

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ

NATIONAL HIGHWAY AUTHORITY through Chairman, Islamabad---Petitioner

Versus

Messrs SAMBU CONSTRUCTION CO. LTD. ISLAMABAD and others---Respondents

Civil Petition No. 3767 of 2020, decided on 13th February, 2023.

(Against the judgment of Islamabad High Court, Islamabad dated 21.09.2020 passed in F.A.O. No. 16 of 2014)

(a) Arbitration Act (X of 1940)---

---S. 30---Arbitration award---Interference by Courts---Scope---Limited scope of judicial review of an Award announced by an Arbitrator stated.

The arbitrator alone is the judge of the quality as well as the quantity of the evidence. He is the final arbiter of dispute between the parties. He acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight. Court is not supposed to sit as a court of appeal and make a roving inquiry and look for latent errors of law and facts in the Award. The arbitration is a forum of the parties' own choice its decision should not be lightly interfered by the court, until a clear and definite case within the purview of the section 30 of the Arbitration Act, 1940 is made out.

Mian Corporation v. Messers Lever Brothers of Pakistan Ltd. PLD 2006 SC 169 ref.

An arbitration Award is a final determination of the dispute between the parties. The grounds for challenging an Award are very limited. There are three broad areas on which an arbitration Award is likely to be challenged i.e. firstly, jurisdictional grounds (non-existence of a valid and binding arbitration agreement); secondly, procedural grounds (failure to observe principles of natural justice) and thirdly, substantive grounds (arbitrator made a mistake of law).

Nigel Blackaby and Constantine Partasides QC, Redfern and Hunter On International Arbitration (6th edn, Oxford University Press, United Kingdom 2015), 569-573 ref.

The review of an arbitration Award cannot constitute a re-assessment or reappraisal of the evidence by the court. An over-intrusive approach by courts in examination of the arbitral Awards must be avoided. The court is not supposed to sit as a court of appeal and must confine itself to the patent illegalities in the Award, if any. The jurisdiction of the Court under the Arbitration Act, 1940 is supervisory in nature. Where two findings are possible the Court cannot interfere with the Award by adopting its own interpretation. Interference is only possible if there exists any breach of duty or any irregularity of action which is not consistent with general principles of equity and good conscience.

Tony Cole and Pietro Ortolani, Understanding International Arbitration (1st edn., Routledge, New York 2020), Chapter-7, 216; Federation of Pakistan v. Messrs Joint Venture Kocks K.G./Rist, PLD 2011 SC 506; Gerry's International (Pvt.) Ltd v. Aeroflot Russian International Airlines 2018 SCMR 662 and Shahin Shah v. Government of Khyber Pakhtunkhwa 2022 SCMR 1810 ref.

(b) Arbitration Act (X of 1940)---

---S. 30(a)---Arbitration award---Grounds for setting aside Award---Misconduct by Arbitrator---Meaning---Misconduct of an Arbitrator in the judicial sense means failure to perform his essential duty or any conduct inconsistent with his duties, resulting in substantial miscarriage of justice between the parties.

Brooke Bond (Pakistan) Ltd. v. Conciliator Appointed by the Government of Sindh PLD 1977 SC 237 ref.

(c) Supreme Court Rules, 1980---

---O. XXVIII, R. 3---Arbitration Act (X of 1940), S. 30---Frivolous and vexatious litigation---Abusing process of the Court---Costs, imposition of---Petitioner had dragged the Award in the courts for over 10 years, which passed for vexatious litigation; wasting the time of all courts below as well as the Supreme Court---Such frivolous litigation clogged the pipelines of justice causing delay in deciding genuine claims pending before the Supreme Court; and added to the pendency of cases which over-burdened the Court dockets and slowed down the engine of justice---Such vexatious and frivolous litigation must be dealt with firmly and strongly

discouraged---Supreme Court imposed costs on the petitioner in the sum of Rs. 300,000/- with the direction that the same shall be paid to the respondent within a month and in case of its failure to pay the said costs, the same shall be recoverable as a money decree---Petition for leave to appeal was dismissed and leave was refused. President of Islamic Republic of Pakistan v. Syed Tasneem Hussain Naqvi 2004 SCMR 590; Muhammad Ramzan v. Additional District Judge, Multan 2005 SCMR 1542 and Province of Punjab v. Messrs Sufi Construction Company 2005 SCMR 1724 ref.

Zahid Idris Mufti, Advocate Supreme Court for Petitioner.

Barrister Muhammad Mumtaz Ali, Advocate Supreme Court and Anis Muhammad Shahzad, Advocate-on-Record for Respondents.

Date of hearing: 13th February, 2023.

ORDER

SYED MANSOOR ALI SHAH, J.---The sole question before us is to examine whether the Arbitrators in granting the Award dated 20.2.2010 ("Award") misconducted themselves in terms of section 30(a) of the Arbitration Act, 1940 ("Act").

2. Brief facts of the case are that parties entered into a Contract Package No. 07 ("Contract") regarding "Rehabilitation of National Highway N-5 from Mian Channu to Sahiwal 46 Km Road". During the execution of the Contract, the Engineer instructed the respondent/ company Messrs Sambu for construction of New Jersey Barriers and provision of Kerb Stones in some sections of the project, which was not part of the original scope of work. As a result, respondent claimed Rs.65,40,226/- for this new/additional work, which was done in pursuance of the instructions of the Engineer. The dispute arose when the said work was considered by the petitioner/National Highway Authority ("NHA") as part of the original scope of work and refused to pay any additional amount for this work to respondent. The matter was referred to Arbitrators; one nominated by each party. Through the unanimous Award dated 20.2.2010, the Arbitrators awarded Rs.65,40,226/- plus eight percent simple interest in favour of the respondent. The civil court decreed the said amount without interest and thereafter executed the decree and respondent received the said amount on 08.10.2018. Petitioner filed an FAO against the order of the civil court, which was dismissed by the Islamabad High Court on 21.9.2020 against which the instant petition has been filed by the petitioner.

3. The contentions raised by the learned counsel for petitioner are that minutes of the pre-bid meeting do not form part of the Contract and, therefore, the Arbitrators wrongly relied on pre-bid meeting in which petitioner had clarified that the Kerb Stones are not included in scope of the work. He also submitted that New Jersey Barriers were also included in the outline drawing. Learned counsel for the respondent submitted that the minutes of the pre-bid meeting formed part of the Contract document and referred to Contract dated 24.6.2005 along with the list of documents and submitted that petitioner vide letter dated 29.6.2005 issued signed Contract documents. The said Contract documents included pre-bid minutes of the meeting; hence the minutes of the pre-bid meeting are part of Contract. He submitted that the Arbitrators rightly noted that pre-bid minutes of meeting are part of Contract as mentioned in para-5 of Award. He submitted that petitioner also admitted that pre-bid minutes of meeting formed part of documents and filed before the Civil Court. He submitted that petitioner made a wrong statement before this Court on the basis of which notices were issued to respondent. He submitted that reference to clause 19.4 of the Contract by petitioner is misplaced and addendum to bid documents is only necessary if clarification given in pre-bid meeting requires any change in the bidding documents. Since no addition was required to be made, petitioner only clarified and confirmed in the pre-bid meeting that Kerb Stones is not part of original scope of work, hence there was no need for any addendum and, therefore, clause 14.2 referred by the petitioner is also misplaced. Further, since Kerb Stones or New Jersey Barriers were not mentioned in the schedule of pricing in bid document, hence no price was ever paid and it was never mentioned in the scope of work.

4. The arguments have been heard and the record perused. The record reveals that the main thrust of the argument of the parties have been on the moot point; whether the minutes of the pre-bid meeting dated 14.02.2005 are to be considered as an integral part of the Contract? It is pertinent here to mention that the minutes of pre-bid meeting and the addendum No. 2 were issued by the petitioner vide its letter No. 2(4)

GM(P&CA)/NHA/05/292, dated 1.03.2005. The minutes of pre-bid meeting and addendum No. 2 had several contractual cross-references. For instance, the whole concept of pricing the Contract was based on the information provided in item 7(a) and 7(1) of the minutes of pre-bid meeting. The pre-bid meeting and its minutes thereof were a natural corollary of the Instructions to the Bidders/Tenderer (ITB) which formed an important part of the Contract documents. Therefore, it is obvious that the minutes of pre-bid meeting are an integral part of the Contract Document, which fact is further duly established by including the same as a part of 327 certified pages of Contract Document duly signed by both the parties under the Contract. The question by the respondent under item 14 of the minutes of pre-bid meeting was "On Contract-7 (Mian Channu to Sahiwal) has no Kerb Stone shown on the drawing". The response by the petitioner was "It is clarified that this is not included in the scope of work under the package". Relying on the premise as claimed by the respondent they did not factor in the cost for these items presuming that these items were not required under the Contract. The minutes of the pre-bid meeting very clearly stated that Kerb Stone was not included under the scope of the works under the Contract. The cost of the same could not, therefore, had been catered for under the Contract. Additionally, nowhere in the Contract documents, the provision of Kerb Stone, retaining wall topped with New Jersey Barrier was mentioned.

5. We have also examined the Award with the help of the learned counsel for the parties and find that the contentions of the petitioner are misplaced. The Award clearly deals with all the contentions raised by the petitioner and rightly holds that the pre-bid meeting forms part of the Contract document. Besides, we agree with the interpretation of clauses 19.4 and 14.2 as given by the Arbitrators. We are also mindful of the fact that there is a limited scope of judicial review of the 'Award' announced by an Arbitrator. An arbitration Award is a final determination of the dispute between the parties. The grounds for challenging an Award are very limited. There are three broad areas on which an arbitration Award is likely to be challenged i.e. firstly, jurisdictional grounds (non-existence of a valid and binding arbitration agreement); secondly, procedural grounds (failure to observe principles of natural justice) and thirdly, substantive grounds (arbitrator made a mistake of law).¹ The review of an arbitration Award cannot constitute a re-assessment or reappraisal of the evidence by the court. An over-intrusive approach by courts in examination of the arbitral Awards must be avoided.² The court is not supposed to sit as a court of appeal and must confine itself to the patent illegalities in the Award, if any.³ The jurisdiction of the Court under the Act is supervisory in nature. Where two findings are possible the Court cannot interfere with the Award by adopting its own interpretation. Interference is only possible if there exists any breach of duty or any irregularity of action which is not consistent with general principles of equity and good conscience.⁴ The arbitrator alone is the judge of the quality as well as the quantity of the evidence. He is the final arbiter of dispute between the parties. He acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight.⁵ By applying the afore-noted principles of law on the subject and considering the petitioner's objections within the limited scope of court's jurisdiction in testing the validity of Award this court is not supposed to sit as a court of appeal and make a roving inquiry and look for latent errors of law and facts in the Award. The arbitration is a forum of the parties' own choice its decision should not be lightly interfered by the court, until a clear and definite case within the purview of the section 30 of the Act is made out. We do not find any jurisdictional, procedural or substantive error patently floating on the record that could justify interference by this Court.

6. As far as the question of misconduct by Arbitrators is concerned, it would not be out of place to mention here that a misconduct of an Arbitrator in the judicial sense means failure to perform his essential duty or any conduct inconsistent with his duties, resulting in substantial miscarriage of justice between the parties.⁶ We have gone through the objection petition filed by the petitioner against the Award and find that all the objections substantially relate to the merits of the case. Even the particulars and other necessary details of any misconduct were not given by the petitioner in their objection petition. Also, the petitioner failed to point out any conduct of the Arbitrators that was inconsistent with their essential duty or any breach of duty resulting in substantial miscarriage of justice between the parties. The allegations against the Arbitrators are vague and nebulous. No substantial grounds with precision are pleaded which could be construed to be misconduct by the Arbitrators to the satisfaction of this Court.⁷ We find no illegality in the Award or misconduct on the part of the Arbitrators

in deciding the issues. The decision of the Arbitrators on all the issues are logical, convincing, based on cogent evidence and supported by reasons. The Contract and its documents have been examined by the Arbitrators and interpreted by them and this Court has no jurisdiction to substitute the evaluation done by the Arbitrators. Since the petitioner had failed to make out a case of misconduct before learned trial and High Court on the part of the Arbitrators, and so is the case before this Court; hence, we are also not inclined to examine the factual controversy under Article 185(3) of the Constitution of Islamic Republic of Pakistan. In these circumstances, leave is refused and this petition is dismissed. We, however, highlight that the arbitration falls within the domain of alternate dispute resolution ("ADR") and the parties having once resorted to out of court dispute resolution, they must abide by the decision of the Arbitrators rather than challenging the same in the court of law, as it defeats the purpose of ADR. In this case, the petitioner challenged the Award in the civil court thereafter in the High Court and now before us. The Award was announced in the year 2010 and the petitioner is still litigating the matter in 2023, totally undermining the purpose of ADR. Such practice must be strictly curbed.

7. Before parting with this order, we have observed that the petitioner has dragged the Award in the courts for over last 10 years, which passes for vexatious litigation; wasting the time of all courts below as well as this Court. Such frivolous litigation clogs the pipelines of justice causing delay in deciding genuine claims pending before us. Such vexatious and frivolous petitions add to the pendency of cases which over-burdens the Court dockets and slows down the engine of justice. Such vexatious and frivolous litigation must be dealt with firmly and strongly discouraged.⁸ We, therefore, are minded to impose costs on the petitioner in the sum of Rs. 300,000/- which shall be paid to the respondent within a month and in case of its failure to pay the said costs, the same shall be recoverable as a money decree.

MWA/N-6/SC Petition dismissed.