JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CIVIL REVISION NO. 101 OF 2023

NATIONAL HIGHWAYS AUTHORITY

VS

PETROSIN SERVICES HARRO RIVER (PVT) LTD.

Petitioner by : Ms. Raheema Khan, Advocate.

Respondent by : Mr. Mehmood Azam Awan, Advocate via video link. M/S Akhwand Aurangzeb Raza and Muhammad Naeem Awan, Advocates.

Date of Hearing : 30.06.2025

MUHAMMAD AZAM KHAN, J.

1. Through the instant Civil Revision Petition filed under Section 115 of **the** Code of Civil Procedure, 1908 ("**CPC**"), the National Highways Authority ("**Petitioner**") has assailed the Order dated 03.05.2023 ("**Impugned Order**" passed by the learned Civil Judge 1st Class, Islamabad-West ["**Trial Court**"] whereby the Application under Section 28 of the Arbitration Act, 1940 **("Arbitration Act")**, for enlargement of time for making the Award, filed by the Arbitrators, has been accepted.

2. The brief facts of the case, as per the contents of the instant Revision Petition, are that Petrosin Services Harro River (Pvt) Ltd ("**Respondent**") was awarded a Contract/Concession Agreement on 25.03.2013 on BOT basis for a project of 02 mini service areas on both sides of M-1 Motorway to be developed at Harro River. The project was planned to be completed in a period of 18 months, but the Respondent was unable to achieve financial close, and the possession was never handed over to the Respondent. However, the Respondent alleged that the site could not be peacefully handed over and filed an application under Section 20 of the Arbitration Act**,** on 30.09.2015**.** The Respondent also filed an Application under Section 41-B of the Arbitration Act, praying therein that the Petitioner/NHA be restrained from cancelling the Contract and taking any adverse action against the Respondent till the final adjudication of the arbitration. The Application under Section 41-B was dismissed vide Order dated 24.10.2016 for the reason that the

Respondent was not in possession of the site and that the site could not be kept in a static position. However, the Application under Section 20 of the Arbitration Act, was allowed vide Order dated 24.10.2016, and the reference, was sent to the learned Arbitrators on 18.10.2017 with a direction to the learned Arbitrators to enter upon the Arbitration proceedings in accordance with law and submit their Award within the stipulated time. After the reference, the Petitioner neither received any notice for proceeding with the arbitration from the learned Arbitrators, nor was there any interest shown by the Claimant/Respondent in the arbitration. The Petitioner, after waiting for years, invited proposals for procurement of the filling station and allied facilities on 16.12.2021, following which, in February 2022, a Letter of Acceptance was issued to a new Contractor, i.e., M/s Imex Associates, after acceptance of their bid, and the Concession Agreement was executed with the said Contractor on 08.03.2022, and the possession was also handed over. Following the handing over of the site to M/s Imex Associates, the Respondent filed a second Application under Section 41-B of the Arbitration Act, on 12.09.2022, seeking a restraint order against the Petitioner/NHA from creating any third-party rights. The said Application was also dismissed vide Order dated 07.10.2022, and both the Orders of 2016 and 2022 for dismissal of the Application under Section 41-B were not challenged and had attained finality. On 19.12.2022, an Application under Section 28 of the Arbitration Act, for enlargement of time for making an Award was filed, which was contested by the Petitioner by filing a reply seeking dismissal of the Application on grounds of unreasonable delay of almost 06 years, particularly when the Arbitrators had not followed due process as per the provisions of the Arbitration Act since they had not even entered upon the reference**.** After hearing the parties, the learned Trial Court allowed the Application under Section 28 vide Impugned Order dated 03.05.2023. Being aggrieved by the Impugned Order, the Petitioner has filed the instant Petition.

3. The learned Counsel for the Petitioner contends that the Impugned Order is contrary to facts and law, suffers from material irregularities, is beyond jurisdiction, and merits being set aside. The Arbitrators, appointed in 2017, never entered upon the reference, and mere acceptance of office does not equate to entering upon the matter, as per PLD 1966 Dacca 59. Extension of time under Section 28 of the Arbitration Act, is discretionary but cannot be granted in favor of negligent parties. A six-year delay in filing the Application by the Arbitrators is wholly unreasonable, and no request for condonation of delay was made. The arbitration process, aimed at speedy resolution, was deliberately

prolonged. The Act provides a four-month period for the Award, and this discretion to extend must be exercised only for cogent reasons. The failure of Arbitrators to act for six years without explanation amounts to legal misconduct, rendering any subsequent Award invalid. Under Schedule I**,** Para 2 of the Arbitration Act, Arbitrators must appoint an umpire within one month of their appointment, and this requirement is mandatory. Case law confirms that failure to appoint an Umpire within time renders the Award invalid. The Arbitrators' reliance on the Respondent's letter as notice to act is misconceived. Arbitrators appointed by Court Order dated 18.02.2017 require no separate notice. The letter appears to be a contrived attempt to justify the delay. Lastly, learned Counsel prayed that the instant Civil Revision be accepted, the Impugned Order may graciously be set aside, and the Application filed by the Respondent under Section 28 of the Arbitration Act may kindly be dismissed.

4. Conversely, the learned Counsel for the Respondent, in support of the Impugned Order, contends that a plain reading of the relevant extracts of the Impugned Order regarding the scope of the Court's power under Section 28 of the Arbitration Act, consent, conduct, prejudice, and interest of justice, suffices to demonstrate that it does not suffer from any irregularity or illegality in the exercise of jurisdiction; that Section 115 CPC empowers a High Court to make such order in the case as it thinks fit when a subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of the jurisdiction illegally or with material irregularity; that neither a case of illegality, defined consistently since 1949 as meaning in breach of some provision of law, has been made out, nor any irregularity, defined as committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision, is made out. That the Petitioner has concealed Judgment dated 16.02.2023 passed in W.P. No. 881/2023 between the same parties, wherein this Court held that the dispute between parties will be determined in pending arbitration; that the said Judgment was upheld by a Division Bench of this Court when disposing of the Respondent's ICA No. 134 of 2023; that the Judgments of this Court in W.P. No. 881/2023 and ICA No. 134/2023 have attained finality and operate as judicial estoppel against the Petitioner, if not *res judicata* against any proceedings to have the arbitration proceedings terminated; that the Petitioner seeks a way out of a binding arbitration agreement; that the Petitioner admits execution of the Concession, as it does the fact that the Concession has not been terminated and that it provides for settlement of all disputes by arbitration; that

the Petitioner asserts that the Arbitrators are *functus officio* or that the agreement stands terminated because of the Arbitrators' misconduct, these are distinct remedies under Section 33 of the Arbitration Act, or its Sections 8, 9, and 11, which the Petitioner has not availed. The Court has been empowered to appoint and remove Arbitrators under Sections 8, 9, and 11 of the Arbitration Act in the circumstances provided therein; that Section 33 provides that the existence or validity of an arbitration agreement or award can be challenged by an Application, and the questions presented in such an Application will be decided by the Court; that the Act does not provide for a Court to decide any dispute or controversy between parties to an arbitration agreement until an Award has been issued; that the Petitioner's conduct has been deceitful, if not fraudulent; that denial of consent is an afterthought; that during the proceedings in W.P. No. 881/2023 and ICA No. 134/2023, the Petitioner neither denied arbitrability of the dispute in any of those proceedings nor did it claim that the Arbitrators were *functus officio*; that the matter of existence or otherwise of the Consent is a dispute, difference, or controversy of the nature mentioned in the dispute resolution mechanism supplied by the Concession. Consent or lack thereof is, therefore, a question of fact to be decided after the recording of evidence before the Arbitrators themselves. Lastly, learned Counsel prayed for the dismissal of the instant Petition.

5. I have heard the learned Counsel for the parties and have also perused the relevant record with their able assistance.

6. It is an admitted fact that Arbitrators have been appointed by the order of the Court, but the arbitration could not be completed within a reasonable period of time. The Arbitrators allege that both parties decided first to conclude the arbitration proceedings related to another project between the same parties and agreed mutually to proceed with arbitration in the instant matter thereafter; therefore, the Arbitrators filed an application for the enlargement of time to conclude the arbitration proceedings in the matter in question. The Petitioner alleges that they have not given any consent to the Arbitrators to delay the arbitration proceedings or to approach the Court for the enlargement of time for concluding the arbitration. In this regard, it is pertinent to mention that the Petitioner has not provided anything to show that they have approached the Arbitrators in any way to ask them to proceed with the arbitration and similarly have not filed any Application before the Court for the removal of the Arbitrators for not entering upon and proceeding with the reference. The only

ground which the Petitioner is agitating is that due to the passing of an unreasonable time period since the appointment of Arbitrators by the Court Order, the Arbitrators have not entered upon the reference, therefore, they have become *functus officio*.

7. The Petitioner has not made any effort to make the Arbitrators complete the Award within the stipulated time and similarly has not applied for the removal of the Arbitrators before any forum. The Arbitration Act provides for enlargement of time by the Court, if it thinks fit, irrespective of the expiry of time for making an Award. The matter between the parties is still pending, and both parties have already consented to arbitration between them, and the Arbitrators now seek the enlargement of time to arbitrate on the matter pending between the parties, which is provided under the Arbitration Act.

8. The learned Trial Court has rightly allowed the Application of the Arbitrators for enlargement of time to proceed in the arbitration, and the learned Petitioner's Counsel has failed to point out any illegality or jurisdictional defect in the Impugned Order. The only argument of the Petitioner is that due to the passing of sufficient time in concluding the arbitration, the Arbitrators have become *functus officio*, but this argument lacks legal basis and is unsustainable under the law**.** Therefore, the Impugned Order does not call for any interference by this Court. Resultantly, the instant Civil Revision Petition is **dismissed.**

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the open Court on this _____ day of July 2025.

JUDGE

/Sajid/