JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

F.A.O. NO. 83 OF 2017

NATIONAL HIGHWAY AUTHORITY.

VS

M/S SAADULLAH KHAN AND BROTHERS & ANOTHER.

Appellant by	**:**	**Barrister Asghar Khan.**
Respondents by	**:**	**Mr. Waqar Ahmed, Advocate for the Respondent No.1.**
Date of hearing	**:**	**22.04.2025**

MUHAMMAD AZAM KHAN, J.

1. Through the instant Appeal, the Appellant **[**National Highway Authority **("NHA")],** has assailed the Order dated 11.04.2017 (**"Impugned Order"**) passed by the learned Civil Judge 1st Class, West-Islamabad (**"Trial Court"**), whereby the objection petition filed by Respondent No.1 was accepted, the Award dated 28.02.2014 was accordingly set aside, and the application under Section 14(2) of the Arbitration Act, 1940, filed by the Appellant was dismissed.

2. The brief facts of the case as narrated in the memo of appeal are that the NHA/Appellant invited bids for the execution of works, namely "Resurfacing and strengthening of National Highway (N-5) through cold recycling from Mian Chunnu Sahiwal-Okara and remedying any defects therein." Respondent submitted a bid, which was accepted by the Appellant, and thereafter, the Appellant and Respondent No.1 entered into an agreement dated 18.07.2006 for the rehabilitation work. The contract consisted of various documents, including the conditions of contract Parts I and II, wherein a clause regarding dispute resolution was mentioned. As per the terms of the contract, payment for work was to be made to Respondent No.1 in two currencies, i.e., Pakistani Rupees and US Dollars. During the execution of the work, a dispute arose between the parties regarding payment in two currencies, and Respondent No.1, being aggrieved by the Engineer's calculation, referred the dispute to the Dispute Resolution Expert **(“DRE”)** pursuant to Clause 64 of the Agreement. The DRE gave his recommendations in respect of the aforementioned dispute vide letter dated 02.01.2010. The Appellant, being aggrieved with the recommendations

of the DRE, served a notice upon Respondent No.1 pursuant to Clause 67 of the Agreement to commence arbitration and thereafter referred the matter to a sole arbitrator, Respondent No.2. Respondent No.2 initiated arbitration proceedings. A number of hearings took place before the learned Arbitrator, but Respondent No.1 deliberately failed to join the proceedings despite the issuance of several notices. Respondent No.2, after detailed proceedings, announced his Award on 28.02.2014 and duly notified the parties of the same. The Appellant filed an application under Section 14(2) of the Arbitration Act for making the Award a Rule of Court, which was contested by Respondent No.1 by way of an objection petition. The Appellant also filed a reply to the objection petition. The learned Trial Court, vide Impugned Order dated 11.04.2017, accepted the objection petition filed by Respondent No.1 on the ground that the Award was improperly procured and thus fell within Clause (c) of Section 30 of the Arbitration Act, 1940, and dismissed the application under Section 14(2) filed by the Appellant for making the Award the Rule of the Court. Being aggrieved by the Impugned Order, the Appellant filed the instant Appeal.

3. The learned counsel for the Appellant argued that the Trial Court ignored the material fact by recording the finding that the notice to commence arbitration proceedings was not on the court file; that the notice to commence arbitration dated 11.01.2010 was part of the court record and proved the fact that the Appellant had issued the notice within time as stipulated in the contract documents and, as such, the objection petition on this ground was not sustainable; that the objection petition filed by the Respondent could not have been accepted as the same was time-barred, having been filed beyond the prescribed period of limitation, and therefore, could not have been decided on merits without first addressing the point of limitation raised by the Appellant; that the finding of the Trial Court that the Award had been improperly procured is not sustainable and is liable to be set aside, as the notice to commence arbitration was given within time and the Arbitrator issued notices to the Respondent at the address provided by them during the procurement of the contract; as such, any notice on the registered address of the Respondent is presumed to be served, and if the Respondent chose not to participate in the arbitration proceedings, the same does not vitiate the Award rendered by the Arbitrator after exhaustive proceedings; that the Trial Court failed to note that both parties were given notice of the announcement of the Award, and that the Trial Court did not take into account the fact that the Arbitrator was not asked to submit the Award in court and the

arbitration proceedings were not brought before the court; that under Section 14(2), the court was required to issue notice to the Arbitrator for submission of the Award and all relevant documents, and after submission, parties could then file objections in terms of Sections 30 and 33 of the Arbitration Act, 1940; that in the instant case, the objection petition was filed before the Award was submitted to the court, and the Impugned Order is flawed as the court failed to distinguish between its powers under Sections 14 and 17 of the Arbitration Act, 1940; that the court presumed the Section 14 application as one for making the Award a Rule of Court, whereas it was only to seek a direction to the Arbitrator to file the Award; that the court could not have given a finding on limitation without the Arbitrator's record to determine when notice under Section 14(1) was sent and received; that the Impugned Order reflects misreading and non-reading of material on the record. Lastly, he prayed for allowing the instant appeal, directing the Arbitrator to file the Award and record before the court, and remanding the matter to the Trial Court for decision afresh.

4. On the other hand, the learned counsel for Respondent No.1 argued that the learned Trial Court passed a well-reasoned order which does not call for any interference. Finally, the learned counsel prayed for dismissal of the instant Appeal.

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

6. During the execution of the work, a dispute arose between the parties regarding payment in two currencies, and Respondent No.1, being aggrieved by the Engineer's calculation, referred the dispute to the DRE pursuant to Clause 64 of the Agreement. The DRE gave his recommendations regarding the aforementioned dispute vide Letter dated 02.01.2010 in favour of Respondent No.1. The Appellant approached the DRE for a review of his recommendation through a Letter dated 28.04.2010, i.e., after expiry of 115 days. The DRE again heard the parties and upheld his previous recommendation vide letter dated 07.07.2010. According to Clause 67 of COPA "*the recommendations of DRE shall be binding on both the parties, who shall promptly give effect to it unless and until the same shall be revised as hereinafter provided in arbitral Award"*. After the expiry of 115 days, neither arbitration proceedings were initiated nor any arbitrator appointed to set aside the DRE's recommendation; resultantly, the DRE's recommendations became binding on both parties in light of Clause 67 of COPA.

7. At the time of signing the agreement, certain documents were made part of the agreement, including the "Binding Document, Contract Package II-B." The said document provides a mechanism for the resolution of disputes between the parties. The relevant clause of the Binding Document provides as under:

> *"If either the employer or the contractor is dissatisfied with any recommendation of the DRE, or of the DRE fails to issue his recommendation within 56 days after he has received the written request for recommendation, then either the employer or the contractor may, within 14 days after his receipt of the recommendation, or within 14 days after the expiry of the said 56 day period, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.*
>
> *If the DRE has issued a recommendation to the employer and the contractor within the said 56 days and no notice of intention to commence arbitration as to such dispute has been given by either the employer or the contractor within 14 days, after the parties received such recommendation from the DRE, the recommendation shall become final binding upon the employer and the contractor.*
>
> *Whether or not it has become final and binding upon the employer and the contractor, a recommendation shall be admissible as evidence in any subsequent dispute resolution procedure, including any arbitration or litigation having any relation to the dispute to which the recommendation related."*

8. Thus, as per the mechanism provided in the contract documents, if either party is dissatisfied with the recommendation of the DRE, that party is bound to issue a notice to the other party within 14 days of receipt of the recommendation, indicating its intention to commence arbitration. In the event of failure to do so, the recommendation of the DRE shall become final and binding upon the parties. Admittedly, in the instant case, the DRE issued its recommendation vide Letter dated 02.01.2010, while the Appellant filed a request for review on 28.04.2010, after the lapse of 115 days. The Appellant, instead of initiating arbitration proceedings, applied for a review, indicating that it had not intended to commence arbitration within the stipulated period. The Arbitrator/Respondent No.2 finalized the Award on 20.01.2014. The stance of Respondent No.1 is correct that arbitration proceedings were not commenced within the prescribed period, and further, that Respondent No.1 was not afforded an opportunity of hearing. In this regard, reliance is placed on the case titled *Pratap Singh v. Kishan Prasad and Co. Ltd.* **(AIR 1932 Bombay 68)**, wherein it was held:

"(b) Arbitration---Rights of parties-party must be allowed reasonable opportunity of proving his case by evidence or arguments.. An inquiry before the arbitrator should be assimilated as near as possible to proceedings in a trial in a court of law, and therefore a party to the arbitration must not only have notice of the time and place of the meeting, but he should be allowed reasonable opportunity of proving his case either by evidence or by arguments or both, and of being fully heard. The notice must be sufficiently long in order to give the party that reasonable opportunity if he wants to be heard. If there is no sufficient notice, there cannot be a proper hearing nor a valid Award, it being a well recognized rule of natural justice that a man's legal rights cannot be determined without giving him an opportunity of being heard."

We have to consider that by not giving any notice of the date, time and place of the proceedings, the arbitrators have committed misconduct or not? No doubt that the arbitrators are not bound by any rules of procedure or even law of evidence, but even then such forum cannot proceed in disregard to the rules of natural justice or the law on the subject. The arbitrators while appearing as AW-1 and AW-2 before the court have not stated that any notice for arbitration was served upon the appellant. As DW-1, the appellant categorically stated that he was unaware of the entire arbitration proceedings as he was neither given any notice nor he had appointed respondents Nos.2 and 3 as arbitrators. We are of the view that the act of not giving any notice to the appellant or for that matter not providing him an opportunity of being heard in support of his case and proceedings conducted at his back amounts to misconduct resulting in gross miscarriage of justice."

9. In light of the above discussion, this Court is of the view that the learned Trial Court rightly accepted the objection petition filed by Respondent No.1 and set aside the Award with cogent reasons. The learned counsel for the Appellant has failed to point out any illegality or infirmity in the Impugned Order. Resultantly, the instant Appeal is hereby **dismissed**, being devoid of merit.

(MUHAMMAD AZAM KHAN)
JUDGE

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

JUDGE

Sajid/--