ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

(JUDICIAL DEPARTMENT)

Civil revision no. 200/2023

CRTG- Matracon JV
versus
Federal Employees Benevolent Fund & Group Insurance Fund

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
3	19.03.2024	Mr. Hamza Siddiqui, learned counsel for the petitioner. Malik Zafar Abbas, learned counsel for the respondent.

This civil revision petition impugns the order dated 19.09.2023, whereby the learned Additional District Judge (ADJ) dismissed the petitioner's application under section 8 of the Arbitration Act for the appointment of an arbitrator, by returning a finding that the dispute in question could not be raised by the petitioner in the first place under the terms of the construction contract (the **Contract**) between the parties for the construction of a high-rise building in Islamabad by the petitioner *qua* Contractor for the respondent *qua* Employer.

2 The petitioner had raised a claim for exchange rate uplift in the contract price primarily due to a change in legislation, the particulars of which we need not concern ourselves with for the purposes of this decision. That claim was rejected by the Engineer under clause 67.1 of the General Conditions of the Contract. The petitioner gave notice of his intent to arbitrate under clause 67.2 and proposed a name for the arbitrator. When the parties remained unable to appoint an arbitrator by consent within 15 days of the petitioner's notice, the petitioner filed its application under section 8 of the Arbitration Act, 1940, for the civil court to appoint the arbitrator.

3 On notice by the civil court, the respondent filed its reply where it disputed the merits of the petitioner's claim with reference to the clauses of the Contract, relying heavily on the Engineer's decision premised on the clauses of the Particular Conditions of Contract concluding that (i) the Conditions of the Contract under Appendix-B titled "Foreign Currency Requirements" was marked "Not Applicable" and was not filled by the Contractor during the tendering stage, and (ii) that the Conditions of Contract under Appendix-C to the bid Notes stated that "Any fluctuations in the indices or prices of materials other than those given above shall not be subject to adjustment".

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4 Learned counsel asserts that the Contractor's claim was for increase in costs due to change in legislation, and rested primarily on clause 70.2 of the General Conditions of the Contract titled 'Changes in Cost and Legislation'. The Engineer's decision, that was not only reproduced in the resopndent's reply to the civil court but was also reproduced and *relied on* in the impugned order by the learned ADJ, concluded that the petitioner was precluded from raising the claim premised on foreign exchange related increase in costs. The learned ADJ went on to say in para 7 of the impugned order that the court, before referring the matter to the arbitrator, had to assess whether or not the dispute sought to be raised was covered by the agreement. But, with respect, the learned ADJ misdirected herself in confusing the 'arbitrability' of that dispute under the Contract with the merits of that dispute, and ended up giving a judgment that the dispute could not be raised by the petitioner under the terms of the Contract as interpreted by the Engineer and agreed with by the learned ADJ.

5 Learned counsel for the respondent refers to clause 13.2 of the Special Conditions of the Contract stipulating that "*For the purpose of payments, the exchange rates used in preparation shall apply for the duration of the contract. No compensation shall be made due to currency fluctuations or inflation*…", to urge that under no circumstances a claim based on foreign exchange fluctuation was to be raised under the Contract, and that, therefore, there was no dispute referable to arbitration in the first place.

6 I am afraid both the learned ADJ and the learned counsel for the respondent proceed on the legally incorrect premise that it was for the ADJ to conclude whether the petitioner's claim was sustainable under the Contract, and ended up concluding that under no circumstances a claim for increased costs due to exchange rate variation could be raised by the petitioner, and *ex hypothesi*, under no circumstances a dispute on that score could arise between the parties.

7 While the learned ADJ has taken great pains to delve into the clauses of the Contract, this is exactly what the learned ADJ was not meant to do under section 8 of the Arbitration Act, for its scope is confined to the appointment of an arbitrator if the parties remained at odds over such appointment. The learned ADJ itself assumed the role of the arbitrator in that the very question whether or not the Contractor was entitled to the claimed escalation was one which fell within the

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domain of the arbitrator to decide, and in doing so the learned ADJ unwittingly ended up committing a material irregularity.

8 This was a case of an application under section 8 of the Arbitration Act, where the civil court's role was limited to ascertaining the existence of an arbitration agreement and the inability of the parties to appoint the arbitrator. This was not an application under section 20 of the Arbitration Act whereunder the court has a more extensive role to play. The Madras High Court in *The Union of Indian vs. Mangaldas N. Varma* ((1958) 2 MLJ 16) observed that "*Section 8(2) is only an enabling section. The party whose notice was ignored is enabled by section 8(2) to apply to the Court for the appointment of an umpire. The scheme underlying section 8 is that the default of a party to the reference or even the default of an arbitrator should not normally result in the arbitration agreement itself becoming abortive*." [1]

9 The civil court in an application under section 8 of the Arbitration Act, and I would add, even under section 20, has only to see whether a dispute exists and whether it is covered by the arbitration agreement, and is not meant to delve into the merits of the dispute itself. The threshold of the examination has to be extremely low to see only whether the dispute raised is one which, under the terms of the dispute resolution clause, could be considered a dispute under or in relation to that contract, and can by no means extend to an interpretation of the contract clauses to examine whether that interpretation justifies or precludes the claim in dispute; that is the arbitrator's job. An assertion of a claim by one party and the repudiation thereof by the other party constitutes a dispute warranting the arbitration clause to become operative[2].

10 The dispute resolution clause in the Contract in question is clause 67.1 and is titled 'Settlement of Disputes', which, in material part, reads as follows:

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[1] Also see *Union of India vs. Om Parkash* (1976 AIR 1745), with the Supreme Court of India holding that: "Section 8 only empowers the Court to appoint an arbitrator where the parties do not concur in the appointment. Section 20 contains provisions for arbitration with the intervention of a Court, where there is no suit pending. This section confers power on the court to order the agreement to be filed and further to make an order of reference to the arbitrator appointed by the parties or where the parties cannot agree upon an appointment, to an arbitrator appointed by the court. On the other hand, section 8 does not contain any provision empowering the court to make a reference to the arbitrator as one finds in section 20."

[2] See *Ghulam Ishaq Khan Institute of Engineering, Science and Technology v. Messrs Hassan Construction Co. (Pvt.) Ltd*. (1998 CLC 485); *AJ Corporation v. Fauji Fertilizer Bin Qasim Limited* (2013 CLD 636). Though rendered in the context of section 20 of the Arbitration Act, the point under consideration is identical.

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> "If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the contract…"

The aforesaid dispute resolution clause is couched in the broadest of terms, so that the very dispute whether a cost-escalation claim resting on exchange rate variation was valid under the terms of the Contract was one which was in *connection with or arose out of the contract* and was therefore referable to the Engineer in the first instance and thereafter to the arbitrator. The learned ADJ, however, in her well-intentioned but misplaced zeal stepped into the shoes of the arbitrator and went on to conclude that any claim in respect of foreign exchange rate variation was precluded altogether.

11 Since the matter has to proceed to arbitration, one has to be careful with any observations on the merits of the case, but it needs to be said that there can be a distinction between a variation to the contract price occurring due to a change in legislation referred to in clause 70.2 of the Contract and variation based on market-based currency fluctuation in the ordinary course. The consequences of changes in legislation on the foreign cost component and the consequences of exchange rate fluctuations due to ordinary market movements are not necessarily the same thing. Whether this distinction holds in this case and whether the petitioner is entitled to any escalation on that basis on the proper construction of the Contract was a job reserved for the arbitrator and not for the civil court.

12 Resultantly, this revision petition is **allowed** and the impugned order is set aside. The petitioner's application stands restored before the learned Additional District Judge to pass an order thereon.

(Sardar Ejaz Ishaq Khan)
Judge

Rana.M.Ift

Approved for Reporting

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