JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.233 of 2016
National Highway Authority
Versus
M/s Sambu Construction Company Ltd. and others

Dates of Hearing:	26.10.2022, 03.11.2022, 17.11.2022 & 18.01.2023
Petitioner by:	Barrister Asghar Khan, Ali Roshan Gillani and Atif Waheed, Advocates
Respondents by:	Barrister Muhammad Mumtaz Ali for respondent No.1.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition the petitioner, National Highway Authority (**"N.H.A."**), impugns the order dated 19.02.2016 passed by the Court of the learned Additional District Judge (West), Islamabad whereby the petitioner's appeal under Section 39 of the Arbitration Act, 1940 (**"the 1940 Act"**) against the order dated 14.12.2013 passed by the Court of the learned Civil Judge, Islamabad was dismissed. Vide the said order dated 14.12.2013, the learned Civil Court dismissed the N.H.A.'s objections filed under Sections 30 and 33 of the 1940 Act to the Arbitration Award dated 20.02.2010 and allowed respondent No.1's application under Sections 14 of the 1940 Act to make the said award a Rule of Court.

2. The facts essential for the disposal of the instant petition are that on 24.06.2005, the N.H.A. and respondent No.1, Ms. Sambu Construction Co. Limited ("**SAMBU**") entered into a contract for the Rehabilitation Works of National Highway N-5 Contract Package No.7 (Mianchannu to Sahiwal – 46 Km) (**"the Contract"**). SMEC International Pty Ltd. (JV) was appointed as the Engineer to administer the execution of the Contract.

3. Clause 67.1 of the Conditions of Particular Application (which are part of the Contract documents) provided for the mechanism for the settlement of contractual disputes between the parties. It provided for disputes to be referred in the first instance to the Dispute Review Expert (**"DRE"**) in accordance with the provisions of DRE's rules and

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procedures attached to the Conditions of Particular Application. The recommendation of the DRE was to be binding on both parties unless the same is revised in arbitration. The said clause provided for a party dissatisfied with the recommendation of the DRE to give notice to the other party of its intention to commence arbitration within fourteen days after the party received the recommendation of the DRE. Failure on the part of the party dissatisfied with the DRE's recommendation to give notice within the said period of its intention to commence arbitration would result in the DRE's recommendation becoming final and binding on the parties. It was also mandatory on the party that gives notice of its intention to commence arbitration to start the arbitration within seventy days of such notice failing which the DRE's recommendation would become final and binding on the parties.

4. The Contract was awarded by the N.H.A. to SAMBU after a competitive tender bidding process. After the N.H.A. published an advertisement inviting bids for the award of the said Contract and issuing the tender documents to the applicants, a pre-bid meeting took place on 14.02.2005 between the N.H.A. and all the pre-qualified bidders. The minutes of the said meeting issued by the N.H.A. show that Special Provision-6: Engineer's Office ("SP-6"**) (which was also to be a part of the Contract documents) was revised. The said minutes also show that the contractor was to provide for the Engineer's Office, all facilities and equipment listed in the revised SP-6.**

5. After the pre-bid meeting, the N.H.A. issued Addendum No.2 to the tender documents which provided *inter alia* for the different equipment that SAMBU was to provide for the Engineer's Office. SAMBU was to include the prices of this equipment in its financial bid. Addendum No.2 reflects the decisions taken by the N.H.A. at the pre-bid meeting. The revised SP-6 comprised of two pages was made a part of Addendum No.2.

6. As mentioned above, the Contract was signed on 24.06.2005 and the N.H.A. sent the Contract documents to SAMBU on 29.06.2005. These documents also included the minutes of the pre-bid meeting dated 14.02.2005 as well as Addendum No.2.

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7. Four months after the Contract was signed, the Engineer, vide letter dated 14.11.2005, called upon SAMBU that the second page of the revised SP-6: Engineer's Office was missing ("missing page") from the Contract documents issued to SAMBU. The missing page was said to have been inadvertently left out during the copying of the Contract documents for distribution. The Engineer sent Corrigendum No.1 to the Contract so that the missing page could be made a part of SP-6: Engineer's Office. It was also clarified that the corrigendum shall incur no change in the contract price or the time for completion of the Contract. The Engineer requested SAMBU to sign the corrigendum.

8. SAMBU refused to sign the corrigendum. In its letter dated 19.11.2005, SAMBU took the position that the price quoted by it in the bid documents was according to Addendum No.2 according to which the revised SP-6: Engineer's Office did not include the equipment (listed in the missing page) which were sought to be made a part of SAMBU's obligation to supply.

9. On 05.12.2006, the Engineer issued a report on the disputed instruction to provide equipment for the Engineer's Office as per the list in the missing page in the Contract documents. According to the said report, during the bidding process, one page of SP-6: Engineer's Office initially included in the original tender documents was omitted from Addendum No.2 and subsequently from the Contract documents. SAMBU had been directed to provide the equipment listed in the missing page but had claimed the cost of this equipment on the ground that this was equipment in addition to the list in the revised SP-6: Engineer's Office, being a part of the Contract documents executed between the parties. The amount thus claimed by SAMBU from the N.H.A. was Rs.2,293,860/-. The Engineer's determination was that SAMBU had not come up with convincing evidence that the price submitted in its bid for SP-6: Engineer's Office was based on a reduced scope resulting from the missing page. SAMBU's claim that for the missing page to be included in SP-6: Engineer's Office a contract variation was required, but was rejected by the Engineer.

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10. Brigadier (Retd.) Khalid M. Ameen had been appointed as the DRE in July 2007. It was not until 03.09.2007 that SAMBU sent a notice under clause 67 of the Conditions of Particular Application to the N.H.A. expressing its dissatisfaction with the Engineer's determination and its intention to refer the dispute to the DRE. The N.H.A., vide letter dated 10.09.2007, acknowledged receipt of SAMBU's said notice, and took a position in consonance with the Engineer's determination dated 05.12.2006. On 17.11.2007, SAMBU referred the dispute pertaining to the missing page to the DRE in terms of clause 67.1 of the Conditions of Particular Application. On 14.01.2008, the DRE decided that SAMBU's claim for the amount of Rs.2,293,860/- for providing the equipment listed in the missing page was justified. The DRE decision shows that the N.H.A. had taken an objection to the effect that SAMBU had not referred the dispute to the DRE within the period prescribed in the Contract.

11. On 29.01.2008, the N.H.A. issued notice of its intention to commence arbitration on the dispute regarding the missing page to SAMBU. The N.H.A. filed its statement of claim before the Two-Member Arbitral Tribunal on 10.09.2008. Vide award dated 20.02.2010, it was held that SAMBU was entitled to receive an amount of Rs.2,293,860/- for providing the Engineer's equipment listed in the missing page. The arbitrator also awarded simple interest at rate of 8% per annum on the said amount with effect from 21.03.2010.

12. On 19.05.2010, SAMBU filed an application before the learned Civil Court under Section 14(2) of the 1940 Act praying for the award to be made a Rule of Court and for a decree to be passed in terms thereof. On 07.07.2010, the N.H.A. filed objections to the award under Sections 30 and 33 of the said Act.

13. Vide judgment and decree dated 14.12.2013, the award dated 20.02.2010 was made a Rule of Court. However, the learned Civil Court did not uphold the award to the extent of awarding interest.

14. The N.H.A. preferred an appeal against the said judgment and decree dated 14.12.2013 before the Court of the learned Additional District Judge, Islamabad who, vide judgment dated 19.02.2016

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dismissed the said appeal. The N.H.A. has assailed the said concurrent judgments in the instant civil revision petition. It may be mentioned that the said judgments and decrees have already been executed and SAMBU has received the entire decretal amount.

15. Learned counsel for the N.H.A., after narrating the facts leading to the filing of the instant civil revision petition, submitted that pursuant to the pre-bid meeting dated 14.02.2005, the N.H.A. issued Addendum No.2 to the tender documents; that through Addendum No.2, SP-6: Engineer's Office was revised; that revised SP-6: Engineer's Office comprised of three pages; that the said second page, which lists the drafting equipment and a part of the list of office furniture and computer equipment required for the Engineer's Office, was inadvertently not copied to be made a part of the contract documents that were signed by the parties; that when the Engineer came to know about this mistake, he issued corrigendum No.1 on 14.11.2005 so as to incorporate the missing page of SP-6: Engineer's Office in the contract documents; that SAMBU decided not to sign the corrigendum and instead made a claim of Rs.2,293,860/- for providing the equipment listed in the missing page; that the said claim was correctly rejected by the Engineer through its report dated 05.12.2006; that the DRE erred by not appreciating that the equipment listed in the missing page were a part of the original bid documents; that the omission of the missing page from Addendum No.2 and from the contract documents signed by the parties was an inadvertent mistake that SAMBU wants to take an undue advantage from; that SAMBU's bid for the award of the Contract was based on the original bid documents which did include the equipment listed in the missing page; and that the missing page should have been read as part and parcel of SP-6: Engineer's Office (which is a part of the Contract) by the DRE as well as the Arbitral Tribunal.

16. Learned counsel for the N.H.A. further submitted that SAMBU's claim for Rs.2,293,860/- on account of providing equipment listed in the missing page was rejected by the Engineer on 05.12.2006; that on 03.09.2007, SAMBU issued a notice under clause 67 of the Conditions of Particular Application expressing its intention to refer the dispute

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regarding the missing page to the DRE; that vide letter dated 10.09.2007, the N.H.A. expressed its agreement with the Engineer's determination dated 05.12.2006; that SAMBU should have referred the matter to the DRE within a period of seven days from 10.09.2007 in terms of clause 67.1 of the Conditions of Particular Application read with Rule 9(c) of the Rules and Procedures for the Functions of the Disputes Review Expert; that since SAMBU referred the dispute to the DRE on 17.11.2007, the reference should have been rejected as time barred; that the N.H.A. raised an objection to the said effect before the DRE but it was not answered; that the Arbitral Tribunal, after holding that the time limit provided for referring a dispute to the DRE had not been adhered to, turned down the N.H.A.'s objection on the ground that time limit could not run against a matter which ostensibly did not constitute a part of the Contract; and that the learned Civil Court as well as the learned Appellate Court concurrently erred by not appreciating that the belatedly filed reference before the DRE was not maintainable. Learned counsel for the N.H.A. prayed for the revision petition to be allowed and for the impugned judgments dated 19.02.2016 and 14.12.2013 passed by the learned Courts below to be set-aside.

17. On the other hand, learned counsel for SAMBU submitted that although the equipment listed in the missing page of SP-6: Engineer's Office was a part of the original bid documents, but pursuant to the decisions taken in the pre-bid meeting dated 14.02.2005, SP-6: Engineer's Office was revised and in this regard Addendum No.2 was issued by the N.H.A.; that it is an admitted position that Addendum No.2 did not include the missing page and therefore SAMBU's bid could not have been based on the equipment listed in the missing page; that since the missing page was not a part of Addendum No.2, it was not a part of the contract documents signed by the parties; that it was not until four months after the Contract was signed by the parties that the Engineer required SAMBU to execute corrigendum No.1 to the Contract so that the missing page was included in SP-6: Engineer's Office; that even though SAMBU was not under any obligation to

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provide the equipment listed in the missing page, it nonetheless provided the equipment with the caveat that it shall be making a claim for the cost of the additional equipment; that SAMBU's claim of Rs.2,293,860/- was unlawfully rejected by the Engineer on 05.12.2006; and that the DRE's decision dated 14.01.2008 in SAMBU's favour is strictly in accordance with the provisions of the Contract and so is the award dated 20.02.2010.

18. Learned counsel for SAMBU further submitted that the N.H.A.'s objection that the reference of the dispute to the DRE made by SAMBU on 17.11.2007 was time barred is not supported by any provision of the Contract or the law; that the N.H.A.'s objection to the said effect had been correctly spurned by the Arbitral Tribunal; that the N.H.A. had also raised an objection to the said effect before the learned Civil Court and the learned Appellate Court but the same was concurrently rejected; that this Court, in exercise of revisional jurisdiction, cannot substitute its views with those of the Courts below; that since the decision of the DRE, award by the Arbitral Tribunal and the judgments and decrees passed by the learned Courts below are all in SAMBU's favour, this Court ought not to overturn the four concurrent findings. Learned counsel for SAMBU prayed for the revision petition to be dismissed.

19. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant revision petition are set out in sufficient detail in paragraphs 2 to 14 above and need not be recapitulated.

20. The N.H.A.'s challenge to the four concurrent findings of the DRE, Arbitral Tribunal, the learned Civil Court, and the learned Appellate Court are on two grounds. The first being that since the equipment listed in the second page (which went missing) of SP-6: Engineer's Office was a part of the original bid documents, it ought to have been read as part of the Contract regardless of the fact that it was not included in Addendum No.2 as well as the Contract signed by the parties. The second being that SAMBU had not referred the dispute

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regarding the missing page to the DRE within a period of seven days from 10.09.2007 i.e., the date when the N.H.A. did not agree with the dispute regarding the missing page agitated by SAMBU.

21. The N.H.A. supported the Engineer's determination dated 05.12.2006, whereby SAMBU's claim of Rs.2,293,860/- for having provided the equipment listed in the missing page of SP-6: Engineer's Office was rejected. In the said determination, it is clearly mentioned that during the bidding stage one page of SP-6 which was initially included in the original bid documents was omitted from Addendum No.2 and subsequently from the contract documents. As mentioned above, pursuant to the decision taken in the pre-bid meeting dated 14.02.2005, SP-6 was revised by issuing Addendum No.2. This Addendum was issued prior to the submission of the financial bids. Since the Engineer, in his determination dated 05.12.2006, has confirmed that one page of SP-6 was omitted from Addendum No.2, the N.H.A. is left with no ground to assert that SAMBU had submitted its financial bid bearing in mind the equipment listed in the missing page of SP-6. Had one page of SP-6 in Addendum No.2 been inadvertently missed out, the N.H.A. ought to have rectified this mistake at the stage of the signing of the Contract. The N.H.A. did not do so. The contract documents signed by the parties and sent by the N.H.A. to SAMBU along with letter dated 01.03.2005 also did not contain the missing page of SP-6. It was not until four months after the signing of the contract documents that the Engineer, vide letter dated 14.11.2005, informed SAMBU that the missing page of SP-6 in Addendum No.2 had inadvertently been left out during the copying of the contract documents. The Engineer proposed that corrigendum No.1 to the Contract be issued so as to incorporate the missing page of SP-6. SAMBU was well within its rights to have refused the execution of the corrigendum since the missing page was neither included in Addendum No.2 issued soon after the pre-bid meeting nor made part of the contract documents signed by the parties. SAMBU, however, did supply the equipment listed in the missing page of SP-6 but made a

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claim of Rs.2,293,860/- for having supplied the equipment, which according to SAMBU was not a part of its contractual obligation.

22. The N.H.A.'s small mistake of not including the missing page of SP-6 in Addendum No.2 as well as the contract documents signed by the parties resulted in the onerous consequence of the DRE allowing SAMBU's claim for Rs.2,293,860/-. More often than not little mistakes have grave consequences. The mistake of not including the missing page of SP-6 in Addendum No.2 and the contract documents signed by the parties was not in any manner attributable to SAMBU but to the N.H.A. It is the N.H.A. who had admittedly prepared the contract documents with little room for negotiation by SAMBU. The parties are to be held down by a contract signed, sealed and delivered. Since the missing page of SP-6 was not a part of Addendum No.2 and the contract documents signed by the parties, I am of the view that SAMBU's claim for supplying the equipment listed in the missing page of SP-6 was correctly allowed by the DRE as well as the Arbitral Tribunal.

23. It is the N.H.A.'s doing which created an ambiguity in its mind as well as that of the Engineer as to whether the missing page of SP-6 could be read as a part of the contract documents. The *contra proferentem* rule: "when there is a doubt about the meaning of the contract, the words will be construed against the person who put them forward" has been given judicial recognition by the Hon'ble Supreme Court in the judgment reported as Universal Insurance Company Vs. Karim Gul (2021 CLD 1189). In the said report, reference has been made to the judgment of the Supreme Court of Canada in the case of Co-operators Life Insurance Co. Vs. Gibbons [2009] 3 SCR 605 holding that whoever holds the pen creates the ambiguity and must live with the consequences.

24. As regards the N.H.A.'s plea that the DRE ought to have rejected SAMBU's reference of the dispute regarding the missing page filed on 17.11.2007 on the ground that the same had been filed beyond a period of seven days prescribed in Rule 9(c) of the Rules of Procedure for the Functions of the Disputes Review Expert, this objection was taken by

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the N.H.A. before the DRE as well as the Arbitral Tribunal, both of which concurrently spurned it. This objection did not find favour with the learned Civil Court which made the award a Rule of Court as well as the learned Appellate Court which dismissed the N.H.A.'s appeal against the learned Civil Court's judgment and decree in terms of the award.

25. The N.H.A. now wants this Court to reappraise the evidence and the documents on the record in order to take a different view from the one concurrently taken by the four different *fora*. It is well settled that the powers of the High Court in revisional jurisdiction are very limited. If, on the reappraisal of evidence, a different view is possible, the High Court cannot substitute its own view and upset the findings of fact concurrently arrived at by the Courts below. Such findings can only be interfered with if the Courts below had misread the evidence or had committed a jurisdictional error. In the case of Muhammad Akhtar Vs. Mst. Manna (2001 SCMR 1700), it has been held that a different view on reappraisal of the evidence by the High Court in exercise of its jurisdiction under Section 115 C.P.C. could not be a ground for interference with such findings of fact by two Courts below. Furthermore, it was held that where the concurrent findings of fact by the Courts below were perverse, arbitrary or fanciful, the same could not be termed as 'sacrosanct' and could be interfered with. In the case of Abdul Hakeem Vs. Habibullah (1997 SCMR 1139), it has been held as follows:-

> ***"6. Before considering the contentions of the parties on merit, we would like to mention here that the scope of interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction under section 115, C.P.C. is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under section 115, C.P.C. cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under section 115, C.P.C. if the Courts below have either misread the evidence on record or while assessing or evaluating the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under section 115, C.P.C. if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record."***

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26. In the case of Pakistan Steel Mills Corporation, Karachi Vs. Messrs Mustafa Sons (Pvt.) Ltd., Karachi (PLD 2003 S.C. 301), it has been held as follows:-

> ***"17. Much stress has been laid by learned counsel for the petitioner on subsection (c) of section 30 (ibid) saying that the award is otherwise invalid. It is noted that the Arbitrator is the final Judge on the law and facts and it is not open to a party to challenge the decision of the Arbitrator, if it is otherwise valid. If the Arbitrator has given his decision in terms of the submission nothing adverse could be attributed to him. Even, if there was wrong interpretation of a clause in a contract, in such cases, view has been taken that an Arbitrator is not bound to give specific findings on each and every issue nor he is required to state reasons for his conclusion, if the findings are within the parameters of submissions made before him. It is also no ground to set aside an award on the plea that different view was possible if the facts would have been appreciated with different angle."***
> **(Emphasis added)**

27. In order to determine whether the concurrent decisions of the learned Courts below endorsing the award through which the N.H.A.'s objection that the reference of the dispute to the DRE was beyond the prescribed time limit provided in the Contract were perverse, arbitrary or the result of gross misinterpretation of the contractual provisions, this Court examined clause 67.1 of the Conditions of Particular Application as well as the Rules and Procedures for the Functions of the Disputes Review Expert.

28. The first paragraph of clause 67.1 of the Conditions of Particular Application does not provide any period within which an employer or a contractor is to refer a dispute in connection with or arising out of the contract in the first place to the DRE. The fifth paragraph of the said clause provides that either the employer or the contractor may refer a dispute to the DRE in accordance with the provisions of the DRE's Rules and Procedures attached to the Conditions of Particular Application.

29. Rule 9 of the Rules and Procedures for the Functions of the Disputes Review Expert provides for the procedure for dispute referring to the DRE. Rule 9(a) provides that *"if either party objects to any action or inaction of the other party or the Engineer, the objecting party may file a written Notice of Dispute to the other party with a copy*

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to the Engineer stating that it is given pursuant to clause 67 and stating clearly and in detail the basis of the dispute." **In the instant case, it was the Engineer's determination dated 05.12.2006 (whereby SAMBU's claim for Rs.2,293,860/- was rejected) with respect to which notice of dispute dated 03.09.2007 was given by SAMBU to the N.H.A.. The said notice clearly mentions that it was given pursuant to clause 67 and sets out with reasonable detail the basis of the dispute. The N.H.A. does not assert that the said notice was not in conformity with the requirements of Rule 9(a).**

30. Rule 9(b) provides that *"the party receiving the notice of dispute will consider it and respond in writing within fourteen days after receipt."* The N.H.A., on 10.09.2007, responded to SAMBU's notice of dispute dated 03.09.2007. Rule 9(c) reads thus:

> ***"This response shall be final and conclusive on the subject, unless a written appeal to the response is filed with the responding party within seven days after receiving the response. Both parties are encouraged to pursue the matter further to attempt to amicably settle the dispute."***

31. Rule 9(c) does not prescribe any time limit within which a party issuing the notice of dispute is to refer the dispute to the DRE. The time limit of seven days is for filing a written appeal to the response *"with the responding party"* and not to the DRE. The responding party here was the N.H.A. which had given a response on 10.09.2007 to SAMBU's notice of dispute dated 03.09.2007.

32. Rule 9(d) provides *inter alia* that *"when it appears that the dispute cannot be resolved without the assistance of the DRE, or if the party receiving the notice of dispute fails to provide a written response within fourteen days after receipt of such notice, either party may refer the dispute to the DRE by a written request for recommendation to the DRE."* The N.H.A.'s response dated 10.09.2007 to SAMBU's notice of dispute dated 03.09.2007 made it clear that the dispute between the parties could not be resolved without the assistance of the DRE. It is for this reason that SAMBU on 17.11.2007 referred the dispute to the DRE under clause 67 of the Conditions of Particular Application. Just like Rule 9(c), Rule 9(d) also does not prescribe any time limit within which a party can refer a dispute (with respect to which a notice of dispute

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had earlier been issued) to the DRE. Contractual provisions which place a time limit on a party's right to initiate a dispute resolution process have to be strictly construed. Therefore, it is my view that the reference of the dispute to the DRE on 17.11.2007 does not offend any provision of clause 67 of Conditions of Particular Application read with Rules and Procedures for the Functions of the Disputes Review Expert.

33. In view of the above, I do not find any merit in the instant petition, which is accordingly dismissed with costs throughout.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN OPEN COURT ON 07/02/2023

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING

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