JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.149 of 2017
Better Engineered Solutions (Pvt.) Ltd.
Versus
Balochistan Development Authority, Quetta and another

Dates of Hearing:	10.03.2022 & 29.08.2022
Appellant by:	Mr. Muhammad Shahid Kamal Khan, Malik Fazal Ali and Rana Tanveer Ahmed Khan, Advocates
Respondents by:	Mr. Abdul Zahir Kakar, Advocate for respondent No.1. Mr. Saif Khojak, J.M. (Legal), Balochistan Development Authority

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MIANGUL HASSAN AURANGZEB J.- Through the instant appeal, the appellant, Better Engineered Solutions (Pvt.) Ltd., impugns the order dated 02.10.2017 passed by the Court of the learned Civil Judge (West), Islamabad, whereby respondent No.1's objections filed under Section 30 of the Arbitration Act, 1940 (**"the 1940 Act"**) to the arbitration award dated 15.08.2016 were allowed and consequently the said award was set-aside. Furthermore, the prayer made by the appellant in its reply to respondent No.1's objection for the said award to be made a rule of Court was turned down.

2. The record shows that three agreements were entered into between the appellant and respondent No.1 for the Supply, Installation and Commissioning of Sea Water Intake and Brine Disposal System for Desalination Plants at Gaddani, Pasni and Jiwani in the Province of Balochistan (**"the Agreements"**). The Agreements contained an identical arbitration clause, which is reproduced herein below:-

> *"In case of any dispute the matter shall be resolved amicably by the parties. In case the matter is not resolved by the parties the same will be subject to Arbitration by Arbitrators to be appointed one each by the parties."*
> **(Emphasis added)**

3. After disputes and differences arising from and related to the Agreements developed between the parties, respondent No.1 claims to have appointed Mr. Naimatullah as one of the arbitrators and intimated the appellant about such appointment through letter dated 02.04.2016.

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The appellant, however, asserts that this letter was posted on 03.05.2016 and not received by the appellant until 05.05.2016. Furthermore, the appellant asserts that vide letter dated 13.04.2016 it had informed respondent No.1 about its decision to initiate arbitration proceedings and to have appointed Major (Retd.) Muhammad Asif Zagr Mengal (“Major Mengal”) as one of the arbitrators.

4. Vide letter dated 18.05.2016, the appellant informed respondent No.1 that Major Mengal would not be able to conduct the arbitration due to his preoccupation. Furthermore, respondent No.1 was informed as to the appellant’s decision to substitute Major Mengal with Mr. Ghulam Usman Babai (“Mr. Babai”) as the sole arbitrator. Respondent No.1 was required to convey its consent to Mr. Babai’s appointment as the sole arbitrator.

5. Vide letter dated 03.06.2016, the appellant informed respondent No.1 that in view of the time that would be consumed in the arbitration, it had agreed to resolve the disputes through negotiations. Apparently, the negotiations that ensued between the parties were unsuccessful. Respondent No.1 had accused the appellant of wasting time and delaying the works under the Agreements.

6. Vide letter dated 16.06.2016, the appellant informed respondent No.1 that it had decided to resume the arbitration process which had been temporarily disrupted in order to give a chance for the disputes to be settled amicably. The appellant addressed another letter dated 16.06.2016 to respondent No.1 informing it that Mr. Ghulam Nabi Mangrio (“Mr. Mangrio”) had been appointed as the sole arbitrator in place of Major Mengal. On the very same day, the appellant addressed a letter to Mr. Mangrio requesting him to act as the sole arbitrator in accordance with Section 9(a) of the 1940 Act. This letter was also copied to respondent No.1. Vide letter dated 24.06.2016, the appellant requested Mr. Mangrio to enter upon reference and commence the arbitration proceedings at the earliest.

7. Mr. Mangrio entered upon reference and issued notices to the contesting parties. Vide letter dated 12.07.2016, respondent No.1 informed Mr. Mangrio that it had neither appointed him as the sole arbitrator nor had it given consent to the appellant for doing so. Vide

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letter dated 19.07.2016, respondent No.1 informed Mr. Mangrio that it had appointed Mr. Naimatullah as its arbitrator and had informed the appellant about the said appointment; and that the appellant had replaced its arbitrator but respondent No.1's arbitrator remained unchanged. Furthermore, Mr. Mangrio was called upon to withdraw his notices.

8. Mr. Mangrio went ahead with the arbitration proceedings and rendered the award on 15.08.2016. Perusal of the said award shows that a notice had been issued by the arbitrator to respondent No.1 that in the event it did not appear before the arbitrator, *ex-parte* proceedings would be initiated. It is also mentioned in the award that respondent No.1 *"participated in the arbitration proceedings by sending some documents and written arguments by mail."*

9. On 02.09.2016, Mr. Mangrio filed the award and the record of the arbitration before the learned Civil Court at Islamabad. On 22.11.2016, respondent No.1 filed objections to the award whereas on 30.03.2017, the appellant filed a reply to respondent No.1's objections and prayed for the award to be made a rule of court.

10. Vide order dated 02.10.2017, respondent No.1's objections to the award were allowed by the learned Civil Court and the said award was set-aside. The said order dated 02.10.2017 has been assailed by the appellant in the instant appeal.

11. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that on 13.04.2016, the appellant had issued a notice to respondent No.1 clearly informing the latter that Major Mengal had been appointed as the appellant's arbitrator; that since respondent No.1 did not appoint the second arbitrator within a period of fifteen days from the notice dated 13.04.2016, Major Mengal was appointed as the sole arbitrator in terms of Section 9(b) of the 1940 Act; that since Major Mengal had declined to sit as an arbitrator due to his preoccupation, the appellant substituted him on 18.05.2016 with Mr. Babai, who was also substituted with Mr. Mangrio on 16.06.2016; that once the appellant had appointed a sole arbitrator under Section 9(b) of the 1940 Act, it did not need to take respondent No.1's consent to substitute the sole arbitrator; that

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although respondent No.1 had appointed Mr. Naimatullah as its arbitrator but notice of his appointment was not received until 05.05.2016 by which date Major Mengal already stood appointed as the sole arbitrator; that since Mr. Mangrio is based at Islamabad, there was no legal infirmity in the arbitration proceedings having been conducted at Islamabad; and that neither had the arbitrator misconducted the proceedings nor did the award suffer from any invalidity. Learned counsel for the appellant prayed for the appeal to be allowed and for a judgment and decree to be passed in terms of the award.

12. On the other hand, learned counsel for respondent No.1 submitted that in the appellant's letter dated 13.04.2016, respondent No.1 was not called upon to appoint the second arbitrator; that nevertheless on 02.04.2016, respondent No.1 had appointed Mr. Naimatullah as its arbitrator; that respondent No.1 had never agreed to the appointment of Major Mengal or any of his substitutes to be appointed as the sole arbitrator; that at no material stage did respondent No.1 submit to the jurisdiction of the sole arbitrator; that vide letters dated 12.07.2016 and 19.07.2016, respondent No.1 had objected to the assumption of jurisdiction by Mr. Mangrio as a sole arbitrator; that in the arbitration proceedings, respondent No.1 had not contested the appellant's claim on merits; that the Agreements were signed at Quetta and the works were performed at Gaddani, Pasni and Jiwani in the Province of Balochistan; that since Islamabad had no nexus with the dispute between the parties, the arbitration proceedings could not have been conducted at Islamabad; that the impugned order dated 02.10.2017 passed by the learned Civil Court does not suffer from any jurisdictional infirmity; and that respondent No.1 is ready, willing and able to participate in arbitration proceedings that may be initiated by the appellant in accordance with the arbitration clause in the Agreements. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

13. 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 appeal have

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been set out in sufficient detail in paragraphs 2 to 10 above and need not be recapitulated.

14. The arbitration clause in the Agreements shows that the parties had agreed for their disputes and differences to be resolved through arbitration by two arbitrators "*to be appointed one each by the parties.*" Where a party to an arbitration agreement, which provides for arbitration by a two-member arbitral tribunal one to be appointed by each party, wants to initiate arbitration proceedings without the intervention of the Court, it must, after appointing its arbitrator, serve a written notice on the other party as to such appointment and require the other party to appoint its arbitrator. If the other party does not appoint its arbitrator within fifteen clear days of the service of such notice, the party which had appointed its arbitrator acquires the right to appoint its arbitrator as the sole arbitrator by invoking the provisions of Section 9(b) of the 1940 Act. The sole arbitrator appointed through this process is treated as having been appointed with the consent of the parties.

15. Arbitration without the intervention of the Court is dealt with in Chapter-II of the 1940 Act, which also contains Section 9. For the purposes of clarity, Section 9 is reproduced herein below:-

> *"9. **Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator.--** Where an arbitration agreement provides that a reference shall be to two arbitrators, **one to be appointed by each party**, then, unless a different intention is expressed in the agreement,--*
> *(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;*
> *(b) **If one party fails to appoint an arbitrator**, **either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:***
> *Provided that the Court may set aside any appointment as sole arbitrator made under Clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.*
> ***Explanation**:-- The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section."*

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16. Section 9 is attracted only when the arbitration agreement requires the disputes between the parties to be referred to two arbitrators, one to be appointed by each party. The essential condition for the exercise of the power by a party to appoint a sole arbitrator under Section 9(b) is that the other party fails to appoint an arbitrator for 15 days after service of notice in writing to make an appointment. Before that time a sole arbitrator cannot be appointed and if appointed the arbitrator has no jurisdiction. Failure to give requisite number of clear days will be fatal to the appointment and the statutory period should be calculated after the service of the written notice and not from the date of posting of the notice. After the other side to the dispute refuses to appoint or does not appoint its arbitrator within 15 days of the service of notice upon him, it is open to the party issuing the notice to appoint its own arbitrator as the sole arbitrator in the reference.

17. In short the following prerequisites must be fulfilled before there can be a valid appointment of a sole arbitrator under Section 9(b):-

- **(i) There must be a valid arbitration agreement between the parties providing for reference to two arbitrators, one to be appointed by each party;**
- **(ii) The party willing to exercise this power must have appointed its own arbitrator before service of notice on the other party;**
- **(iii) After appointing its own arbitrator, the party must serve a notice on the other party intimating about the appointment of its own arbitrator and calling upon the other party to appoint its arbitrator;**
- **(iv) There must be a default or failure of the other party to appoint its arbitrator for a period of 15 clear days from the date of service of the notice;**
- **(v) On the expiry of this period of 15 clear days from the date of service of the notice, the party who had appointed its own arbitrator acquires the right to appoint its own arbitrator as the sole arbitrator;**
- **(vi) The right to appoint its own arbitrator as the sole arbitrator has to be exercised by the party that has already appointed its arbitrator and notice of such appointment has to be given to**

the other party. The appointment of a sole arbitrator is subject to the contingency that the Court may set-aside any such appointment and allow further time to the defaulting party to appoint an arbitrator or pass such order as it thinks fit.

18. In the case at hand, respondent No.1 claims to have taken the first step for initiating the arbitration proceedings without the intervention of the Court by appointing Mr. Naimatullah as its arbitrator and informing the appellant about the said appointment vide letter dated 02.04.2016. The appellant disputes this and takes the position that the respondent's letter whereby Mr. Naimatullah was appointed as the arbitrator was couriered to the appellant on 03.05.2016 and received by the appellant on 05.05.2016. The courier tracking report and the courier receipt produced by the appellant in the arbitration proceedings shows that letter dated 02.04.2016 (whereby Mr. Naimatullah was appointed as the arbitrator by respondent No.1) was sent by respondent No.1 on 03.05.2016 and received by the appellant on 05.05.2016. So it was not until 05.05.2016 that the appellant came to know that respondent No.1 had appointed Mr. Naimatullah as its arbitrator on the two-member arbitral tribunal.

19. The appellant had issued notice to respondent No.1 on 13.04.2016 about its decision to appoint Major Mengal as one of the arbitrators. When the said notice was issued, the appellant did not know about Mr. Naimatullah's appointment as respondent No.1's arbitrator. In none of respondent No.1's pleadings or written arguments did it deny receipt of the said notice dated 13.04.2016. Assuming that the said notice was served on respondent No.1 on 13.04.2016, and that respondent No.1 did not appoint its arbitrator within fifteen clear days of the service of such notice (i.e., by 29.04.2016), this lapse on respondent No.1's part vested the appellant with the right to appoint Major Mengal as the sole arbitrator under Section 9(b). However, it is an admitted position that the appellant did not issue notice to respondent No.1 about Major Mengal's appointment as the sole arbitrator. The mere expiry of the fifteen-day period could not *ipso facto* result in the appointment of Major Mengal as the sole arbitrator. The acquisition of a right to appoint a sole arbitrator by the appellant under

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Section 9(b) would not imply that Major Mengal stood appointed as the sole arbitrator on the expiry of the fifteen-day period without him having been duly appointed as the sole arbitrator and notice of such appointment having been served on respondent No.1.

20. There is nothing on the record to show that the appellant had on the expiry of the fifteen-day period issued notice to respondent No.1 as to the appointment of Major Mengal as the sole arbitrator. The appellant's letter dated 18.05.2016 is not a notice as to the appointment of Major Mengal as the sole arbitrator but an intimation to respondent No.1 that due to Major Mengal's preoccupation *"he is not able to conduct the arbitration."* Vide the very same letter, the appellant appointed Mr. Babai as the sole arbitrator in place of Major Mengal and sought respondent No.1's consent to his appointment as the sole arbitrator. It is not disputed that respondent No.1 had not given its consent for appointment of either Major Mengal or Mr. Babai as a sole arbitrator.

21. The term *"may appoint that arbitrator to act as sole arbitrator"* in Section 9(b) connotes the appointment of a sole arbitrator by serving a notice about such appointment on the party that failed or refused to appoint its arbitrator within the fifteen-day period. Appointment of arbitrators on a two-member arbitral tribunal or the appointment of a sole arbitrator in terms of Section 9(b) can be validly made only by serving a notice on the other party as to the appointment. The appointment of Major Mengal as the sole arbitrator by the appellant cannot be held to have been complete without communication thereof to respondent No.1. In the case of Thomas Vs. Fredrick (1847 (10) Q.B. 775), Lord Denman held that *"[n]either party can be said to have chosen an arbitrator until he lets the other party know the object of his choice."* Therefore, it is safe to hold that since at no material stage did the appellant appoint Major Mangal as the sole arbitrator or issued notice to respondent No.1 about such appointment, the question of substituting him with Mr. Babai as the "sole arbitrator" did not arise. Therefore, the appointment of Mr. Babai as the sole arbitrator cannot be held to have been validly made. In the case of Hari Chand Vs.

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Lachhman Das (AIR 1948 EP 11), the High Court of East Punjab, after making reference to Section 9(b) of the 1940 Act, held as follows:-

> ***"It will been seen from clause (b) that after the other side had refused to appoint their arbitrator within fifteen days of the service of the notice upon them, it was open to the appellants' counsel to appoint their own arbitrators as sole arbitrators in the reference, but they did nothing of the kind. The appellants' learned counsel argued that there was no necessity of a formal appointment of the arbitrator previously appointed as sole arbitrator but I do not find it possible to agree with him. The words of clause (b) appear to me to be very clear and as I read them, my opinion is that unless there is a formal appointment in the words of the clause the arbitrator appointed by one party cannot arrogate to himself the functions of a sole arbitrator and has no jurisdiction to proceed with the reference. The words of the proviso to the section strengthen this conclusion. It lays down that after an arbitrator appointed by one of the parties has been appointed as the sole arbitrator under clause (b) a special right accrues to the other party to have that appointment cancelled by the Court and to apply for being granted further time for appointing his own arbitrator, and to hold that no formal appointment need be made, would be to deprive other party of that right."***
>
> **(Emphasis added)**

22. Section 9(b) vested the party that appointed its arbitrator with the right to appoint its arbitrator as the sole arbitrator on the other party's failure or refusal to appoint its arbitrator within fifteen clear days of a *"notice in writing to make the appointment."* In the case of Satya Narayan Agarwall Vs. Baidyanath Mandal (AIR 1972 Patna 29), it was held that *"Section 9(b) was an exceptional provision and was in effect a penalty on the defaulting party for his failure to make the appointment on getting notice and caution from the other side."* Strict compliance with the requirements of Section 9(b) is required if the defaulting party is to be met with the penalty for its failure to appoint an arbitrator after a notice in writing from the party to make the appointment. Now, the appellant, through its letter dated 13.04.2016, neither required respondent No.1 to appoint its arbitrator nor cautioned respondent No.1 that in the event it does not appoint its arbitrator within fifteen clear days, the arbitrator appointed by the appellant would be appointed as the sole arbitrator. This vital omission in the appellant's letter dated 13.04.2016 cannot be ignored. The mere fact that the appellant had intimated respondent No.1 as to the appointment of its arbitrator cannot be treated as requiring respondent No.1 to appoint its arbitrator. Since the appellant's letter dated 13.04.2016 does not fulfill

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the requirements of a notice requiring respondent No.1 to appoint its arbitrator, I am of the view that the essential prerequisite for penalizing respondent No.1 with the appointment of the appellant's arbitrator as the sole arbitrator had not been fulfilled in the case at hand. In the case of Abdul Khaleq Vs. Province of East Pakistan (PLD 1964 Dacca 166), it was held that one of the conditions precedent to the appointment by a party of his arbitrator as the sole arbitrator under Section 9(b) is that *"the party proposing to exercise this power must have served notice on the other party calling upon him to appoint his arbitrator."*

23. There is also nothing on the record to show that Major Mengal had accepted his appointment or agreed to be the appellant's nominee on the arbitral tribunal. *Russell on Arbitration* (18th Edition), at page 212 reads thus:-

> ***"Acceptance of offices:- Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment. It has been so decided in the case of an umpire, and it would seem to be only reasonable that an appointment should not be considered effective until the person appointed has agreed either expressly or tacitly to exercise the function of the office."***

24. In the case of Tradax Export S.A. Vs. Volkswagenwerk A.G. [1970] 1 All ER 420, the Master of Rolls in the Court of Appeal observed as under:-

> ***"So we have to decide: what is necessary to constitute the appointment of an arbitrator? I think the answer is this: First, it is necessary to tell the other side. That is plain from Tew V. Harris (1847) 11 Q.B. 7. Second, it is necessary to tell the appointee himself. That is obvious because he often has to start acting at once. Third, it is necessary that he should be willing to act and have intimated his willingness to accept the appointment."***
>
> **(Emphasis added)**

Lord Justice Salmon, while agreeing with the Master of Rolls further clarified the matter in the following terms:-

> ***"We know from all the evidence in this case that as a general rule anyone who desires to appoint an arbitrator under this clause gets into touch with the proposed arbitrator to ascertain whether he is willing to act as arbitrator in the dispute in question. If he is willing to act, then the party authorises him to act and communicates with the other party, notifying him of the name of the arbitrator. It is argued, in effect, that everything except the notification of the name of the arbitrator to the other party is a ceremonial ritual performed only out of courtesy. I am afraid I cannot agree. In my opinion the ordinary businessman takes the view no doubt what may be considered the prosaic view, which I share that in order to appoint an arbitrator one must first get his consent to***

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> ***act as arbitrator. In my judgment, three things are necessary in order to make an effective appointment under this clause: first of all, the arbitrator must be communicated with and asked if he is willing to act. Secondly, he must express his willingness and be clothed with authority to act. And thirdly, as is apparent from the case of Tew v. Harris in order to perfect the appointment the other side must be notified of the name of the arbitrator. Sometimes these steps are taken by letter or by cable. There is nothing to prevent them being taken over the telephone or by telex."***

25. The party willing to exercise the power to appoint a sole arbitrator under Section 9(b) must have "appointed" its own arbitrator before service of notice on the other party. It is only after appointing its own arbitrator that the party must serve a notice on the other party in writing, intimating the other party about the appointment of its own arbitrator and calling upon the other party to appoint its arbitrator. Section 9(b) explicitly requires one party to an arbitration agreement giving notice to the other party, requiring it to appoint its arbitrator to have *"appointed his arbitrator before giving the notice."* As mentioned above, the appellant, vide letter dated 18.05.2016, informed respondent No.1 that Major Mengal would not be able to conduct the arbitration due to his preoccupation. There is nothing on the record to show that prior to the issuance of the notice / letter dated 18.05.2016, the appellant had "appointed" Major Mengal as the arbitrator. Can a person be considered having been "appointed" as an arbitrator when he has not at any stage accepted the appointment? Could the time consumed in Major Mengal declining to act as an arbitrator or the time consumed in the appellant informing respondent No.1 as to Major Mengal's said decision, operate to respondent No.1's detriment – in that, it would lose the opportunity to appoint its arbitrator? The answer to both the questions is a firm 'no'.

26. As there is nothing on the record to show that Major Mengal had agreed to act as the appellant's nominee on the arbitral tribunal before excusing himself due to his preoccupation, he cannot be considered to have been "appointed" on the arbitral tribunal by the appellant. Since he was not appointed on the arbitral tribunal, the question of him being appointed as the sole arbitrator did not arise. Major Mengal's regret to sit as an arbitrator gave the appellant the right to appoint another arbitrator, which it did by appointing Mr. Babai, but by no means could that substitute act as "a sole arbitrator."

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27. Would it not be ludicrous for Party-A to assert that even though the person named in his notice to Party-B as the arbitrator appointed by Party-A on the two-member arbitral tribunal had in fact never accepted his appointment as an arbitrator or had declined to be appointed, the time for Party-B to appoint its arbitrator would nevertheless run out in 15 days of the receipt of the notice, and thereafter Party-A would be at liberty to appoint any other person as the sole arbitrator. This is exactly what has happened in the case at hand. Vide letter dated 13.04.2016, the appellant informed respondent No.1 as to the appointment of Major Mengal as one of the arbitrators. There is nothing on the record to show that Major Mengal had agreed to be appointed as the appellant's arbitrator on the arbitral tribunal. But we do know from the appellant that Major Mengal had declined the appointment due to his preoccupation. Even though Major Mengal had not been "appointed" in the true sense of the word as an arbitrator, the appellant appointed Mr. Babai as his substitute but referred to him as "the sole arbitrator." Now, the appellant appointed Mr. Babai as the sole arbitrator on 18.05.2016, by which date the appellant knew about respondent No.1 having appointed Mr. Naimatullah as its arbitrator. The appellant could have substituted Major Mengal with Mr. Babai as one of the arbitrators on the two-member arbitral tribunal but could certainly not have appointed Mr. Babai as the sole arbitrator.

28. Mr. Mangrio was appointed by the appellant as a substitute of Mr. Babai. In other words, Mr. Babai was Mr. Mangrio's predecessor-in-office, who stepped into the shoes of Mr. Babai. The invalidity in Mr. Babai's appointment as the sole arbitrator would knock the foundation of Mr. Mangrio's appointment as a sole arbitrator and render Mr. Mangrio's appointment as invalid as his predecessor's.

29. Another factor, and a fairly serious one, that vitiates the award is that assuming that Mr. Babai had validly been appointed as the sole arbitrator, he could be substituted with a new arbitrator only if he neglected or refused to act, or was incapable to acting, or had died. A party that appoints an arbitrator on an arbitral tribunal cannot substitute him as and when it takes the party's fancy. Section 9(a) entitles a party who appointed an arbitrator to replace him only if the appointed

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arbitrator *"neglects or refuses to act, or is incapable of acting, or dies"* and not under any other circumstances. The record is totally silent as to the reasons why the appellant substituted Mr. Babai with Mr. Mangrio. Again assuming that Mr. Babai was validly appointed as the sole arbitrator, his substitution with Mr. Mangrio was clearly not in accordance with the requirements of Section 9(a), and, therefore, the latter's appointment as the sole arbitrator cannot be held to be valid. In the case of Karachi Dock Labour Board Vs. Quality Builders Ltd. (PLD 2016 SC 121), it has been held by the Hon'ble Supreme Court that though under the arbitration law the parties can chose their own forum for the adjudication of their disputes, but that forum has to be constituted strictly in terms of the arbitration agreement and, in any case, according to the express mandate of the law and not in violation thereof. Furthermore, it was held that if the constitution of the arbitral tribunal is violative of both the agreement and the law, and the objecting party has also not submitted to the jurisdiction of the arbitrator, the rule of waiver and acquiescence cannot be pressed into service against such party.

30. In the said case, the arbitration clause in the agreement between the parties was interpreted such as to provide for the disputes to be referred to a single arbitrator. The Court of first instance, instead of appointing an arbitrator under Section 8 of the 1940 Act, appointed him under Section 9(b). Since Section 9 applies where the arbitration agreement provides for the reference to be to two arbitrators, the Hon'ble Supreme Court held that the appointment of the sole arbitrator (who had been appointed by one of the parties) under Section 9(b) was invalid and the proceedings conducted by him were a nullity in the eyes of law.

31. True, under the proviso to Section 9(b), the Court can set-aside an appointment of a sole arbitrator made under Section 9(b) and where the defaulting party comes up with equitable grounds, the Court can allow further time to such party to appoint an arbitrator. The defaulting party is not required to show sufficient cause or explain delay of each and every day but has to satisfy the Court that he has not been obstructive or evasive and has acted with due diligence. An order under the proviso enables the defaulting party to remedy his failure to make the

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appointment within 15 days after the receipt of notice. The words "*may appoint that arbitrator to act as sole arbitrator in the reference*" in Section 9(b) imply that the sole arbitrator has to be duly appointed by the party who had earlier appointed its arbitrator and had given notice of such appointment to the other party. Where the very appointment of the sole arbitrator is held to be invalid, a party need not apply to the Court under the proviso to Section 9(b) for further time to appoint an arbitrator. An award rendered by a sole arbitrator can be set-aside by the Court under Section 30 of the 1940 Act where the appointment of the sole arbitrator is found to be invalid. In the case at hand, the appointment of Mr. Babai as the "sole arbitrator" and/or his substitution with Mr. Mangrio was clearly invalid, and since such invalidity was not in any manner attributable to respondent No.1, who had already appointed Mr. Naimatullah as its arbitrator (of which the appellant had notice when it substituted Major Mengal with Mr. Babai), it is my view that the proviso to Section 9(b) was not applicable in the case.

32. The learned Civil Court, while allowing respondent No.1's objection to the award dated 15.08.2016 has, in effect, held that even after a lapse of 15 days of the notice of the appointment of one of the arbitrators by one party, if the other party does not appoint the second arbitrator, the sole arbitrator can be appointed only with the consent of the parties, and where the parties did not consent to the appointment of the sole arbitrator, it was the exclusive jurisdiction of the Court to appoint the sole arbitrator under Section 8 of the 1940 Act. The reasons given by the learned Civil Court for setting aside the award dated 15.08.2016 are based on misappreciation of the law and conflation of Sections 8 and 9 of the 1940 Act. For the purposes of clarity, paragraphs 10 and 11 of the learned Civil Court's order are reproduced herein below:-

> ***"10. Keen appreciation of the litigation clause refers that the arbitration clause contains the description of arbitrators to be appointed one each by the parties; as such the petitioner primarily invoked the provisions of section 9 of Arbitration Act, 1940 and accordingly nominated arbitrator who was requested to act as sole arbitrator for the purpose of resolution of dispute. <u>It is relevant to mention here that the litigation clause contains the word Arbitrators therefore, the appointment of Arbitrator is likeable to be done by the consent of both the parties but in the present case communication of consent of respondent is lacking.</u> It is worth mentioning that <u>after service of notice to the adverse side to nominate the second arbitrator and in the event of non appointment within 15 clear</u>***

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days of service of notice the petitioner has no power to appoint arbitrator and to request him to act as sole arbitrator when the concurrence in this regard has not been materialized. *In this respect the conferment of authority upon the appointed sole arbitrator in view of section 9(b) cannot take place at the event when the proper course have not been taken into consideration as per the preceding section 8 of Arbitrator Act, 1940. Since it is the exclusive jurisdiction of the court to make such appointment to intervene in the matter however, no such application has ever been made by the petitioner as prescribed by section 8 of Arbitration Act, 1940. It is relevant to mention here that the petitioner has waived off the applicable remedies pertaining to invoking the arbitration i.e. (i) without intervention of the court (ii) with the intervention of the court as envisaged in Arbitration Act, 1940.* ***In the present case the petitioner itself equipped the sole arbitrator to conduct the arbitration proceedings in quite disregard of section 8 whereby arbitrators to be appointed with the consent of both the parties with the intervention of the court therefore, appointment of sole arbitrator is unilateral act of petitioner rather it was the exclusive jurisdiction of the court to make such appointment.*** *There is an admitted position* ***in the present case that due to non-response of respondent after service of notice u/s 9-a of Arbitration Act, 1940 the course was available to the petitioner for referring the matter before the court however, no such application was ever made to the court as prescribed by section 8 which was not followed by the petitioner therefore, award passed by the learned sole arbitrator can be deemed to be valid award.***

11. In view of this discussion it is ascertained that conferment of authority upon the sole arbitrator to conduct the arbitration proceedings is unilateral act of the petitioner which has been adopted in complete disregard of available course as enunciated in Arbitration Act, 1940. Since the respondent has objected over the very authority of the learned sole Arbitrator as well as the consent of respondent is also lacking in this regard therefore, on the basis of one sided award same cannot be made as rule of court hence, arbitration award dated 15-08-2016 is hereby set-aside resultantly the application u/o 13 Rules 1& 2 C.P.C. stands infructuous same is also dismissed. Parties are left to bear their own costs. File be consigned to record room after its due completion and compilation."

(Emphasis added)

33. The said conclusion of the learned Civil Court is based on the misreading of the arbitration clause in the Agreements as well as misappreciation of law on the subject. The arbitration clause provides for the two-member arbitral tribunal to be constituted by each party appointing one arbitrator. In other words, the arbitration clause does not provide for the arbitral tribunal to be constituted with the consent of the parties.

34. The vital question that needs to be answered is where an arbitration agreement provides for constitution of a two-member arbitral tribunal by each party appointing one arbitrator or where an arbitral tribunal is so constituted, can the Court exercise power under Section 8

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of the 1940 Act to appoint an arbitrator if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies?

35. In the case at hand, neither party had submitted an application to the Court for the appointment of arbitrator(s). The parties could not have resorted to Section 8 of the 1940 Act for the appointment of arbitrator(s) since the arbitration clause in the Agreements did not provide for the arbitral tribunal to be appointed with the consent of the parties. Where arbitrators are appointed by the parties or a sole arbitrator is appointed pursuant to Section 9(b), and thereafter either of the appointed arbitrators or the sole arbitrator neglect or refuse to act, or are incapable of acting, or die, then their substitutes can be appointed by the respective parties that had appointed them. The parties exercise this power vested in them by Section 9(a) of the 1940 Act, which provides the mode for filling a vacancy in the appointment of arbitrators and comes into play only if either of the appointed arbitrators neglect or refuse to act or are incapable of acting or die.

36. Section 8(1)(a) empowers a party to serve a notice on another party to concur in the appointment of an arbitrator etc., where the arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and the parties do not, after differences have arisen, concur in the appointment or appointments. Under Section 8(1)(b), if any appointed arbitrator or umpire etc. neglects or refuses to act or is incapable of acting or dies, and the agreement does not show that the vacancy is not to be supplied, and the parties etc. do not supply the vacancy, then a notice may be served by any party on the other party for concurring in supplying the vacancy. Section 8(2) provides *inter alia* that if the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party which gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be. An application under Section 8(2) for the appointment of arbitrator(s) can be made only if the arbitrator(s) who neglected or refused to act or had become incapable of acting or had died had been appointed with the consent of the parties or by the Court under Sections 8 or 20 but not where such

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arbitrator had been appointed by any party without the other party's consent. Reference in this regard may be made to the following case law:-

(i) In the case of Akbar Hussain Vs. Wadero Muhammad Tayyab (PLD 1996 Karachi 545), the Division Bench of the Hon'ble High Court of Sindh held as follows:-

> ***"It will at once be seen that whereas under section 8, for want of concurrence in the appointment of the arbitrator(s), aid and attention of the Court is necessary, the appointment, in terms of section 9 of the Act, by the party not in default can ipso facto, upon the requirements being met, becomes final and no recourse to Court needs to be made. This is what distinguishes sections 8 and 9."***

(ii) In the case of Alpha Insurance Co. Limited Vs. Ch. Niazam Din & Sons (2001 CLC 289), the Hon'ble Lahore High Court, after making reference to Sections 8 and 9 of the 1940 Act, held that Section 8 applies to cases where the arbitrator or arbitrators are to be appointed by the consent of all parties and not to those where each party is to appoint to his own arbitrator. Furthermore, it was held as follows:-

> ***"Both the sections provide that a substitute can be appointed by a certain party in the place of an arbitrator who neglects to act (a) If the party who is to concur in such an appointment or is to appoint such a substitute, fails in terms of the section, to do so, then under section 8(2) recourse to be taken to the Court but under section 9(b) the opposite party may appoint his own arbitrator to act as the sole arbitrator. In other words, recourse to the Court is not required under section 9. Secondly, the words by consent of the parties, which occur after clause (c) of that subsection unmistakably indicate that the section applies to those arbitration agreements under which arbitrators are appointed by the consent of both the parties. On the other hand section 9 applies to those of such agreements under which two arbitrators are appointed and one of them is to be appointed by each party."***

(iii) In the case of Subal Chandra Vs. MD. Ibrahim (AIR 1943 Calcutta 484), the partnership deed provided for reference of disputes to a single arbitrator in case the parties agree upon one, otherwise to two arbitrators one to be appointed by each party to the dispute. It was held that where an arbitrator appointed by one party is made sole arbitrator under Section 9, the other party having refused to act, the procedure to be followed is not that which is laid down in Section 8(1)(b) but the procedure in Section 9 will be followed, and the party which appointed

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the arbitrator who became the sole arbitrator may appoint a fresh arbitrator after giving notice to the other side. Furthermore, it was held as follows:-

> ***"This arbitration agreement cannot be construed as an agreement to refer the disputes to a single arbitrator simpliciter so as to attract the operation of Section 8 of the Act. Reference to a single arbitrator is conditional on all the parties agreeing to do so and there is an alternative mode of appointment of two arbitrators. To construe this arbitration agreement as an unconditional agreement to refer to one arbitrator is to cancel the alternative provision altogether and will amount to making a new contract for the parties, which is obviously not permissible."***

37. Section 8 refers to the power of the Court to appoint an arbitrator or an umpire in case of neglect, refusal to act, incapability of acting, death of the appointed arbitrator and when the parties do not concur in the appointment of an arbitrator or umpire. Section 9 empowers a party to appoint his arbitrator as the sole arbitrator. Section 9 is applicable only when the arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party. Since in the case at hand, the arbitration clause in the Agreements provided for the two arbitrators to be appointed by each of the parties, the element of consent of the parties was lacking, and therefore, Section 8 was of no relevance in the case. The conclusion of the learned Civil Court that the sole arbitrator should have been appointed by the Court under Section 8 is erroneous, and therefore not sustainable.

38. In view of the above, the instant appeal is dismissed and the setting aside of the award rendered by Mr. Mangrio is maintained *albeit* for different reasons referred to herein above. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 30/08/2022

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING