JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

REGULAR FIRST APPEAL NO. 70 OF 2015

NATIONAL HIGHWAY AUTHORITY

VS

M/S HUSNAIN COTEX LIMITED & ANOTHER

Appellant by : Mr. Muneeb Ahmed, Advocate.

Respondents by : Muhammad Masood Khan & Syed Faisal Hussain Shah Advocates for Respondent No.1.

Date of hearing : 25.02.2025

MUHAMMAD AZAM KHAN, J.

1. Through the instant Appeal, National Highway Authority (NHA) **("Appellant")** has assailed the Order and Decree dated 23.11.2013 **("Impugned Order and Decree")** passed by the learned Civil Judge 1st Class, Islamabad-West **("Trial Court")** whereby the application filed by the Appellant under Section 16 of the Arbitration Act, 1940 **("Arbitration Act")** read with Section 151 of the Code of Civil Procedure, 1908 **("CPC")** and all other enabling provisions of the law for remission of Award **("Application")** was dismissed.

2. The brief facts of the case in hand are that the Appellant filed the Application, before the learned Trial Court contending therein that the Appellant awarded contract to the Respondent No. 1 [M/S Hussain Cotex Limited] for "Construction of bridge over river Chanab at Sher Shah, District Muzaffargarh **("Contract")**. A formal agreement was signed between the Appellant and the Respondent No.1 on 04.02.2005. The date of commencement of the contract was fixed as 25.02.2005 with completion period of 30 months whereas the original date of completion under the Contract was 28.08.2007. The original contract amount as stated in the agreement was Rs.845 million. The Appellant appointed Brig. (R) Engr. M. Afzal Pervaiz as "The Engineer" and engaged M/S National Engineering Services NESPAK (Pvt.) Limited as the "Supervisory Consultants" for the

Contract. As per methodology required by the Appellant, the Respondent No. 1 had planned to work in parallel on two bridges, to cast most of his piles on the dry bed of the river and take up pilling in the active channel of the river only during the low flow season after diverting the river channel through the dry bed. The Engineer instructed the Respondent No.1 to adopt the revised strategy of completing one of the two bridges within 18 months and then completing the balance work within the contract period. The desire of the Appellant was reiterated by its Chairman during his visit to the project site on 01.12.2005, when he cited the need for early diversion of the traffic from the existing railway-cum-road bridge which had become unsafe. The Respondent No. 1 conveyed that the plan of early completion of one of the bridges would entail additional expenses as this would invoke working in the active river channel in periods other than the low flow season. In response the Appellant's Chairman offered a number of incentives to the Respondent No. 1 in case he completed one of the bridges by 14.08.2006 and the entire project by 24.02.2007. The Respondent No. 1 claimed extra amount for piling in active channel of the river. The General Manager Construction (Punjab-South), NHA agreed to make provisional payment for the earthen platform (jetty) instead of payment for piling in active river channel. He further directed the Respondent No. 1 to submit his case to the Resident Engineer. After submission of claim by the Respondent No. 1, the Resident Engineer determined a rate of Rs.77.83 per m3 for the earthen platform. Accordingly, provisional payment was made to the Contractor in Interim Payment Certificate (IPC) No.13 at the rate of Rs.77.83 per m3. The Project Director advised the Resident Engineer and the Respondent No. 1 to revise the Rate Analysis in the light of the observations made by the Appellant's Head Quarter. The Respondent No. 1 revised and resubmitted the Rate Analysis at the rate of Rs.169.66 per m3. The Appellant declined to approve the submitted rate and advised the Respondent No. 1 to approach the Engineer for seeking determination on the issue. After determination of issues by the Engineer, the Resident Engineer provided his revised rate analysis to the Engineer. The Engineer determined that the instruction for early completion of one of the bridges by 14.08.2006 was a variation in the contract invoking Clause 51.1(f) of the Conditions of Contract Part I, for which the Respondent No. 1 should be compensated as per relevant Clause.

The Appellant did not agree with this determination of the Engineer and the Respondent No. 1 was advised to settle the matter through Arbitration.

3. After determination of issues, the Sole Arbitrator/Respondent No. 2 filed his Award on 10.04.2010 by stating that the instruction of Engineer, under the direction of the Appellant for early completion of one of the two bridges by 14.08.2006 was a variation in the contract invoking Sub-Clause 51.1(f) of the conditions of Contract Part I, for which the Respondent No. 1 shall be compensated as per conditions of the Contract and such compensation shall be paid to the Respondent No. 1 at the rate of Rs.77.83 per m3. The Appellant, dissatisfied with the Sole Arbitrator/Respondent No. 2's Award, filed Application before the learned Trial Court, seeking the remission and setting aside of the Award, and requesting that the parties be directed to a fresh arbitration.

4. The learned Trial Court issued notices to the Respondents, whereupon the Respondent No. 1 filed written reply to the Application and prayed for dismissal of the same and for making the Award dated 10.04.2010 rule of the Court. The learned Trial Court after hearing the arguments of both the parties, dismissed the Appellant’s Application vide the Impugned Order and Decree. Being aggrieved of the same, the Appellant has filed the instant Appeal.

5. The learned counsel for the Appellant argued that the Impugned Order and Decree has been passed in an arbitrary manner without application of judicious mind and is thus liable to be set-aside; that the Impugned Order and Decree has resulted in grave miscarriage of justice, the same is thus liable to be set-aside; that the learned Trial Court failed to appreciate that the objections to the legality of the Award are glaringly evident on its face, as well as in the record; that the learned Trial Court failed to properly exercise the jurisdiction vested with it, in accordance with the guidelines laid down by the apex Court of Pakistan as well as settled legal principles; that notwithstanding the above, the learned Trial Court failed to appreciate that the findings given by the Sole Arbitrator/Respondent No. 2 are based on mis-reading and non-reading of evidence, against the express contractual provisions, against the settled legal principles as well as extraneous to the

material available on record; that the learned Trial Court failed to appreciate that on various issues, the findings given by the Sole Arbitrator/Respondent No. 2 are so indefinite so as to be incapable of execution, inconclusive and self-contradictory, therefore, the same amount to error apparent on the face of record in terms of Sections 16 and 33 of the Arbitration Act; that the learned Trial Court also failed to appreciate that several of the conclusions and findings given by the Sole Arbitrator/Respondent No. 2 are based on reasons never discussed during the arbitration proceedings and thus based on surmises, infatuations and irrelevant as well as extraneous material and information; that the learned Trial Court failed to appreciate that the reasoning given by the Sole Arbitrator/Respondent No. 2 on Issues Nos. 1 and 2 are completely extraneous to the record, as such have no relevance with the case; that the findings of the learned Trial Court are based on illogical and patently incorrect interpretation of legal provisions; that the findings of the Sole Arbitrator/Respondent No. 2 on Issue No. 3 are inconclusive, blatantly contrary to the evidence, and based on misreading and non-reading of evidence; that the findings on Issue No. 3 are also in violation of Section 26-A of the Arbitration Act, thus the same amount to misconduct in terms of the Arbitration Act; that the learned Trial Court failed to appreciate that the Sole Arbitrator/Respondent No. 2, while announcing the Award, has completely and entirely failed to place the 'burden of proof' on the relevant parties and to proceed with arbitration proceedings in light of the same, thus, the Sole Arbitrator/Respondent No. 2 mismanaged the proceedings, rendering the Award liable to be set-aside; that notwithstanding, the foregoing, the learned Trial Court failed to appreciate that the findings given by the Sole Arbitrator/Respondent No. 2 on issues Nos. 4 and 5 are inconclusive, indefinite, irreconcilable and self-contradictory with the Award; that the learned Trial Court failed to appreciate that while giving findings on issues No. 6 and 7, the Sole Arbitrator/Respondent No. 2 has completely misstated the legal, as well as factual position and has thus misconducted himself in terms of the Arbitration Act; and that the learned Trial Court failed to appreciate that the findings of the Sole Arbitrator/Respondent No. 2 on issues Nos. 8 to 13 are completely and glaringly irreconcilable with the evidence, facts as well as settled legal principles. Lastly, the learned counsel prayed that the present

appeal be allowed and the Impugned Order and Decree be set aside and parties be directed to fresh arbitration.

6. On the other hand, the learned counsel for the Respondent No. 1 argued that the Appellant's counsel has failed to point out any illegality in the Impugned Order and Decree and the learned Trial Court has rightly dismissed the Appellant's application, based on correct appreciation of evidence and proper application of judicial mind; that the learned Trial Court passed the Impugned Order and Decree keeping in view the facts and evidence available on record. In the last, the learned counsel prayed for the dismissal of the instant Appeal.

7. I have heard the learned counsel for the parties in detail and have also perused the record with their able assistance.

8. It is an admitted fact that the parties through insertion of an arbitration clause in the Contract had agreed to refer their respective disputes to a forum of their choice. The Sole Arbitrator/Respondent No. 2 was proposed by the Appellant and duly consented by the Respondent No. 1 whereafter, the arbitration proceedings had commenced. The Sole Arbitrator/Respondent No. 2 announced the Award dated 10.4.2010 at Lahore. The objections raised before this Court, mainly relate to the findings of the Sole Arbitrator/Respondent No. 2 and on some agreed terms of the Contract. The Sole Arbitrator/Respondent No. 2 has discussed all the thirteen issues with their findings and reasons in detail. The Appellant has not been able to point out any error on the face of the Award, so as to render it invalid. In this regard, I will discuss the arguments and reasoning put forward by the learned counsel for the parties during this Appeal and my findings on each point raised during the arguments. The learned counsel on behalf of the Appellant raised different grounds in support of his case, while impugning the order of the learned Trial Court. He stated that the Sole Arbitrator/Respondent No. 2 failed to provide proper opportunity to the parties to adduce evidence which amounts to misconduct. Perusal of Paragraph 25 of the Award reveals that the Sole Arbitrator/Respondent No. 2, by mutual consent of the parties, decided that to save time, the presentation of evidence through witness statements, examination-in-chief,

and cross-examination would not be conducted unless deemed necessary by the Sole Arbitrator/Respondent No. 2. *The findings of the Sole Arbitrator/Respondent No. 2 on Issue No. 3 are based on the documents placed on record and the arguments of both parties. Since the NHA raised no objection during the proceedings of the Award, this objection cannot be raised before the learned Trial Court or in this Court in appeal, and thus, it will not be considered as misconduct.* The learned counsel for the Appellant further stated that it has been upheld by the apex courts that Arbitrator cannot interpret documents in a manner, so as to replace his own view, as against the express stipulation contained therein. Reliance is placed on *Sh. Muhammad Saleem versus Saadat Enterprises*, **2009 CLD 390 LHR**. As per Clause 52.5 of conditions of the Contract Part-1, a notice is required to be sent by the Respondent No. 1 to the Appellant for extra payment within 14 days of such intrusion. The Sole Arbitrator/Respondent No. 2 decided in Issue No. 4 that an Engineer or Arbitrator would find it hard to extinguish a party's otherwise established right to compensation merely on the basis of such a technicality. *In this regard to my view, the work undertaken in respect of the earthen platform and the comprehensive revision of the work methodology entailed by the Appellant's change instructions and requirements during the course of project, added considerably and enhanced the cost of the Respondent No. 1. The Sole Arbitrator/Respondent No. 2 fairly held that Appellant could not be allowed to wrinkle out his financial liabilities on the basis of a mere technicality.* The learned counsel for the Appellant stated that if the Award represents a "perverse verdict" meaning that the factual conclusion drawn is against the law, the Award is liable to be set-aside. In this regard, he stated that the Sole Arbitrator/Respondent No. 2 himself established (a) that the valuation can only be done by Engineer and (b) this is not a case of "acceptance by conduct".

9. The relevant provision of the Arbitration Act is reproduced here under: -

> ***"Section 30. Grounds for setting aside award.*** *An award shall not be set aside except on one or more of the following grounds, namely:*

a. that an arbitrator or umpire has misconducted himself or the proceedings;
b. that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
c. *that an award has been improperly procured or is otherwise invalid."*

This section should be read with Sections 15 and 16 of the Arbitration Act.

Section 15 empowers the Court to modify or correct the Award i.e.

a. where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect decision of the matter referred; or
b. where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
c. where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Section 16 empowers the Court to remit award for reconsideration on the following grounds:-

a. where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or
b. where the award is so indefinite as to be incapable of execution; or
c. where an objection to the legality of the award is apparent upon the face of it.

10. An error or infirmity in the Award that renders it invalid must be apparent on the face of the Award. The Arbitrator is the final authority on both law and facts, and it is not for a party to challenge the Arbitrator's decision if it is otherwise valid. If the Arbitrator has rendered a decision based on the submissions, no adverse inference can be drawn against him. The Court, under Section 30 of the Arbitration Act, is not meant to function as a Court of Appeal or re-evaluate the award. While examining the validity of an Award, the Court does not act as a Court of Appeal, and a Court hearing objections to an Award cannot undertake reappraisal of evidence recorded by the Arbitrator and the findings of a Sole Arbitrator, which are otherwise legally sound and proper in all respects, cannot be disturbed. The Court, generally speaking, leans in favor of the Award. It does not sit as a Court of Appeal, however, the Award can be set aside if there is an error apparent on the face of Award or that error should be of a jurisdictional nature or some fraud has been practiced in obtaining such Award. The Court

cannot travel beyond the Award and make inquiries and investigations in the proceedings and documents, which do not form part of the Award. In order to construe misconduct on part of the Arbitrator, it is essential that the grounds are raised with precision and allegations are pleaded clearly, rather being evasive in nature. It is not for the Court to fish for latent errors in arbitration. These principles and law have been laid down in the light of the object and purpose intended to be achieved by the Arbitration Act. Reliance is placed on the cases titled as: -

i. *Shahin Shah Vs. Government of Khyber Pakhtunkhwa,* **2022 SCMR 1810**;
ii. *Gerry's International Pvt. Limited Vs. Aeroflot Russian International Airlines,* **2018 SCMR 662;**
iii. *A. Qutubuddin Khan Vs. Chec Millwala Dredgging Company (Pvt.) Limited,* **2014 SCMR 1268**;
iv. *Federation of Pakistan Vs. Joint Venture Knocks K.G/RIST*, **PLD 2011 SC 506**;
v. *Mian Corporation Vs. M/s Lever Brothers of Pakistan Limited,* **PLD 2006 SC 169**.
vi. *Pakistan Steel Mills Corporation Vs. M/s Mustafa Sons (Pvt.) Limited*, **PLD 2003 SC 301**.
vii. *M/s Joint Venture K.G/RIST Vs. Federation of Pakistan*, **PLD 1996 SC 108**.
viii. *National Highway Authority Vs. Lilley International (Pvt.) Limited,* **2020 CLC 608 Islamabad**.

11. The Sole Arbitrator/Respondent No. 2 after discussing each and every issue, gave "Award" that "the instructions of the Engineer, under the direction of the NHA for early completion of one of the two bridges by 14.08.2006 was a variation in the Contract invoking sub-clause 51.1 (f) of the conditions of Contract Part-1, for which the Contractor shall be compensated as per Clause 52.1 of the conditions of Contract". The learned counsel has failed to point out any misconduct or any irregularity committed by the Sole Arbitrator/Respondent No. 2 while deciding the controversy between the parties through an Award dated 10.04.2010.

12. In cases where a contract includes an arbitration clause, the general approach should be to minimize Court interference, especially when the parties have voluntarily selected their preferred forum for resolving disputes. The Courts can interfere to the extent as provided in the Arbitration Act. It is emphasized that expeditious and inexpensive Dispute Resolution should be

considered vital for a vibrant economy and inevitable for economic growth and progress. The Courts have a crucial role to play in ensuring that the commitments made between the parties are honoured and implemented. It is the duty of the Courts to promote with certainty by enforcing the binding commitments made by the parties.

13. The august Supreme Court in the case of *Lahore Development Authority versus Khalid Javed Company,* **1983 SCMR 718** held as under: -

> *"it is high time that Government Departments should accept more gracefully the awards made by forums selected by themselves and manned by their own officers. They would be well advised if they took greater pains and more care than they are doing at present in preparing and prosecuting their case before the Arbitrators rather than in subsequently expanding their time, energy and efforts on fruitless objections and appeals against the awards made against by, them, for which they are mostly themselves to blame".*

14. Therefore keeping in view the findings of superior Courts and after going through the Award in detail, this Court is of the considered view that the Sole Arbitrator/Respondent No. 2 has rightly given his findings on each and every issue discussed in the "Award" dated 10.04.2010. Even otherwise the objection filed by the Appellant is time-barred under Article 158 of the Limitation Act, 1908, which provides that the time limit for filing of objections to an Award is thirty days from the date of notice of filing of an Award in Court. Reliance is placed on *Airports Development Agency Limited versus M/s M.Y Corporation and others,* **PLD 2001 Kar 158** The relevant portion is as under: -

> *"it goes without saying that it is by now a settled law that objections have to be filed within 30 days and if they are filed beyond the statutory period then they cannot be taken into consideration especially in the absence of any application for condonation of delay and possible justification as to why the objections were not filed within the prescribed time".*

Reliance in this regard is also placed upon the ruling of the Supreme Court of Pakistan cited in *Shahin Shah's case (ibid)* relevant portion of which is reproduced as under: -

> ***(g) Limitation Act (IX of 1908)---***
>
> *---S. 5---Condonation of delay---Scope---Party must explain each day of delay and, the Court, ought to adjudge whether each day of delay*

has been sufficiently explained to the satisfaction of the Court with evidence---If such discretion has been exercised properly, then, an appellate Court cannot arbitrarily disregard the reasons so given by the Trial Court while discounting the reasons provided by one party in an application for condonation of delay by the Trial Court unless there is misreading or non-reading of the record.

Purpose of arbitration is defeated if a party refuses to abide by the agreed mode of dispute resolution---Such a trend must not be encouraged."

15. For what has been discussed above, the Appellant has failed to point out any illegality or irregularity in the Impugned Order and Decree and as such there is no force in the Appeal, hence, the same is hereby **dismissed**.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the Open Court on _____ day of March, 2025.

JUDGE

--/Mehboob/--

Approved for Reporting
Blue Slip added.