Limited (2014 SCMR 1268)*** and ***Ghulam Abbas vs. Trustees of the Port of Karachi (PLD 1987 SC 393)***. He further submitted that the learned Additional District Court at the time of considering the award for making it the Rule of Court did not appreciate that the learned Arbitrator had misconducted himself by considering a time-barred claim and by awarding interest when the law did not empower him to do so. He submitted that pursuant to Clause-14.7 read together with Clause-14.8 of the Contract, a contractor was only entitled to receive financing charges from the date when any Interim Payment Certificate was issued. He submitted that as in the instant case no Interim Payment Certificate in the amount granted by the learned Arbitrator re prolongation costs was issued, delayed payment under Cluse-14.8 of the Contract could not have been granted. The learned District Court further mis-appreciated the facts in

Uncertified

concluding that the objections filed by NHA were time barred. He submitted that time for purposes of Section 14 of the Arbitration Act, 1940, would begin to run from the date when a signed copy of the Award was filed with the Court. But in the instant case only a photocopy of the award was filed and the objections ought not have been rejected for being time barred.

3. The learned counsel for the Respondent submitted that the learned Arbitrator had duly framed issues and decided the same through a reasoned order. He submitted that the learned Arbitrator had held while interpreting provisions of Clause-20 of the Contract that the cause of action was recurring and the notice under Clause-20.1 of the Contract had been duly given by the Contractor to NHA. Consequently, the requirement of issuing a detailed claim within forty two days of the Contractor becoming aware of the events and circumstances giving rise to the claim was not applicable, as the prolongation was caused by various events that continued to unfold. And the Contractor was in compliance of the requirement of issuing a notice under Para-1 of Clause-20.1 of the Contract, whereby the Contractor had given a notice to the engineer of its intention to bring a claim for extension of time as well as additional payments. He further submitted that the learned Arbitrator did not grant interest *pendent lite*, but granted to the contractor delayed payment charges that were provided in Clause-14.8 of the Contract agreed between the parties. He submitted that the instruction of NHA with regard to Clause-14.8 of the Contract was misconceived as the engineer was an employee of NHA and in the event that an engineer did not issue an Interim Payment

Uncertified

Certificate that included the requisite payments to be made to the contractor, the entitlement of the contractor to delayed payment charges would become redundant. He further submitted that it is now settled law that the Arbitrator is a judge of facts and law and it is not for the Court to sit in judgment over the conclusions drawn and decisions rendered by an Arbitrator while adjudicating a dispute between parties, who have mutually agreed to submit such dispute to the Arbitrator. He submitted that the learned Arbitrator had been appointed by Capital Development Authority (CDA) and merely because findings of the learned Arbitrator were against NHA, it was now seeking that the Court second-guess the award. He further submitted that the learned Additional District Court had issued a reasoned and detailed order and there was no reason for this Court to interfere with the judgment of the learned Additional District Court in exercise of its appellate jurisdiction.

4. This Court is an agreement with the learned counsel for the Respondent. The award rendered by Justice (Retd.) Sheikh Ijaz Nisar, in his capacity as the Sole Arbitrator, dated 14.09.2021, satisfies the requirements of Section 26-A of the Arbitration Act, 1940, by identifying the issues that arise from the claim filed by the Contractor and by addressing such issues through a reasoned decision. The learned Arbitrator considered and rejected the objections of NHA that the claim had not been filed within a period of forty two days, which was a mandatory requirement of Para-5 of Clause-20.1 of the Contract. The learned Arbitrator determined that the mandatory requirement of issuing a notice of intent of the contractor to bring a claim

Uncertified

within a period of twenty eight days from the trigger event had been complied with by the Contractor. And the requirement to furnish a detailed claim was not applicable as the causes for the claim for prolongation costs were recurring. The objection with regard to the interpretation rendered by the learned Arbitrator was then considered in detail by the learned Additional District Court, who concluded that the requirement for furnishing a complete claim within a period of forty two days was not a mandatory requirement in terms of Para-10 of Clause-20.1 of the Contract. And the only consequence that would flow from a delayed submission of claim would be that while considering such claim any delay in its filing would be considered adversely against the claimant in the event that an investigation of the claim could not be carried out due to the delay caused by the complainant in filing such claim beyond the forty-two day period.

5. The second objection of NHA with regard to grant of interest is equally misconceived. The learned Arbitrator has not granted interest *pendent lite*. The contention of the learned counsel for the appellant that the august Supreme Court has held (see for example ***K. F. Development Corporation Limited***, ***Dawood Cotton Mills Limited***, ***A. Qutubuddin Khan*** and ***Ghulam Abbas***) that an Arbitrator has no authority to grant interest *pendent lite* unless the grant of the same is provided for either explicitly or impliedly within the contract between the parties does not counter the findings of the learned Arbitrator. The interest in question is not interest *pendent lite*. It is the grant of a claim for delayed payment allowed by the learned

Uncertified

Arbitrator pursuant to Clause-14.8 of the Contract. Clause-14.8 of the Contract states the following:-

> ***Clause-14.8- Delayed Payment:*** *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.*

6. The ordinary textual meaning of Clause-14.8 of the Contract clearly provides that a contractor is entitled to receive financing charges in the first sentence. The second sentence is a deeming provision, which prescribes the period for which such financing charges are to be allowed, which is where the issuance of the Interim Payment Certificate becomes a trigger. There can be at least two possible interpretations of this clause. One is that delayed payment can only be allowed where a payment, which forms part of the Interim Payment Certificate, is not released by the employer within the prescribed time period under the Contract. The second interpretation could be that where a payment ought to have been made part of the Interim Payment

Uncertified

Certificate as determined through the adjudicatory process provided within the Contract, a contractor is entitled to financing charges in relation to such claimed amount once approved through the dispute-resolution process.

7. In the present case the learned Arbitrator has adopted the second interpretation of Clause 14.8 of the Contract. Neither the learned Additional District Court nor this Court can sit in judgment over the interpretation of a contractual provision rendered by the learned Arbitrator while determining whether or not the learned Arbitrator has misconducted himself. The scope of exercise of jurisdiction by the Court while considering whether an award is to be made Rule of Court has been interpreted by the Courts over time and the various judgments on the matter were referred to in ***Gerry's International Private Limited vs. Aeroflot Russian International Airlines (2018 SCMR 662)***. In ***Gerry's International Private Limited*** the august Supreme Court delineated the general principles with regard to the powers of an Arbitrator and the Courts while considering awards issued by Arbitrators and included, *inter alia*, the following:-

> *(i) When a claim or matters in dispute were referred to an arbitrator, he was the sole and final Judge of all questions, both of law and of fact;*
>
> *(iii) The very incorporation of section 26-A of the Arbitration Act, 1940 requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine that the reasons were not inconsistent and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court;*
>
> *(xi) Where two views were possible, the Court could not interfere with the award by adopting its own interpretation;*

Uncertified

8. In view of the law laid down in ***Gerry's International Private Limited***, it is for the Arbitrator to interpret provisions of the Contract to determine a dispute between the parties that they agreed to have their disputes and claims adjudicated by. Where an Arbitrator interprets a certain clause in a reasoned manner just because a Court of law might have reached a different interpretation of the provision of the Contract is not a basis for the Court to interfere with the decision of the Arbitrator.

9. In the instant case, the question of whether the claim was filed within time and was maintainable in terms of Clause-20.1 of the Contract and whether the contractor was entitled to delayed payments under Clause-14.8 of the Contract formed the subject-matter of the dispute that was referred to the learned Arbitrator. It was after hearing both NHA and the Contractor that the learned Arbitrator rendered a reasoned award, which the learned Additional District Court could neither second-guess nor set-aside merely because the learned Additional District Court preferred a different interpretation of the contractual clauses that had to be interpreted to adjudicate the claim in question. The learned Additional District Court therefore correctly concluded that the award is not a product of legal misconduct and made it the Rule of Court.

10. The learned counsel for the appellant has failed to convince this Court that the award is a product of legal misconduct or that the judgment rendered by the learned Additional District Court suffers from any infirmity and requires

Uncertified

to be interfered with in this Court's appellate jurisdiction. The appeal is therefore without merit and is ***dismissed*** with a cost of Rs.50,000/- payable by the appellant to respondent No.1 within a period of thirty days. The learned counsel for the appellant will file a certificate with the Deputy Registrar (Judicial) of this Court, certifying that the order as to cost has been complied with within such period.

**(BABAR SATTAR)**
**JUDGE**

A. Rahman Abbasi.

Uncertified