

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No.1461 of 1998

*[A. Qutubuddin Khan, Proprietor QMR Expert Consultants vs. CHEC
Millwala Dredging Co.(Pvt) Limited]*

Date of hearings : 21.03.2017, 30.05.2017,
17.01.2018, 28.02.2018,
16.01.2019 and 13.02.2019.

Date of Decision : 24.04.2019.

Plaintiff

*[A. Qutubuddin Khan, Proprietor
QMR Expert Consultants]* : Through Mr. Nadeem Qutub,
Advocate.

Defendant

[CHEC Millwala Dredging
Co. (Pvt) Limited]. : Nemo for Defendant.

Case law cited by learned counsel for Plaintiff.

1. PLD 2006 Supreme Court page-169
(Mian Corporation through Managing Partner vs. Messrs Lever
Brothers of Pakistan Ltd. through General Sales Manager, Karachi).
2. PLD 2003 Supreme Court page-301
(Pakistan Steel Mills Corporation, Karachi vs. Messrs Mustafa Sons
(Pvt.) Ltd., Karachi).
3. 1984 SCMR page-597
(Ashfaq Ali Qureshi vs. Municipal Corporation Multan and another).
4. 2010 CLC page-506 [Karachi]
(Messrs Gandhara Consultants (Pvt.) Ltd., vs. Pakistan Defence
Officer's Housing Authority, Karachi).
5. 1984 CLC page-691 [Lahore]
(Dr. Abdul Waris vs. Javed Hanif and others).
6. PLD 1987 Karachi page-575
(Messrs Waseem Construction Co., vs. Government of Sindh and
others).
7. 1999 CLC 1777 [Karachi]

(Messrs Quality Builders Ltd. vs. Karachi Metropolitan Corporation).

8. 2003 CLC page-419 [Lahore]
(SMI Brothers through Managing Partner vs. Municipal Committee, Murree through Administrator).
9. 2002 SCMR page-1662
(Ascon Engineering (Pvt.) Ltd. vs. Province of Punjab through Secretary, Housing and Physical Planning Department).
10. 1989 CLC page-521 [Karachi]
(Special Steels of Pakistan Limited vs. Pakistan Insurance Corporation and another).
11. 1991 CLC page-258 [Karachi]
(Akhtar Trading Co. vs. Food Department and others).
12. PLD 1996 Supreme Court page-108
(M/s. Joint Venture KG/RIST through D.P. Giesler G.M., Bongard Strasse 3,4000, Dusseldorf-30, Federal Public Republic of Germany, C/o. 15-Shah Charagh Chambers, Lahore and 2 others vs. Federation of Pakistan, through Secretary Food, Agricultural & Coop: and another).
13. PLD 2003 PLD 1960 (W.P.) Karachi-78
(Suleman Haji Muhammad & Co. vs. State Bank of Pakistan).
14. 1986 CLC page-254 [Karachi]
(Muhammad Saleem Butt vs. Messrs Trading Corporation of Pakistan, Karachi).
15. PLD 2006 Karachi page-216
(Messrs AER Rianta International Pakistan (Pvt.) Ltd. vs. Civil Aviation Authority).
16. PLD 2011 Supreme Court page-506
(Federation of Pakistan Through Secretary, Ministry of Food, Islamabad and others vs. Messrs Joint Venture Kocks K.G./Rist).
17. 2008 CLC page-426 [Karachi]
(Award in Dispute Between Mrs. Sunble Zareen Khan and D.C.A.S. (ADMN) and 2 others).
18. 1998 CLC page-1671 [Karachi]
(Messrs Khan Brothers and Associates vs. Director General Food, Government of Pakistan).
19. 2010 YLR page-991 [Karachi]
(Messrs Mehran Metal Containers (Pvt.) Ltd., vs. National Refinery Ltd).
20. 1993 MLD page-1291 [Karachi]
M/s. Valika Wooleen Mills Company Ltd., Karachi vs. Government of Pakistan through Director General Procurement (Army), Ministry of Defence, Rawalpindi and other).

21. 1988 CLC page-1872 [Karachi]
(Elite Builders and Developers (Private) Ltd. vs. Abdul Majeed and others).
22. 1993 MLD page-1863 [Lahore]
Federation of Pakistan through Secretary, Ministry of Food, Agriculture and Cooperatives, Islamabad and another vs. M/s. Joint Venture kocks KG/RIST)
23. 1999 CLC page 1698 [Karachi]
(G.M.K. Enterprises vs. Shaheen Builders).
24. 2001 CLC page-1878 [Lahore]
(Privatization Commission of Pakistan Constitution Avenue, Islamabad vs. Messrs Petrosin Products (Pvt.) Limited and 2 others).
25. 2008 CLC page-798 [Karachi]
(Al-Abdullah Constructors (Pvt.) Ltd vs. Pakistan Water and Power Development Authority through Chief Engineer).
26. 2002 CLC page-353 [Karachi]
(S.G. Rayon Mills (Pvt) Limited vs. Fida Hussain and Associates).
27. PLD 1987 Supreme Court page-393
(Ghulam Abbas vs. Trustees of the Port of Karachi).
28. 2006 SCMR page-1555
(Dawood Cotton Mills Ltd vs. K.F. Development Corporation Ltd).
29. 1993 MLD page-1571 [Karachi]
(Habib Bank Ltd. vs. M/s. Farooq Compost Fertilizer Corporation Ltd and 4 othes).
30. 1989 CLC page-2229 [Karachi]
(Messrs Saingee Cargo Services vs. Messrs Cargo Movers and others).
31. 1989 CLC page-2243 [Peshawar].
(Pakistan Paper Corporation Ltd vs. the Collector, Central Excises and Land Customs and 2 others).
32. 2010 CLC page-506 [Karachi]
(Messrs Gandhara Consultants (Pvt) Ltd vs. Pakistan Defence Officer's Housing Authority, Karachi).
33. 2010 CLC page-513 [Lahore]
(Syed Iqbal Hussain Shah and 10 others vs. Muhammad Naseem and another).
34. 1980 CLC page-1977 [Karachi]
(A. Qutubuddin Khan vs. Karachi Electric Supply Corporation Ltd., Karachi).
35. PLD 2002 Karachi page-427
(Maj. [Retd.] Humayun Akhtar vs. Pakistan Defence Officers Housing Authority).

36. PLJ 1989 Karachi page-147 [DB]
(Ghulam Nabi vs. Khuda Bux and 2 others).
37. 2000 SCMR page-1647
(Aziz ullah Khan and others vs. Gul Muhammad Khan).
38. 2001 SCMR page-1700
(Muhammad Akhtar vs. Mst. Manna and 3 others).
39. PLD 1986 Quetta page-321
(Province of Baluchistan vs. Messrs Tribal Friends Company,
Loralai).
40. PLD 1989 Lahore page-261
(The Province of the Sindh vs. Syed Shafique Ahmed).

Law under discussion: The Arbitration Act, 1940.

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present dispute between the parties has a chequered history.

2. Merely for the sake of reference, the Plaintiff, namely, [A. Qutubuddin Khan, Proprietor QMR Expert Consultants] will be referred to as the ‘**Claimant**’, whereas, the Defendant, namely, [CHEC Millwala Dredging Co. (Pvt) Limited] will be referred to as the ‘**Objector**’.

3. In the earlier round, the Award was made Rule of the Court by the order dated 05.09.2000, but when challenged by the present Objector in High Court Appeal No.311 of 2000, was set-aside and finally the Hon’ble Supreme Court in Civil Appeal No.319 of 2004 has upheld the decision of the learned Division Bench of this Court and while remanding the case, has held that the Objection filed by the Objector is time barred, but this Court has to consider the legality of Award.

4. The undisputed facts of the present case are that earlier the present Plaintiff invoked the Arbitration Proceeding and obtained an *ex parte* Award, which was filed in this Court and the proceeding was registered as

Suit No.1733 of 1997. The said Award by a consent order dated 13.08.1998 was set-aside and the parties to the present proceeding were directed to appoint their respective Arbitrators, who shall appoint an Umpire.

5. The other litigation between the same parties was in the shape of Suit No.1426 of 1998, instituted by the present Objector [CHEC Millwala Dredging Co. (Pvt) Limited], against the predecessor of present Plaintiff (Claimant), who was the sole proprietor of the concern, namely, Q.M.R. Expert Consultant. The subject matter of the above suit, instituted by the Objector, (CHEC Millwala Dredging Co. (Pvt) Limited) was to seek a declaration and injunction against the present Claimant and the Agreement dated 28.11.1996, which was relied upon by the present Claimant in support of their Claims, to be a forged document. It is averred by the Objector that the Arbitration Clause as mentioned in this Agreement (**impugned Agreement**), was an interpolation. It was the stance of present Defendant / Objector that another Agreement of same date, which is on the letterhead of Objector Company, is the genuine Agreement. This Agreement is available in record as '**CA-1**', whereas, the agreement impugned by the present Objector has been marked as '**EX-P/1**'. Both these Agreements are available at pages-61 and 53 of the record and proceeding file of the present proceeding (Suit No.1461 of 1998) bearing a caption '**Exhibits**'.

6. The above suit preferred by the present Objector was contested by the present Claimant, who besides filing their Written Statement had also filed a CMA No.1611 of 2001 under Order VII Rule 11 of CPC, which after hearing the learned counsel for the parties, was allowed and the plaint of the above suit (preferred by the present Objector) was rejected.

It is relevant to mention here that this Court while passing the above order dated 28.01.2002, has also observed that after comparing both the

documents / agreements executed on the same date, the terms, rates and conditions for providing loaders and dumpers by the Claimants, are same.

7. The present dispute between the Claimant and Objector is with regard to nonpayment of idling charges of the machines / equipments; it is stated that the Objector has not paid the rent / charges of that period when the dumpers and loaders given to the Objector, remained idle, because it is the case of the Claimant, that the subject dumpers and loaders were there at the disposal of Objector round the clock.

8. Mr. Nadeem Qutub, Advocate, has argued that relationship *inter se* the parties are not disputed, so also the scope of work. He has referred to the two Agreements, viz. 'EX-P/1' and 'CA/1' (as mentioned in the preceding paragraphs) to fortify his arguments that the terms of both Agreements, particularly the rates, are same, which is Rs.410 (*Rupees Four Hundred and Ten only*) per hour for each dumper and Rs.770 (*Rupees Seven Hundred and Seventy only*) per hour for the loader. He has referred to the Clause-1 of the document/agreement ('CA-1'), which is not a disputed document, as per the pleadings of the present Objector, to show that the Claimant rented out the two dumpers and one loader, whose description is mentioned in Clause-1 itself. He has further argued that after passing of the consent order (afore referred) in earlier Suit No.1733 of 1997 for referring the matter to Arbitrator, despite notifying the Objector, the latter did not appear and, therefore, the sole Arbitrator commenced the proceeding and decided the matter and subsequently the subject Award has been filed in this Court. The learned counsel has also cited number of reported decisions in support of his arguments, which are mentioned in the opening part of this decision.

9. Arguments heard and record perused.

10. Surprisingly, in the present post-remand proceeding, the Objector has not appeared.

11. To a specific query, the Claimant's counsel has referred to the notice dated 27.8.1998 addressed to Objector as well as to the sole Arbitrator, *inter alia*, communicating to the Objector that in terms of the consent order dated 13.8.1998 of this Court passed in Suit No.1733 of 1997, the Claimant has appointed Mr. Shamshad Ahmed Khan as latter's (Claimant) Arbitrator and called upon the Objector to appoint its Arbitrator. This letter was sent through courier and the receipt was also appended with the correspondence. A subsequent correspondence of 10.10.1998 is also available in record on page-5 of the File-Exhibits. This correspondence is addressed to the above named sole Arbitrator and contains a request that since Objector had failed to nominate its Arbitrator, the above named Arbitrator should act as a sole Arbitrator, in view of Section 9 (b) of the Arbitration Act, 1940. A copy of this correspondence is also addressed to Objector. The learned counsel for the Plaintiff has also produced the original courier receipts of the above correspondence(s) as receipts No.474 and 483; besides this, a delivery Certificate from the Chief Post Master (*Karachi City GPO*) with regard to receipt No.483 has also been produced during hearing. It is further contended, that the requirement as mentioned in Section 27 of the General Clauses Act, 1897, for effecting service of notice on the Objector has been complied with.

Even though the Objections preferred by the Objector have been held to be time barred, but merely to appreciate relevant facts, the said Objections are considered.

The Objectors have disputed the fact that they were ever notified about the appointment of Arbitrator by the Claimant, but at the same time, it is pertinent to note, that the Objector has never mentioned the fact about

any correspondence from their side addressed to the Claimant, in compliance of the consent order dated 13.08.1998; it means that the Objector never addressed a letter about appointment of their Arbitrator, which it should have. Objector has not pursued the matter in a diligent manner. The relevant portion of the consent order, whereby, the parties hereto were directed to invoke the Arbitration proceeding is reproduced herein under_

“...Both the parties agree that they are prepared to lead evidence, as otherwise it would not be possible to come to a just and fair solution. Obviously no evidence was led at the time when the award was obtained. By consent the matter is disposed of on the following terms:

- 1. That both the parties shall appoint an Arbitrator with the arbitrators exercising their right to appoint an Umpire.***
- 2. Both the parties shall exercise the right to raise objection, if any in respect of the arbitration proceedings. The learned arbitrator shall decide the matter on merits according to law within three months. The nomination of arbitrators is to be done within two weeks.”***

12. Failure on the part of the Objector to appoint an Arbitrator, the nominated Arbitrator of Claimant acted as sole Arbitrator in terms of sub section (b) of Section 9 of the Arbitration Act, 1940.

13. The Arbitrator filed the Award under covering letter dated 14.11.1998 and the Assistant Registrar’s Diary shows that notices were issued to the Claimant and Objector on 24.12.1998.

14. The sole Arbitrator has accepted the claim of Claimant for Rs.86,84,990/- (*Rupees Eighty Six Lac Eighty Four Thousand Nine Hundred Ninety only*) and also granted the interest / profit ‘at the rate of 20% (percent) from the date of previous award; besides granting costs of the proceeding in the sum of Rs.30,500/- (*Rupees Thirty Thousand and Five Hundred only*)

15. Since the Objector did not participate in the arbitration proceeding, therefore, the claim and the evidence led in support thereof have gone unchallenged. The sole Arbitrator has also determined the question of the two Agreements, viz. Exhs-‘P/1’ and ‘CA-1’, by framing a specific Issue; and as per the finding of learned Arbitrator, the Agreement–Ex-‘P/1’ is a genuine document and not a forged one, (as alleged by the Objector).

During hearing also, both documents / agreements have been considered and the contention of the learned counsel for the Claimant, so also observed in the above referred order dated 28.01.2002, that charges / rates mentioned for the equipments / vehicles in both the Agreements (disputed and undisputed) are identical, is correct.

16. Perusal of the Award shows that the claim of Claimant with regard to idling charges of the vehicles have been calculated on the undisputed rates, that is, Rs.410/- (*Rupees Four Hundred and Ten only*) per hour for the Dumper and Rs.770/- (*Rupees Seven Hundred and Seventy only*) per hour for the Loader. Undisputedly by virtue of both the Agreements (afore referred), that is, Ex-‘P/1’ and ‘CA-1’, two Dumpers bearing No.PT.0053 and PT.0054 and one Loader, bearing No.C-950 were given to the Objector at the Site. But the claim in respect of the two additional Dumpers No.A.B.5173 and No.9269 should have been disallowed by the Arbitrator. Even though it is a settled principle that at this stage the Court cannot undertake the exercise of appraisal of evidence, but it is also an established rule that any apparent error or illegality can be taken note of and decided accordingly. In this regard, I am fortified in my view by the two reported Judgments of the Hon’ble Supreme Court, already mentioned in the opening paragraph of this decision, viz. (i) PLD 2003 Supreme Court page-301 (*Pakistan Steel Mills Corporation, Karachi vs. Messrs Mustafa Sons [Pvt.] Ltd., Karachi*) and (ii) PLD 1996 Supreme Court page-108 (*M/s.*

Joint Venture KG/RIST vs. Federation of Pakistan and another). It would be advantageous to reproduce the relevant portion of the above decision_

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

18. In the case reported as M/s. Joint Venture KG/RIST v. Federation of Pakistan (PLD 1996 SC 108), at page 119 the following dictum has been laid down: -

“We may mention here that the Court while examining the validity of an award does not act as a Court of appeal. Therefore, a Court hearing the objection to the award cannot undertake reappraisal of evidence recorded by the arbitrator in order to discover the error or infirmity in the award. The error or infirmity in the award which rendered the award invalid must appear on the face of the award and should be discoverable by reading the award itself. Where reasons recorded by the arbitrator are challenged as perverse, the perversity in the reasoning has to be established with reference to the material considered by the arbitrator in the award.”

17. Adverting to the present case in view of the above discussion; the claim with regard to the two additional Dumpers is certainly an additional plea taken by the Claimant and contrary to the undisputed record, particularly the aforementioned two Agreements. Admittedly, the entire controversy between the parties hereto revolves around the above two Agreements (disputed and undisputed, both)-Exh-‘P/1’ and ‘CA-1’, wherein, one loader and two dumpers are mentioned and not the afore-referred two additional dumpers. The amount determined in the arbitration proceeding in respect of these two additional Dumpers is

Rs.14,15,730/- (Rupees Fourteen Lac Fifteen Thousand Seven Hundred and Thirty only) and Rs.12,84,018/- (Rupees Twelve Lac Eighty Four Thousand and Eighteen only), respectively; which comes to Rs.26,99,748/- (Rupees Twenty Six Lac Ninety Nine Thousand Seven Hundred and Forty Eight only). To this extent the award under consideration contains an obvious error. Similarly, awarding the interest at the rate of 20% (percent) from the date of previous Award, is illegal, because admittedly the previous Award was set-aside by the consent order dated 13.08.1998.

18. In view of the above, the Award has to be modified / corrected in terms of Section 15 of the Arbitration Act, 1940, because the illegality as highlighted in the preceding paragraphs is separable from the main Award. Consequently, from the total claim of the Claimant for Rs.86,84,990/- (Rupees Eighty Six Lac Eighty Four Thousand Nine Hundred and Ninety only), a deduction of Rs.26,99,748/- (*Rupees Twenty Six Lac Ninety Nine Thousand Seven Hundred and Forty Eight only*) is to be made and the total claim which the Claimant is entitled to, comes to Rs.59,85,242/- (Rupees Fifty Nine Lac Eighty Five Thousand Two Hundred and Forty Two only), together with 10% markup from the date of the Award (14.11.1998) till its realization along with costs of Rs.30,500/- (*Rupees Thirty Thousand and Five Hundred only*), which is already mentioned in the Award in favour of Claimant. Consequently, with this modification the Award is made Rule of the Court.

Award made Rule of the Court.

Dated 24.04.2019

JUDGE