JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT.

ICA No.313/2016

LTH JV	**Versus**	**Pakistan Civil Aviation Authority & another.**
Appellant by:		Mr. Muhammad Masood Khan, Advocate.
Respondent No.1 by:		Mr. Babar Sattar, Advocate.
Respondent No.2 by:		Mr. Muhammad Nasir Khan, Advocate.

ICA No.286/2016

Mr. Bilal A. Khwaja	**Versus**	**Pakistan Civil Aviation Authority & another**
Appellant:		Mr. Muhammad Nasir Khan, Advocate.
Respondent No.1 by:		Mr. Babar Sattar, Advocate.
Respondent No.2 by:		Mr. Muhammad Masood Khan, Advocate.
Date of hearing:		19-01.2017

JUDGMENT

MOHSIN AKHTAR KAYANI, J. By this single judgment, we intend to decide both the above mentioned appeals.

2. Through the instant ICAs, appellants have assailed the order dated 29.04.2016 passed by learned Singe Judge in Chambers in Civil Suit No.27/2016 whereby learned Judge has allowed the C.M. Nos.01 & 143 of 2016 with the following observations:-

> *"13. For what has been discussed above, the instant application is allowed. The Defendant No.1 is restrained to act as a Member of the DRB. However, in order to ensure that the proceedings of the DRB are not affected, the Defendant No.2 may nominate another person to be appointed as a Member of the DRB till the adjudication of the suit."*

3. Brief facts of the instant ICAs are that Pakistan Civil Aviation Authority invited bids for the construction of new Islamabad International Airport Project and the Authority accepted the bid for construction of new Islamabad International Airport

Project (Package-8) from LTH Joint Venture (appellant in ICA No.313/2016) whereby an agreement was executed on 24.07.2008 in respect of Package-1 while agreement dated 14.09.2010 was signed for Package 8A. The agreement contains mechanism for dispute resolution under Clause 67 whereby 03 tier have been provided, in case of any dispute matter shall be referred to the Engineer for his decision under Clause 67 of Particular Conditions of Contract (hereinafter referred to as the "PCC"), any party may challenge the decision of the Engineer within specified period before the Dispute Review Board (DRB) pursuant to clause 67.2 of PCC, the decision of DRB is open to challenge before an Arbitration Tribunal pursuant to Clause 67.3 and 67.5 PCC. The contract agreement stipulates that DRB shall be constituted and shall remain in place during the term of contract agreement till such time that it has adjudicated upon all disputes referred to it as an adjudicatory forum. The agreement also imposes certain procedures and conditions upon the DRB called as Dispute Revenue Board Rules and Procedures. Mr. Bilal A. Khwaja (appellant in ICA No.286/2016) was nominated by LTH Joint Venture as one of the Members of DRB for both packages No.1 and 8-A. Pursuant to clauses of PCC, respondent No.1 (Civil Aviation Authority) signed declaration of acceptance as required under Rule 11 of DRB Rules and Procedures accepting his selection and undertaking to abide by Clause 67 of PCC. Mr. Bilal A. Khwaja sent an e-mail addressed to Faisal Chaudhry (Board Member), Richard Smyczek (Project Manager of LTH JV), Mushtaq Ahmed (Board Member), Mushtaq Soomro, Muhammad Javed (General Managers, Contract of LTH JV) and Mohammad Farrukh Aslam (Member) whereby the subject of that email dated 02.10.2014 was "Draft-DRB Decision of ED-11", Pakistan Civil Aviation Authority raised objection on the issuance of e-mail by Mr. Bilal A. Khwaja on the ground that it amounts to breach of trust and impartiality of Mr. Bilal A. Khwaja DRB Member whereas there is no express provision in the contract agreement regarding removal of DRB Member, therefore, a request was made to Project Director to review the matter with the aim to replace Mr. Bilal A. Khwaja for breach of his obligation under the contract agreement.

4. Mr. Bilal A. Khwaja responded to said letter and explained his position whereafter refused to resign from the position of DRB Member as a result of said event

of distrust Pakistan Civil Aviation Authority having no other remedy except to file a civil suit, filed C.S. No.27/2016 with the prayer that Mr. Bilal A. Khwaja (DRB Member/appellant) has committed misconduct and breach of contractual obligations under the contract agreement, therefore, he may be removed. The suit was contested by the present appellants who are defendants in main suit whereafter the learned Single Judge in Chamber after hearing the parties decided the CM and restrained Mr. Bilal A. Khwaja/appellant to act as DRB Member, as a result of said order instant ICAs have been filed.

5. Appellant (Mr. Bilal A. Khwaja) argued that impugned order has been passed by learned Single Judge in Chambers while relying upon two emails dated 19.12.2015 which are contrary to record; that the impugned order is based upon 2002 CLD 120 [Karachi], ATCO Lab. (Pvt.) Limited versus PFIZER Limited and others", whereby nothing in separate has been suggested as to how the plaintiff will suffer irreparable loss or balance of convenience for granting of interim relief is available to the plaintiff; that Pakistan Civil Aviation Authority has not raised any objection regarding continuity of Mr. Bilal A. Khwaja as DRB Member, as Mr. Bilal A. Khwaja has passed decisions in relation to ED-11, ED-12 and ED-17 and the said disputes have been decided against Civil Aviation Authority by majority decision of DRB; that respondent authority has failed to identify any misconduct on the part of appellant Mr. Bilal A. Khwaja through which any delay has been caused or alleged; that the suit is not maintainable as it is based upon concealment of material facts; that the impugned order is silent as to how and under what circumstances the granting of injunction would be in public policy/public interest.

6. Learned counsel of LTH Joint Venture while appearing in ICA No.313/2016 argued that Pakistan Civil Aviation Authority (respondent) has approached the Court with an ordinate delay for the alleging misconduct against Mr. Bilal A. Khwaja for his draft individual decision on 02.10.2014 whereafter respondent without any protest and reservation participated and continued to attend the proceedings of DRB on several reference in which Bilal was acting as one of the Members; that respondent has also filed an application U/S 27 of the Arbitration Act, 1940 on 14.03.2016 before the learned

Arbitrators Mr. Justice (R) Sair Ali and Mr. Justice (R) Athar Saeed (Arbitration Tribunal) on the same grounds during the pendency of arbitration proceedings regarding package No.1; that by raising such kind of disputes against the DRB Member by the respondent, the contractual obligations have been infringed as DRB proceedings have come to stand still which gives the respondents unfair advantage in dispute resolution process which has financial implication; that Pakistan Civil Aviation Authority participated in all proceedings of DRB without complaint hence they could not take a summersault as such kind of action is based upon malafide as Pakistan Civil Aviation Authority is trying to use the Court proceedings to replace LTH JV DRB Member by seeking specific performance which is not permissible under the law as well as under the terms of the contract; that Pakistan Civil Aviation Authority is put to strict proof for the allegations leveled by the respondent in their e-mail as well as in the civil suit and if the impugned order is not set-aside the LTH JV will suffer irreparable loss; that suit has been filed by unauthorized person as no legal authority or authorization is available on record; that learned Single Judge in Chambers while passing the impugned order has ignored the principles of safe administration of justice and even not considered the concept of irreparable loss. Learned counsel has relied upon 2002 CLC 120 “Atco Lab. (Pvt.) Ltd. versus Pfizer Limited and others”, PLD 1975 [Karachi] 464 “Abdul Ghafoor Memon versus Mohammed and another”, 2008 CLC 930 (D.B.) “Arbab Fazal Rauf and another versus Arbab Sajjad and 6 others”, 2013 CLC 454 “Mst. Saeeda versus Province of Punjab and others”, PLD 1979 Karachi 668 “M/s. Quality Builders Ltd. Versus M/s. J. P. Brockhoven V. V. Dredging Contractors and 9 others”, 1984 CLC 440 (Adamjee Paper and Board Mills Limited versus Maritime Agencies Ltdd”, PLD 2011 Karachi 185 “M/s Shakil Waqas & Co. and others versus General Manager/Marketing, Pakistan Railways and others”, PLD 1970 Karachi 332 “Oil and Gas Development Corporation versus Ltd. Col. Shujauddin Ahmed”, 1984 PLC 712 “Cotton Export Corporation of Pakistan Ltd. versus The Sind Labour Appellate Tribunal at Karachi and 2 others”, PLD 1973 Karachi 234 “Aboo Noor Muhammad versus General Iron & Steel Works Limited”, 1979 CLC 307 “Island Textile Mills Ltd. versus V/O Technoexpert and another”, 2015 CLC 34, “Major (Retd.) Ahmed Nadeem Sadal versus Federation of Pakistan through Secretary

Sport and others", PLD 1971 SC 550 "Khan Iftikhar Hussain Khan of Mamdot (represented by 6 heirs) versus M/s Ghulam Nabi Corporation Ltd.", 1987 CLC 367 "Abubakar Saley Mayet versus Abbot Laboratories and another", PLD 1966 SC 684 "M/s Muhammad Siddiq Muhammad Umar and another versus The Australasia Bank Limited", 2006 CLD 85 "National Insurance Corporation and others versus Pakistan National Shipping Corporation and others", 2005 CLD 1208 "M/s Razo (Pvt.) Ltd. versus Director Karachi City Region Employees Old Age Benefit Institution and others.

7. Learned counsel for respondent/Pakistan Civil Aviation Authority in both the appeals argued that the contract executed between Pakistan Civil Aviation Authority for construction of new Islamabad International Airport (Package-1 and Package 8A) on 14.09.2010 with LTH JV provides a dispute resolution mechanism in 3 tier in terms of clause 67 of PCC whereby a DRB was also constituted during the term of contract and all the members of DRB are bound by Appendix-M to the contract agreement which contains a declaration that every DRB Member is agreed to the DRB Rules and Procedures and accepted the same as part of bid. Learned counsel further argued that Bilal. A. Khwaja was nominated as Member of DRB on behalf of LTH JV who acted as Member of DRB however, he issued an e-mail to other DRB Members, Project Director of his own employer LTH JV and other officials with the title "Draft-DRB Decision of ED-11" which amounts to misconduct on his part and the same shows his personal motivated agenda to please his own employers in serious disregard to the rules and procedures of DRB; that Bilal A. Khawaja even after having knowledge of the objections of Pakistan Civil Aviation Authority /respondent has refused to acknowledge the same and continued to be the DRB Member, therefore, there is no other option left with Pakistan Civil Aviation Authority but to initiate the proceedings against DRB Member, Mr. Bilal A. Khwaja; that learned Single Judge in Chambers has rightly passed the order against Mr. Bilal A. Khwaja as if he continues to be DRB Member in terms of clause 67 of the Agreement it means that all the arbitration process in future will be jeopardized and the authorities will have to assail the conduct of DRB Member, hence, the respondent will suffer irreparable loss if the restraining order is set-aside.

8. Arguments heard, record perused.

9. Before proceeding with the instant ICAs, we have seen the objection raised by Mr. Bilal A. Khwaja in his appeal at ground "A" where he has referred the relationship of learned Single Judge in Chambers with reference to his brother who is an employee of plaintiff/ Pakistan Civil Aviation Authority. In response to said objection we have asked Mr. Bilal A. Khwaja and learned counsel of LTH JV as to whether they raised the said objection before the learned Single Judge during the course of hearing of civil suit before passing of the impugned order. Mr. Bilal A. Khwaja and learned counsel for LTH JV stated that no such objection was raised. In our estimation if such objection would be raised before the learned Single Judge in Chambers, the honorable judge would have not heard the case. Even this kind of attempt is considered as an afterthought in order to dispute the Hon'ble Single Judge in Chambers or to raise concern rather amounts to an effort for creating a ground in appeal on the part of appellant, therefore, we depreciate such kind of practices as we have gone through the record and it has been observed that this matter remained fixed before learned Single Judge in Chambers on 28.03.2016, 13.04.2016, 19.04.2016, 25.04.2016, 26.04.2016 & 29.04.2016, wherein Mr. Bilal A. Khwaja and learned counsel for LTH JV have not raised any such query, question or issue before the learned Single Judge in Chambers nor even pointed out the said fact, therefore, we believe that impugned order has been passed with great impartiality and there is no question to consider any bias against the appellants, hence, the objection is hereby turned down and could not be considered as a valid excuse on the part of Mr. Bilal A. Khwaja.

10. From the perusal of record it has been observed that Pakistan Civil Aviation Authority invited bids for construction of new Islamabad International Airport project for package 8A and package-1 whereby LTH JV has succeeded in getting the project through a bidding process and as a result of said bidding the agreement was executed on 24.07.2008 in respect of package-1 and agreement dated 14.09.2010 was signed for package 8-A. As per PCC it was agreed between the parties to resolve the disputes in terms of clause 67 of the agreement which is based upon 3 stages, Engineer's Decisions 67.1, Dispute Review Board 67.2, Arbitration Notice 67.3, Amicable settlement 67.4 and

Arbitration 67.5 whereas the matter agitated before this Court is regarding the terms of DRB which is as under:-

> *"67.2 Dispute Review Board*
>
> *A Disputes Review Board whose Rules and procedures has been set out in Appendix-M attached hereto, shall be constituted within eighty four (84) days of the commencement of the Works and shall comprise three (3) members ("Board Members") to be nominated, one each by the Employer and the Contractor and the third by the said two nominees with mutual consent, failing agreement, the nomination of the third member shall be made by the Pakistan Engineering Council at the request of either of the parties. If either the Employer or the Contractor be dissatisfied with any decision of the Engineer or if the Engineer fails to give notice in writing of his decision, the matter in dispute to the Disputes Review Board which shall, after giving fair hearing to both the parties, give its decision on the dispute referred to them within a period of eighty four (84) days from the date of reference of the said dispute to Dispute Review Board and convey the decision to each of the parties. Expenses in respect of the nominee of each party shall be borne by the respective party whereas those related to the third nominee shall be shared by the parties equally.*
>
> *If the Employer or the Contractor is dissatisfied with the decision of the Disputes Review Board, then the Employer or the Contractor, as the case may be, within a period of seventy (70) days of the receipt of such decision from the Dispute Review Board give notice in writing to the other party through the Engineer of his intention to commence arbitration as hereinafter provided Engineer of his intention to commence arbitration as hereinafter provided in Sub-Clause 67 (3). No arbitration in respect thereof may be commenced unless such notice is given."*

In view of above referred mechanism of DRB three members have to be appointed called Board Members whereas two members have to be nominated by the employer and the contractor and 3rd one by the said nominees with the mutual consent. Mr. Bilal A. Khawaja was nominated by LTH JV who has executed the declaration appended with the agreement which provides certain conditions to be observed by the Board Members.

11. A dispute arose with Mr. Bilal A. Khwaja who issued an e-mail to Faisal Chaudhry (Board Member), Richard Smyczek (Project Manager of LTH JV), Mushtaq Ahmed (Board Member), Mushtaq Soomro, Muhammad Javed (General Managers, Contract of LTH JV) and Mohammad Farrukh Aslam (Member) whereas subject of this email was "Draft-DRB Decision of ED-11", the original e-mail alongwith contents is reproduced as under:

> *"From: "Mr. Bilal A. Khwaja" <bakhwaja@yahoo.com>*
> *Date: 2 October 2014 4:53:00 pm GMT+5*
> *To: Faisal Chaudhry <chfm100@hotmail.com>. Richard Smyczek <rick.smyczek@btinternet.com>, Mushtaq Ahmed*

<Mushtaq11january@hotmail.com>, Mushtaq Smore <mushtaqa45@yahoo.com>, Mohammad Farrukh Aslam <faslam2011@gmail.com>, Muhammad Javaid <javaid200@gmail.com>
Subject: Draft – DRB Decision on ED 11.
Reply-To: "Mr. Bilal A. Khwaja" <bakhwaja@yahoo.com>

Dear Sir,

Attached herewith please find the above.

Happy reading over the Eid holidays. I will expect your input, if any, on the 9th of October, 2014.

Regard,
Mr. Bilal A. Khwaja
Ahmed & Ahmed
Engineering Contracts Consultants
Procurement Advisors and Advocates
Supreme Court of Pakistan
Address: Hameedah Markez
106-C, Jami Comm St 11
Phase 7, DHA
Karachi
Phone: 009221-35889278(9)
Cell: 0092321-8282243"

The said E-mail has not been denied by Mr. Bilal A. Khwaja (appellant) as well as LTH JV in their written statements and written replies, the said e-mail created a disputed situation among the parties as the respondent Pakistan Civil Aviation Authority alleged that sending of said e-mail as "Draft-DRB Decision of ED.11" amounts to misconduct and clear breach of Bilal A. Khawaja's contractual obligation under clause 67 of PCC and clause 1(f), 9(c) and 9 (d) of DRB Rules and Procedures.

12. Respondent/Pakistan Civil Aviation Authority after raising objections on the conduct of Mr. Bilal A. Khwaja filed a civil suit before Islamabad High Court with the following prayer:

In view of the foregoing, it is respectfully prayed that this Honorable Court may graciously;

i) Declare that the impugned actions of Defendant No.1, including the sharing of draft decisions through emails dated 2nd October, 2014, amount to misconduct and are a breach of his contractual obligations under the Contract Agreement to act as a neutral arbiter;

ii) Declare that the refusal of Defendant No.2 to remove Defendant No.1 from the DRB after the issue of misconduct by Defendant No.1 was raised by the Plaintiff is a breach of Defendant No.2's obligations under the Contract Agreement;

iii) Direct Defendant No.2 to withdraw the nomination of Defendant No.1 as DRB member forthwith and to nominate an impartial DRB member in accordance with the Contract Agreement;

iv) Restrain Defendant No.1 from continuing to act as a DRB member and taking any further actions as a DRB member forthwith.

v) Grant damages to the Plaintiff for damage caused by the biased decisions rendered by Defendant No.1;

vi) Grant costs to the Plaintiffs; and

vii) *Grant any other relief deemed fair and just under the circumstances."*

As there is no procedure provided under PCC to remove any of the DRB Member who committed misconduct or violated the terms of contract and rules of Dispute Review Board referred in Appendix M of the PCC, therefore, in order to understand the true intent of the rules referred in Appendix-M, we have gone through each and every rule and procedure referred in the instant ICAs with the help of learned counsel for the parties. Hence, in order to understand the concept of impartiality and transparency some of the key rules referred in the Appendix-M are hereby reproduced as under:-

1. Except for providing the services required hereunder, the Board Members shall not give any advice to either party or to the Engineer concerning the conduct of the Works. The Board Members:

a) shall have no financial interest in any party to the Contract, or the Engineer, or a financial interest in the Contract, except for payment for services on the Disputes Review Board (hereinafter referred to as "the Board");

b) Shall have had no previous employment by, or financial ties to, any party to the Contract, or the Engineer, except for fee-based consulting services on other projects, all of which must be disclosed in writing to both parties to appointment to the Board;

c) Shall have disclosed in writing to both parties prior to appointment to the Board any and all recent or close professional or personal relationships with any director, officer, or employee of any party to the Contract, or the Engineer, and any and all prior involvement in the project to which the Contract relates;

d) Shall not, while a Board Member, be employed whether as a consultant or otherwise by either party to the Contract, or the Engineer except as a Board Member, without the prior consent of the parties and the other Board Members;

e) Shall not, while a Board Member, engage in discussion or make any agreement with any party to the Contract, or with the Engineer, regarding employment whether as a consultant or otherwise either after the Contract is completed or after service as a Board Member is completed;

f) shall be and remain impartial and independent of the parties and shall disclose in writing to the Employer, the Contractor, the Engineer, and one another and fact or circumstance which might be such as to cause either the Employer or the Contractor to

question the continued impartiality and independence required of Board Members; and

g) shall be fluent in the English language.

In addition to above conditionalties the procedure for conduct of hearing has been referred in clause -9 which is reproduced as under:

"9. Conditions of Hearings:

a) ……

b) ……

c) During the hearings, no Board Member shall express any opinion concerning the merit of the respective arguments of the parties.

d) After the hearings are concluded, the Board shall meet privately to formulate its Recommendations. All Board deliberation shall be conducted in private, with all Board Members' individual view kept strictly confidential. The Board's Recommendations together' with an explanation of it's reasoning shall be submitted in writing to both parties and to the Engineer. The Recommendations shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

e) The Board shall make every effort to reach a unanimous Recommendation. If this proves impossible, the majority shall decide, and the dissenting Board Member may prepare a written minority report for submission to both parties and to the Engineer."

The above referred conditions and rules clearly demonstrate that a Board Member shall have no financial interest in any party to the contract nor having any personal relationship with any Director, Officer or employee of the party to the contract and not even allowed to engage in discussion but the most important provision is Clause 1-F where Board Member is directed to remain impartial and independent of the parties which should be considered as a key factor for any quasi judicial authority failing which the disputed question could not be resolved as the parties would lost their confidence upon the Adjudicator, Arbitrator, DRB Member for their neutrality in such like situation.

13. It is mandate of every judicial, quasi juridical system that while hearing any disputed case, proceedings, they have to prove their conduct through implied and express conduct to remain impartial especially when they have signed any declaration or taken any oath under any law or a contract through which they have appointed or notified. We have gone through the relevant clause 9 of Appendix-M regarding the conduct of hearing

of DRB. It has specifically been provided that no Board Member shall express any opinion concerning the merits of respective arguments of the parties even otherwise clause 9-D put emphasis upon the Board to meet ***privately*** for formulation of its recommendations even all board deliberations shall be conducted in ***private*** in order to keep ***strict confidentiality.*** This concept of hearing requires a high standard of professional ethics and character of the Board Members who shall act fairly, honestly and diligently without having any interest with any of the parties. The reasons for imposing the very concept of confidentiality and impartiality in such like contracts is the key factor to resolve the disputes in a fair and transparent manner where no party can express their reservations regarding the Board Members or on the Arbitrators and if any such question is raised the basic appointment of Board Member or Arbitrator comes to an end as any interest of Board Member or for that matter any slightest mistake which gives rise to an impression that Member has some bias in its functioning creates a serious doubt on the entire mechanism of Clause 67 of PCC.

14. In such like situation where there is no procedure provided in the PCC to remove any DRB Member then we have to formulate our view on the basis of principles settled in the following case studies:-

1990 MLD 2010 [Karachi], "Design Group of Pakistan versus Clifton Cantonment Board", wherein it has been held that: -

> *"Mr. Khawaja Balal the learned counsel for the plaintiff has referred to State of Orissa v. Modern Construction Co. AIR 1972 Orissa 219 and Murcrial Lal v. Gopal Chand AIR 1973 Delhi 251 where it was observed that besides removal of arbitrator there may be cases in which it may be necessary to remove the arbitrator under the inherent powers to uphold justice and fair play."*
>
> *"This principle can be applied in cases where question arises whether a named arbitrator be allowed to proceed with the arbitration or not. Therefore, if any person has been named as an arbitrator but is disqualified to act as arbitrator or has misconducted in earlier proceeding which is not of formal or technical in nature then in spite of the agreement to refer the matter to such a named I arbitrator the Court can come to the rescue of the aggrieved party by appointing impartial arbitrator in his place."*

PLD 1977 Lahore 461 "Sardar Ashiq Muhammad Khan Mazari and 3 others versus Chairman, Federal Land Commission, Islamabad and 4 others" wherein it has been held that:-

‘"The common lawyers, however, have used the expression 'natural justice' with surprising precision of meaning, as referring to two important but narrow principles only, namely, audi alteram patrem (hear both sides), and nemo judix in cams sun purest (no one can be judge in his own cause)."’

‘"These principles came to be applied also to the decision of administrative bodies acting judicially whereby the royal Courts exercised a supervisory jurisdiction over them, primarily by means of the former prerogative writs.

The importance of the application of the principles of natural justice rests not merely on the insistence on due compliance with simple or elementary procedural rules, but also on the fact that a decision which has been arrived at in circumstances where the principles of natural justice have not been observed will be void.

'If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision.' (General Medical Council v. Spackman (1943) 2 All E R 437 . . . . . _ . .

“Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair judge, one free from 'bias'. Bias in this context has usually meant that the adjudication must have no financial interest in the matter under dispute, but it is not necessarily so limited, and allegations of bias have been upheld in circumstances where there was no question of any financial interests" as held in Franklin v. Minister of Town and Country Planning (1947) 2 All E R 289,"’

1997 SCMR 988 “Director Housing, A.G’s Brach, Rawalpindi versus M/s. Makhdum Consultants Engineers and Architects”, wherein it has been held that:-

“The bias which disqualified a person to act as a judge in a dispute must, be in the nature of personal bias or prejudice of such a nature as would necessarily render him unable to exercise his functions impartially in a particular case, and this bias or prejudice must be shown as a matter of fact and not merely of a matter of opinion.”

1989 MLD 2434 [Supreme Court of India] “International Airport Authority of India versus K.D. Bali and another” wherein it has been held that:-

“*It is well-said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be constructed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceedings, but of what effect if might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; arbitrator must not do anything which is not in itself fair and impartial.”*

2013 MLD 689 [Peshawar] "Syed Faqir Shah versus Haji Inayatullah Khan and another" wherein it has been held that:-

> *"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 word 'misconduct' has not been defined in the Arbitration Act, 1940 and it appears that the legislature has deliberately left the term undefined. However, when it comes to its dictionary meaning, it has been variously explained. To Webster's New World College Dictionary (third edition), 'misconduct' means, "(1) to manage badly or dishonestly (2) to conduct (oneself) improperly, unlawful, bad or dishonest management, malfeasance, willfully improper behaviour". Similarly, as per The Australian Concise Oxford Dictionary (third edition), 'misconduct' means, "improper or unprofessional behaviour, bad management, misbehave, mismanage". Thus misconduct can be described as an act on the part of arbitrators which has prejudicially affected the basic rights of the party or is violation of any law or principles of natural justice and which if not interfered with, may result in grave miscarriage of justice. From a plethora of case-law cited at the bar, the following inter alia, constitute misconduct on the part of the arbitrator:--*

> *"(1) Neglect of duties and responsibilities by the arbitrators,*

> *(2) If the award is made without having heard all the evidence,*

> *(3) If a party has not been allowed reasonable opportunity of proving his case,*

> *(4) If the evidence of witnesses is recorded behind the back of a party,*

> *(5) If irregularities in proceedings are proved which amount to no proper hearing of the matter in dispute,*

> *(6) If the arbitrator decides a disputed question without going into evidence as they would in such a case be said to have decided it blindly,*

> *(7) If there is indication of gross negligence, dereliction of duty or recklessness on the face of the record. "*

> *In the case titled Ram Chand and another v. Buta Ram and others (AIR 1931 Lahore 65(1), it was held that:--*

> > *"An arbitrator is guilty of misconduct when he examines no witnesses, even though the nature of dispute is such that it could not be settled without evidence."*

2003 YLR 1523 [Karachi] "Civil Aviation Authority, Quaid-e-Azam International Airport, Karachi versus AER Rainta Internaitonal Pakistan (Pvt.) Ltd., Karachi"

wherein it has been held that:-

> "*In legal parlance with reference to arbitration proceedings misconduct imply failure to perform the essential duty of maintaining impartiality,*

> *equal treatment, just and proper assessment evaluation and consideration of facts, circumstances, evidence and material produced and relied upon by the parties. If the arbitrator or Umpire while delivering an award abdicates such duties one can safely say that he misconducted himself. Court have identified both moral and legal misconduct imply favoures for financial or other extraneous consideration or culpable and deliberate act of omission or commission on the part of arbitrator or umpire prejudicially effecting the interest of any party to the Arbitration."*

2006 YLR 589 [Karachi] "Abdullah Contractors versus Water and Power Development Authority" wherein it has been held that:-

> "*In case of Kashmir Corp. Ltd. v. PIA (PLD 1995 Karachi 301) it was held as under : --*
>
> *"As the word `misconduct' has not been defined in the Act, therefore it has several ambiguities hidden in it. This fact is not disputed by anyone and that this word cannot be limited to moral turpitude but it includes legal misconduct also, which in its judicial sense, means failure to perform duty judiciously by some breach and neglect to do justice resulting in substantial miscarriage of justice, though erroneously."*

In view of above case studies it is settled that Arbitrator should be impartial and he should act according to the principles of natural justice. His working should be in accordance with principles where he should be fair, free from bias and has no financial interest, otherwise, there would be no impartiality in the proceedings especially when he has not maintained the concept of confidentiality and impartiality in the DRB proceedings.

15. We have heard the learned counsel for the parties at length and have gone through the judgments referred in their arguments which are mainly given on conduct of the parties approaching the Court with delay and its effect on a temporary relief, principles of grant of injunction, considering the misconduct as a question of fact which requires recording of evidence, and authorization of filing of the suit but the important question remains unanswered as to whether Mr. Bilal A. Khwaja a person of a such a high caliber can send such an e mail to different individuals before the conclusion of DRB in ED-11 but Mr. Bilal A. Khwaja while appearing before this Court admitted the issuance of said e-mail and even during the course of arguments his stance was consistent and same as he did not consider his e-mail as breach of any term of PCC or rules and procedure of DRB although, it is very much evident from record that decision of ED-11 has been made after issuance of e-mail by Bilal A. Khawaja in which he shared proposed draft of the decision

of the said ED-11. During the course of arguments in the ICAs learned counsel for respondent placed a document which reflects that Mr. Bilal A. Khwaja appeared as CW-4 before the learned Arbitrators on 27.10.2016, in the said proceedings he was asked certain questions regarding his disputed e-mail and "Draft-DRB's decision on ED-11", the same are reproduced as under:

*"**BEFORE THE ARBITRATORS***

MUHAMMAD SAIR ALI
And
MOHAMMAD ATHER SAEED

FORMER JUDGE, SUPREME COURT OF PAKISTAN

In the matter of

Arbitration

Between
LTH JV……Claimant
And
Civil Aviation Authority……..Respondent

Date and venue of the proceedings/arbitration: 27.10.2016, Banquet Hall, Islamabad Club, Islamabad.

CW-4 Mr. Balal A. Khwaja, resident of Karachi present at Islamabad.

On solemn affirmation and oath.

Note: The witness has already filed his affidavit which by consent of the Learned Counsel of the parties, is treated as his examination in chief. The witness CW-4 admits to have made, executed and signed the same at Islamabad: the place of its attestation, on 4th May 2016. He wishes to produce the same as his examination in chief. The learned Counsel for the Respondent has no objection thereto.

Examination in Chief

I produce my duly signed and attested deposition / statement in evidence as Exhibit-CW/4.

Cross examination by Mr. Babar Sattar, Advocate learned counsel for Respondent (CAA):-

Q.1. Did you sign a declaration of acceptance (Page 179 Book A/1) agreeing to be bound by DRB's Rules and Procedures (Annex M at pages 175 to 178 Book A/1)?

Ans. Yes I did.

Q.2. Do you believe that you were bound by DRB's rules and procedures?

Ans. Yes.

Q.3. Do you believe that you had an obligation to remain impartial and

independent of the parties while adjudicating the disputes that came before the DRB as required under Rule 1(f) of the Rules?

Ands. Yes I do.

Q.4. Were you aware of your obligations in terms of Rule 9(c) and (d) that required, inter alia, Members not to express an opinion during the hearings and mandated that, "all Board deliberations shall be conducted in private, with all Board Members individual views kept strictly confidential. The Board's recommendations together with an explanation of its reasoning shall be submitted in writing to both parties and to the Engineer"?

Ans. Yes I was.

Q.5. Did you send out an email dated 2-10-2014 to a number of people including employees of the Contractor with the subject "Draft-DRB's decision on ED-11", which read: "Dear Sir, attached herewith please find the above. Happy reading over the Eid holidays. I will expect your input, if any, on the 9th of October 2014"?

Ans. Yes I did.

Q.6. When you sent the email, had the hearing of the dispute in question (ED-11) been completed, and had the Board conducted its deliberations in private and decided what its recommendations would be?

Ans. No the dispute was still pending before the Board."

The above referred admissions by Mr. Bilal A. Khwaja confirms his knowledge, obligations of DRB Rules and Procedures, issuance of e-mail, sending "Draft-DRB's decision on ED-11" and his obligations to remain impartial and independent of the parties which speaks volume about his conduct prima facie, however, we are not in position to discuss the internal arrangements of his terms of references or effect of decisions made by him which is a subject matter of the suit and can be decided after recording of evidence only.

16. In our estimation the entire judicial and quasi judicial system is based upon its impartiality, non-disclosure of opinion as every Tribunal, Authority, Court or Arbitrator or for that matter DRB Members are bound by the code of conduct which has been made part and parcel of their job even in this matter rule and procedure for DRB is clear in its terms where impartiality is a key factor.

17. We have gone through the impugned order passed by learned Single Judge in Chamber while hearing the application under Order 39 Rule 1 & 2 CPC whereby learned Single Judge in Chambers has rightly concluded that respondent/plaintiff has successfully

made out his case prima facie as the question of balance of convenience and irreparable loss and injury leans in favor of Pakistan Civil Aviation Authority as the sharing of e-mail with LTH JV and its different employees gives rise to a disputed situation in which subsequent structure of arbitration may fall on ground as this will be considered as a very basic reason to set-aside any award prepared on the DRB decision where one of the Members of the Board has committed a serious misconduct by breach of its duties and in violation of confidentiality clause specially he himself is an Advocate of the Apex Court having expertise of law and working on the subject of arbitration from last three decades. We could not expect such kind of negligence which is apparent from record and prima facie proves the negative effect on the entire arbitration proceedings although Mr. Bilal A. Khwaja continued to be member of DRB in different portions referred to them subsequent to the issuance of said e-mail but this does not mean that his breach of duty has been ignored rather this will further give rise to complicated situation for any party to upheld their final decision of award in any disputed question after completion of contract before the Court of law. In order to prevent multiplicity of proceedings the learned Single Judge in Chambers has rightly passed the restraining order against Bilal A. Khawaja to act as DRB Member. Although, learned counsel for the appellant have drawn our attention towards the principle of injunction while relying upon ***2008 CLC 930 (D.B.) "Arbab Fazal Rauf and another versus Arbab Sajjad and 6 others", 2013 CLC 454 "Mst. Saeeda versus Province of Punjab and others", PLD 1979 Karachi 668 "M/s. Quality Builders Ltd. Versus M/s. J. P. Brockhoven V. V. Dredging Contractors and 9 others", 1984 CLC 440 (Adamjee Paper and Board Mills Limited versus Maritime Agencies Ltdd", PLD 2011 Karachi 185 "M/s Shakil Wagas & Co. and others versus General Manager/Marketing, Pakistan Railways and others",*** and ***PLD 1970 Karachi 332 "Oil and Gas Development Corporation versus Ltd. Col. Shujauddin Ahmed".*** However, in majority of these referred cases it has been settled that compensation in money is adequate relief for non performance of any contract and injunction in terms of section 56 (f) of Specific Relief Act, 1877, can not be granted to prevent breach of contract. Similarly, the emphasis given by the learned counsel for the appellants are regarding breach of contract for rendering services where injunction could not be granted

for the purpose of prevention but all the case laws cited by learned counsel for appellant does not cover the situation where one of the Members of the Board committed breach of its statutory obligations of fairness, transparency, impartiality which is fundamental principle in any quasi judicial and judicial forums.

18. Mr. Bilal A. Khwaja has been appointed in consequence to his acceptance to become a DRB Member after signing his declaration even LTH JV has a substantial knowledge of the provisions of PCC where Appendix-M provides the rules and procedure of DRB in which clause-1 (f) 9(c) and 9(d) have specifically been violated and the very concept of clause 67 (alternate dispute resolution) is in jeopardy.

19. Serious objections regarding the maintainability of the suit have also been raised by the appellants although the matter is yet to be decided by the learned Single Judge in Chambers, however, in order to understand the very concept of maintainability of such kind of suits is to be seen in the light of section 9 CPC, 1908 where it has been provided that all disputes of civil nature shall be tried by the Civil Court whereas the definition of civil nature has not been provided in CPC but Civil rights have to be seen with reference to common law particularly those created through statutes, rights vested in a person towards property, discharge of functions attached to an office, rights given by the constitution, rights under contracts, inheritance, legitimacy, title, etc. fall under such character of civil nature. It has been seen with great concern that the entire contract is silent towards removal of DRB Member which give rise to a situation that where one of the party is helpless whereas the conduct of DRB Member does not fall within the mandate of Arbitration Tribunal and no one should be deprived from its remedies on the basis of principle "*Where there is wrong there is remedy*". It is settled proposition of law that every wrong has been catered through different enactments provided under the law but it is not necessary that a remedy should be provided for each and every wrong, therefore, concept of declaration referred in section 42 of Specific Relief Act, 1877 is to the extent of denial of any legal right and character which does not mean that it should be expressed or visible in order to seek a remedy under the Specific Relief Act, 1877 as this kind of concept is against the rights of citizens enshrined in the Constitution of Islamic Republic of Pakistan as every individual has been given guarantee for protection of law

by the State, therefore, all kind of civil rights which fall within the category of civil nature can be agitated before the Civil Court in terms of section 9 of CPC, 1908, hence the only remedy available to an aggrieved person is to file civil suit against the removal of DRB Member.

20. In last we are of the confirmed view that if Mr. Bilal A. Khwaja further acts as DRB Member it will create multiplicity of issues and litigation and even any question/ reference which will be brought to DRB where Mr. Bilal A. Khwaja is a Member, the other side will raise objection and as a result of such situation very functioning of DRB would be considered as nullity and the entire philosophy of alternate dispute resolution shall stand destroyed. The concept of alternate dispute resolution has been established with intent to safeguard the time, finance and working of parties specially when the project of new Islamabad International Airport worth billions of rupees is a matter of national importance and as such project would be delayed if injunction has not been granted in such manner as referred in the impugned order.

21. Keeping in view the admission made by LTH JV and Mr. Bilal A. Khwaja regarding e-mail in question, we are of the considered view that if injunction has not been granted, every reference and subsequent arbitration proceedings would ultimately failed. It is the prime duty of the Court to prevent the loss and to avoid multiplicity of the proceedings when it appears from record that Mr. Bilal A. Khwaja, prima facie has violated the rules and proceedings of DRB and the same is also apparent and has been substantiated subsequently in the proceedings of arbitration dated 27.10.2016 when he was cross examined and at this stage withholding the injunction would cause comparatively greater inconvenience which is likely to arise from granting it or in other words the balance of inconvenience lies in favour of respondent Pakistan Civil Aviation Authority as if injunction has not been granted the respondent shall suffer an irreparable loss. Therefore, the only party who shall suffer an irreparable loss is Pakistan Civil Aviation Authority who are the custodians of New Islamabad Airport Project on behalf of Federation of Pakistan whereas the said project is of national interest and any such delay on the basis of DRB member especially when his conduct is under judicial scrutiny will further aggravate the losses of Pakistan.

22. We have gone through the impugned order and we are in agreement that the same is based on sound principles of law and passed after observing all the factors from record, therefore, both the ICAs are hereby dismissed.

C.M. No.613/2016 in ICA No.313/2016.

23. Before parting with this judgment, a new development has taken place and in our estimation it is necessary to place the same on record. Counsel for LTH JV filed C.M. No.613/2017 in ICA No.313/2016 on 07.02.2017 before this Court, which remain under office objection and finally taken up vide order dated 15.03.2017 by this Court and was fixed for 16.03.2017 and 06.04.2017 when other side has also put their appearance.

24. Learned counsel for LTH JV has placed copy of resignation of Mr. Bilal A. Khawaja being Member of DRB on the record of the Court, the same has been considered and taken note of, as the judgment in these cases was already reserved, therefore, there is no need to discuss the implication, effect of resignation of Bilal Bilal A. Khawaja at this stage.

25. In view of above, instant C.M. also stands dismissed.

(AAMER FAROOQ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE **JUDGE**

Irfan Ali

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