IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT:

KHAWAJA MUHAMMAD NASIM, J.
RAZA ALI KHAN, J.

CIVIL APPEAL No. 168 OF 2023

(Against the Judgment dated 23.12.2022 passed by the High Court, Civil Appeal No. 26 of 2017.

Shoukat Khan & Company through Shoukat Ali Khan s/o Haji Sultanant Khan r/o KKH Malra Besham, District Shangla at present Lalazar Colony, Abbottabad, Pakistan.

…Appellant

VERSUS

Earthquake Reconstruction & Rehabilitation Authority through its Deputy Chairman, ERRA HQs, Murree Road, P.O. Box.2688, Islamabad, Camp Office ERRA Zonal Office Upper Chatter, Mohajar Colony No.1, Near Sabir Mughal High School, Muzaffarabad, Azad Jammu & Kashmir and 03 others.

…Respondents

Appearances:

For the Appellant:	Barrister Humayun Nawaz Khan, Advocate.
For Respondents:	Mr. Abdul Rashid Karnai, Advocate.

Date of hearing: 03.06.2024

JUDGMENT

Raza Ali Khan, J:- This appeal by our leave, stems from the judgment of the High Court dated 23.12.2022, whereby, the appeal preferred by the appellant, herein, stood dismissed.

2. The facts, in detail, are that the appellant Shoukat Khan & Company, **(Contractor)** was entrusted with the award for construction of three major bridges under Package 4 and two major bridges under Package 4A # in District Bagh. A dispute arose regarding issuance of the Defect Liability Certificate (**DLC**) and the Final Payment Certificate (**FPC**) by the consultant. Dissatisfied with the decisions, the appellant applied for review of decision, which was rejected. Following the rejection, the Contractor approached the adjudicator, who showed his inability advising the Contractor to approach the Pakistan Engineering Council (PEC). Meanwhile, the role of Project Manager, originally held by (M/S ECIL) was assigned to M/S ERRA. The Contractor then appealed to the Deputy Chairman ERRA for appointment of an arbitrator. On March 17, 2015, a sole arbitrator was appointed, who issued the final award on July 4, 2015.

3. The Contractor subsequently filed an application under Section 14 of the Arbitration Act, 1940 (*hereinafter referred to as* **'Act, 1940'**), before the Additional District Judge, Muzaffarabad on October 1, 2015, seeking to make the award dated July 4, 2015, as the Rule of the Court. The application was

made over to the Additional District Judge, Muzaffarabad. Upon filing of the application, the respondents were summoned and they filed objections.

The respondents contented in their objections that the Contractor was awarded the contract for constructing major bridges in District Bagh on October 17, 2008. The Contractor failed to complete the work within the stipulated time of one year. Later on, despite three extensions granted up to June 30, 2011, the Contractor did not complete the project within the extended period. The project was completed on December 12, 2011, and a completion certificate was issued after approval from the Chief Engineer EEAP (**Employer**), showing delay of 162 days beyond the final extension period, and on the recommendation of the consultant ECIL, the Project Manager imposed liquidated damages (LD's) of Rs. 27 million, which were deducted from the final bill. The respondents asserted that under clause 26 of General Conditions of Contract (**GCC**) and 26.1 a Particular Condition of Contract (**PCC**) of the project agreement, prior approval from the Employer was necessary for any extension time (**EOT**). The claims from the Contractor submitted to the Project Manager, CRE-ECIL, were rejected on May 3, 2013. The Contractor did not challenge this decision before an Adjudicator as provided in the project agreement. Later on, ERRA appointed an Arbitrator for dispute resolution and directed the Employer to settle the issue through arbitration. During arbitration proceedings, the Employer in writing, denied several documents submitted by the Contractor. However, the Arbitrator

ignored significant legal points and instead accepted Claim No.1. CRE-ECIL neither revised the final bill summary by waiving the LDs nor granted the 4th EOT, but the Arbitrator erronously evaluated and misstated these facts in his award. Moreover, as per the Contractor’s claim, the interest rates determined by the Arbitrator on the recovery of LD’s were not in accordance with Contract Clause 40.1. The imposition of LDs was directly related to the time expired beyond the third and final contract extension. The contractor's application for a 4th EOT was not approved by CRE-ECIL, and the LD deduction was made as per contract clause 46.1, accepted and executed by the Employer. The delay was proven by the Employer before the Arbitrator, who acknowledged this in the award but still made an erroneous decision. The final bill, verified by CRE-ECIL on April 19, 2013, was later on revised on December 19, 2013, by CRE, contrary to contract terms and conditions. The third EOT was approved up to June 30, 2011, while the contractor's application for the 4th EOT was rejected by the consultant on May 3, 2013.

4. The Contractor also filed a replication, asserting therein, that the respondents' objections are misconceived and contrary to the statutory provisions. They stated that the relief sought by the respondents in their objections cannot be granted based on such objections. Further, the objections were filed beyond the prescribed statutory period of limitation, rendering them inadmissible. The Contractor emphasized that the respondents failed to support their objections with a sworn affidavit, a mandatory legal requirement. Furthermore, the affidavit provided by the

respondents' counsel was vague and lacked firsthand knowledge, amounting to hearsay evidence, which is inadmissible under the law. The award was submitted to the Court on October 1, 2015, and notices were issued to the respondents. However, the respondents failed to file their objections within the prescribed limitation period. The Contractor urged that they had fully complied with the contract conditions and that the imposition of LD’s by the respondents was patently illegal and contrary to the terms of the contract, which the Arbitrator rightly resolved.

5. The learned Additional District Judge, Muzaffarabad, after hearing the parties and scrutinizing the record, dismissed the application filed under section 14 of the Arbitration Act, 1940, vide judgment dated January 11, 2017, declaring the arbitration conducted by the Arbitrator to be against law, the Project Agreement (GCC & PCC), and Act. This judgment was subsequently, challenged by the Contractor before the High Court through an appeal, which was also dismissed through the impugned judgment dated December 23, 2022.

6. Barrister Hamayoun Nawaz Khan, the learned Advocate representing the Contractor, contended that the judgments delivered by both the Courts below are contrary to the record and law. He emphasized that the Courts below ignored the fundamental principles of arbitration laws, arguing that arbitration serves as a mechanism for dispute resolution between parties through mutually chosen judges. He highlighted that once parties participate in the arbitration process without raising any objection,

they cannot subsequently, challenge the award proceedings, making the impugned judgment is untenable. He further argued that the lower courts failed to consider that the respondents remained fully engaged in the arbitration proceedings without objecting to the arbitrator's authority. According to well-established principles of acquiescence and estoppel, respondents should not be permitted to challenge the arbitration proceedings after participating without raising any objection. The learned Advocate also pointed out that the imposition of LD’s was against the terms of Contract as the delay occurred on behalf of respondents in issuing the completion certificate, as per the contract terms. He noted that the completion certificate was eventually issued after a passage of six months under the same conditions, demonstrating that the Contractor did not violate any contract clause. Therefore, the arbitration award should have been upheld as the rule of Court, but the courts below failed to address this critical aspect of the Contractor’s case. He stressed that the impugned judgment appeared to be influenced by extraneous considerations, whereas the respondents did not raise any valid ground for setting aside the award under law. Moreover, there were no legal grounds available to the lower courts to justify the setting aside of the award. In support of his contentions, the learned Advocate placed reliance on the cases reported as *F.J. Rambarts (Pakistan) LTD vs. Pakistan Steel Mills Corporation [1987 CLC 2198], West Pakistan through the Executive Engineer, Rawalpindi vs. Messrs. Azhar Brothers [[PLD 1977 Lahore 1013], Mst. Akhtar Bashir vs. Muhammad*

Bashir and another [1981 CLC 423], Babubhai Tansukhlal vs. Madhavji Govindji and Co. [AIR 1931 Bombay 343] and A. Kothandapani and others vs. Sampathkumar and another [AIR 1987 Madras 204].

7. Contrarily, Mr. Abdul Rasheed Karnai, the learned Advocate representing the respondents (**Employer**), opposed the arguments presented by the Contractor's counsel and staunchly defended the impugned judgments. He raised an initial objection regarding the requirement of court fee, noting therein that whenever a decree is challenged directly or indirectly through an appeal or revision, the court fee must be paid on an ad-valorem basis. He pointed out that in this case, the requisite fee was not paid along with the appeal before the High Court. He further argued that the impugned award issued by the Arbitrator was without lawful authority, contrary to the Terms of Reference (**TOR**), and did not fulfill the pre-requisites outlined in clauses 23 and 24 of GCC and PCC. Consequently, the lower Court rightly set aside the award, and the decision affirmed by the High Court. He emphasized that the contract was awarded to the Contractor in August 2008, with an agreement signed on October 17, 2008. The Contractor failed to complete the award within the prescribed timeframe, ultimately finishing on December 12, 2011, resulting into six-month delay even after grant of three EOT. Due to this delay, LD's to the tune of Rs. 27.537 million, were justifiably imposed on the contractor. The Court of Additional District Judge, as well as the High Court appropriately declared the arbitration conducted by the Arbitrator being against law, the project agreement, and the Act, 1940, thereby

dismissing the application and appeal. The learned Advocate finally concluded by requesting that this appeal be dismissed with costs, reinforcing his stance that the judgments of the courts are correct and based on concurrent findings of facts.

8. We have meticulously heard the learned Advocates representing both the parties and thoroughly revisited the case record along with the impugned judgments of the courts below. Clause 24 GCC outlines the procedure for dispute resolution: if a contractor is dissatisfied with the Project Manager's decision, the matter must be referred to an Adjudicator within 14 days, who will decide the matter within 28 days. Either party can then refer the Adjudicator's decision to an Arbitrator within 28 days; otherwise, the decision shall become final. It may be stated here that an arbitration is an arrangement between the contending parties for referring the matter or matters of difference for investigation and determination to one or more unofficial persons chosen by the parties. The essence of arbitration is the settlement of a dispute by the decision not by a regular and ordinary Court of law but of one or more persons who are called arbitrators, whose decision the parties agree to accept as binding whether they agree to the decision or not. The person/persons so chosen by parties for determination and resolution of matter in dispute, is called arbitrator. It is an essential ingredient of valid submission to arbitration that the agreement between the contending parties to arbitrate should be contained in a written document. It may also be put that arbitration is based upon and a creature of contract. As for every other type of

contract, arbitration agreement also must meet the requirements to become a valid contract. It may be stated that a valid arbitration agreement must be in writing and meet the requirements of a valid contract under contract law, i.e., Contract Act, 1872 and general principles governing the contract law.

9. In Azad Jammu and Kashmir, the governing law regarding arbitration is the Arbitration Act, 1940 and the Contract Act, 1872, regulates the law relating to agreements and the contracts. Section 2(a) of Act, 1940, defines term as such: "arbitration agreement" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not. Section 2(a), (supra) signifies that essential ingredients of an arbitration agreement are that (1) there should be an agreement; (2) the agreement should be in writing and; (3) the agreement should be to refer either present or future dispute to arbitration. Section 2(e) of the Contract Act, 1872, defines term "agreement" in following terms: " Every promise and every set of promises, forming the consideration for each other, is an agreement''.

10. A bare reading of section 2(e) of Contract Act, 1872, reflect that for either party to the matter 'consideration' is sine qua non for forming the same matter or transaction into an agreement and in absence of 'consideration' for either party an agreement cannot be constituted. By juxtaposed reading of section 2(a) of Act, 1940 and section 2 (e) of Contract Act, 1872, it may be put that an arbitration agreement is an agreement wherein the

consideration is the readiness and willingness of either side of the agreement to abide by the decision or award of the arbitrator even though it may be against him/them. Arbitration can proceed through three approaches: without the court's intervention, with the court's intervention, or with the court's intervention while a suit is pending, wherein the parties agree to resolve their disputes through arbitration, and the suit's outcome is based on the arbitrator's decision. It is crucial that the arbitration process adheres to these procedures to ensure the resulting decisions are legally binding and enforceable.

11. In the case in hand, the Contractor sought the appointment of an adjudicator, but the adjudicator declined and suggested contact the Pakistan (**PEC**) for a new appointment. Subsequently, the Contractor requested the Deputy Chairman ERRA to appoint an Arbitrator, which was eventually appointed to adjudicate upon all disputes arising from the project agreement. The Arbitrator issued a final award, which the Contractor sought to enforce through an application under section 14 of Act, 1940, to make it a rule of the Court. However, the learned Additional District Judge, Muzaffarabad, rejected the application, considering it not maintainable and declaring the arbitration contrary to law, the project agreement, the GCC, PCC, and Act, 1940. The judgment of the Additional District Judge, was based on technicalities such as the Contractor’s authority to request PEC under clause 23 of GCC, which was deemed unauthorized under Act, 1940. Additionally, it was noted that the place of arbitration, as per PCC, was set at Muzaffarabad but was changed to Islamabad

without the employer's consent. The learned High Court also affirmed the judgment of the Additional District Judge. Both the Courts below while passing their judgments erred in law and while resorting to hyper technicalities remained unable to appreciate the law relating to arbitration and Act, 1940, in its true spirit and perspective. In historical context of adjudications and codified laws concept of referring the disputes for reconciliation and 'arbitration' to elders or Chiefs of clans for resolution and putting 'an end to disputes', is more ancient than formal laws and formation of Courts.[1] The object of arbitration proceedings is to curtail the period of litigation and costs likely to be incurred on litigation in Civil Court to the parties. In matters of trade, commercial and contractual nature, the parties to avoid normal proceedings of civil nature in Courts of law and to remain focused on their respective businesses and trades, choose to refer disputes to the arbitrators who are usually belong to, practice and expert in disputes of commercial nature and understand technical aspects of such trade, business, or technical aspects of respective fields. The Arbitrator is not bound strictly by rule of technicalities. The scheme of Arbitration Act, is supervisory in nature and not akin to civil Court and the Civil Court or the appellate Court while adjudicating upon the award of the arbitrator should not resort to powers of appellate Court as provided under the Code of Civil Procedure, 1908. Reference may be made to Champsay Ghara and Company v. Jivrajh Balloo Spinning and Weaving

[1] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review, accessed on 15.06.2024

Company, AIR 1923 PC 66, wherein it has been held as under:-

> "12. Their Lordships think that this argument is based upon a confusion of thought. The question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in this case whether the dispute which 'has arisen is a dispute covered by Clause IS of the Articles. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association. Now that clause refers to the arbitrator the whole question whether it depends on law or on fact, with the exception only of dispute as to quality. It is, therefore, for the arbitrator and not for the Court to decide what is the effect of the rejection based on an award as to quality. In truth this point is decided in terms by the recent case of Sanderson v. Armour [1922] S.C.H.L. 117. It was a Scotch case, but in no way depended upon any peculiarity of the law of Scotland."

12. Having said that we are unanimous to put explicitly that we are not agreed with the observations made by both the Courts below as when the parties through their conduct, adopt a procedure that contravenes and agreed upon the clauses within a contract they may become estopped from challenging the procedure. The arbitration agreement, like any other agreement or contract, may be amended, modified, rescinded or revoked explicitly by mutual consent or impliedly by acts and conduct of parties without raising any objection as to deviation of agreed procedure. The particular condition agreed upon and written in an arbitration agreement may be superseded by new agreement or any of its such

condition which has the effect of extinguishing the existing agreement or condition or by performance of certain act in deviation to previous condition and by necessary implication performed for satisfaction of prior agreement.

13. A party may not be estopped from raising objection as to the validity of appointment of an arbitrator or there is an irregularity in the appointment of an arbitrator but such party if participates in arbitration proceedings, then such party is deemed to have waived its right of objection such irregularity must be held to be cured by the acquiescence of such party. Reliance may be made on Gajadhar v. Chunilal, AIR 1929 All 559; Dev. Const. Corporation v. West Pakistan, PLD 1971 Kar 292; , Bhowani Das v. Harsukhdas, AI 1924 Cal. 524. Estoppel by conduct or estoppel in pais, prevents a party from asserting a position contrary to one they previously accepted if their previous behavior led the party reasonably rely on that conduct to their detriment.

14. In legal disputes, the concept of estopple plays a critical role in ensuring fairness and consistency in the actions and expectations of the parties involved. When parties involved adopt a procedure for the resolution of a dispute that deviates from their original agreement, are estopped from later challenging that procedure, can be analyzed through the lens of various legal doctrines including estopple by conduct and waiver. Estopple by conduct also kown as estopple by pais, prevent a party from asserting something contrary to what is implied by their

previous actions, statements, or silence when such conduct has induced another party to act in reliance on it. This principle is rooted in equity, aiming to avoid injustice that would result if a party was allowed to contradict its earlier action or behavior in the context of dispute resolution, if both parties to a contract agree, either explicitly or implicitly through their actions to follow a procedure different from originally stipulated, their subsequent conduct indicates mutual consent to new procedure, if one party initiates the alternative process and other party participates without objection, both parties are effectively modifying the contract through their actions. The principle of estoppel not only well-founded in common law but also has been given statutory backing in Pakistan. Article 114 of the Qanun e Shahadat, 1984 deals with estoppel. It will be advantageous for us to reproduce here, Article 114, which reads as under:

> **"114. Estoppel**- When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. "

15. In plain words if someone, through their words, actions, or failure to act, has intentionally made another person believe something is true, and that other person has relied on this belief to his detriment, the first person (or their representative) cannot later claim that the thing is not true in any legal case involving the two people or their

representatives. This Court in case reported as Ministry of Kashmir Affairs and Gilgit Baltistan, Government of Pakistan through Secretary and another vs. Messrs ZK Associates (Pvt) Limited through authorized representative and 5 others, reported as 2021 YLR 2337, held as under:

> "It is well settled principle of law that if a party against whom the acquiescence and estoppel is pleaded, was aware about the dents pointed out by the other party, and even then it has participated in the process without raising any objection then in case of adverse order, such party cannot take an inconsistent position."

The principle of estoppel is applicable and well recognized worldwide since long. The Indian Supreme Court in B.L. Sareedhar vs. M. Muniredy and others, AIR 2003 SC 578[2], held as under:

> "Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short 'Evidence Act') which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. [See Sunderabai and Anr. v. Devaji Shankara Deshpande (AIR 1954 SC 82)].
> "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth" Co.Litt., 352(a), cited in Ashpital v. Byron, 3B and S. 474(489); Simon v. Anglo American Telegraph Co., (1879) 5 Q.B.D. 188 C.A., per Bramwell L.J. at p. 202; Halsbury, Vol. 13, Para 488. So there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not. Estoppel, or conclusion, as it is

[2] (https://indiankanoon.org/doc/275180/). Accessed on 15.06.2024.

frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Halsbury, Vol. 13, para. 448. The rule on the subject is thus laid down by Lord Denman, in Pickard v. Sears, 6 Ad. & E. 469 at p. 474: "But the rule is clear, that, where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act to that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." "The whole doctrine of estoppel of this kind, which is fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel - estoppel by representation- which is founded upon reason and it is founded upon decision also." Per Jessel, M.R. in General Finance & Co. v. Liberator, L.R. 10 Ch.D.15(20). See also in Simon v. Anglo-American Telegraph Co., L.R. 5 Q.B.D.202 Bramwell, L.J. said" An estoppel is did to exist where a person is compelled to admit that to be true which is not true and to act upon a theory which is contrary to the truth."

On the whole, an estoppel seems to be when, in consequences of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim, allegans contrarir non est audiendus (a party is not be heard to allege the contrary) and is that species of presumption juries et de jure- (absolute or conclusive or irrebutable presumption), where the fact presumed is taken to be true, not as against all the world, but against a particular party, and that only by reason of some act done; it is in truth a kind of argumentum ad hominem.

"In our old law books," said Mr.Smith in his notes to the Duchess of Kingston's case, "truth appears to have been frequently shut out by the intervention of an estoppel, where reason and

> good policy required that it should be admitted.... However, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act."
> "An estoppel is not a cause of action- it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself." Per Lindley L.J. in Low v. Bouveria, (1831) 3 Ch. 82 at p.101. In the same case, at p.105.Bowen L.J. added:" Estoppel is only a rule of evidence; you cannot found an action upon estoppel."
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> Estoppel though a branch of the law of evidence is also capable of being viewed a substantive rule of law in so far as it helps to create or defeat rights, which would not exist or be taken away but for that doctrine.
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> Estoppel is a complex legal notion, involving a combination of several essential elements statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law... Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified"

The Supreme Court of Canada in a case reported as Ryan vs.Moore, reported as [2005 SCC 38][3] held as under:

> "50. While the principle of estoppel is often referred to in connection with cases of waiver,

[3] https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2270/index.do. Accessed on 15.06.2024.

election, abandonment, acquiescence and laches, in the context of commercial and contractual relationships, the case law in Canada on this subject is not as abundant as that in the United Kingdom. It is therefore useful for this Court to address the issue in some detail, especially where it has long been accepted that estoppels are to be received with caution and applied with care (see *Harper v. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.), at p. 383).

51. The state of the law of estoppel was articulated by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122, as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

The Supreme Court of USA in the case reported as New Hampshire vs. Maine, reported as 532 US 742 (2001)[4] held as under:

> " (a) Judicial estoppel is a doctrine distinct from the res judicata doctrines of claim and issue preclusion. Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position…"

The High Court of Australia in a case reported as "Waltons Stores (Interstate) Ltd vs. Mahar, [1988] HCA 7,[5] held as under:

> 12. The nature of an estoppel in pais is well established in this country. A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to: Craine v. Colonial Mutual Fire Insurance Co.Ltd. [1920] HCA 64; (1920) 28 CLR 305, at pp 327-328 (affirmed on other grounds by the Privy Council - 31 CLR 27, at p 38); Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507, at p 547; Newbon v. City Mutual Life Assurance Society Ltd. [1935] HCA 33; (1935) 52 CLR 723, at p 734; Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641, at pp 657, 674, 676. In Thompson v. Palmer Dixon J. said, at p 547:
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> " The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the

[4] https://caselaw.findlaw.com/court/us-supreme-court/532/742.html. Accessed on 15.06.2024

[5] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1988/7.html?stem=0&synonyms=0&query=walton%20stores. Accessed on 15.06.2024.

assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party."

The effect of an estoppel in pais is not to create a right in one party against the other; it is to establish the state of affairs by reference to which the legal relationship between them is ascertained. A classical statement of the doctrine as it is understood at least in this country is to be found in the judgment of Dixon J. in Grundt v. Great Boulder, at pp 674-675:

" The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. ... (The rules governing estoppel) work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to,

> the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice."

The United Kingdom House of Lords, in the case reported as Johnson v. Gore Wood and Co. [2001 UKHL 65][6], held as under: -

> "The function of the estoppel is here said to be to preclude the respondent firm from contending that Mr. Johnson, by personally advancing a separate claim to damages against the respondent firm instead of doing so at the same time as pursuing his company's claim, was abusing the process of the court. That, as I see it, must relate to a matter of law. It could, however, be appropriate subject mat- ter for an estoppel by representation, whether in the form of promissory estoppel or of acquiescence, on account of which the firm is, by reason of its prior conduct, precluded from enforcing its strict le- gal rights against Mr. Johnson (to claim that his personal proceedings against the firm constituted an abuse of the process of the court). Such an estoppel is not, as I understand it, based on a com- mon underlying assumption so much as on a representation by the representor that he does not in- tend to rely upon his strict legal rights against the representee which is so acted on by the represen- tee that it is inequitable for the representor thereafter to enforce those rights against him. This ap- proach, as I see it, is consistent with the conclusion of my noble and learned friend

[6] https://www.casemine.com/judgement/uk/5b46f20d2c94e0775e7f1634

> Lord Millett. who considers that the firm would be so precluded by virtue of its acquiescence in the manner in which Mr. Johnson had conducted the litigation hitherto. In the context of the present case, more-over. I can see no material difference between invoking promissory estoppel or acquiescence as the ground on which the respondent firm should be precluded from asserting that the appellant had abused the process of the Court. In the end. I am inclined to think that the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them."

This Court in a recent judgment titled AKLASC & others vs. Misdaq Hussain Kayani & others[7], observed as under: -

> "……Syed Nazir Hussain Shah Kazmi, Advocate, has diverted our attention towards Annexure "RA" (details of payment of pension). It appears that the appellants, have accepted the offered package and received their pension in a lump sum. The record further reveals that writ petition No. 597/2019 was filed by 213 pensioners and writ petition No. 1619/2020 was filed by 222 pensioners, however, the appeal before this Court has been filed by only 18 pensioners. This reinforces Syed Nazir Hussain Shah Kazmi's argument that the pensioners' acceptance of the package precludes them from contesting it, invoking the legal principles of estoppel and acquiescence. Essentially, by accepting the lump-sum payments, the pensioners have implicitly affirmed the validity of the package, thus barring them from legally challenging it thereafter.
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> 10. Article 114 of the Qanun-e-Shahadat, 1984 defines the doctrine of estoppel under which when a person has, by his declaration, act or omission, intentionally

[7] Civil Appeals No. 155 & 156 of 2024, decided on 10.06.2024

caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. In fact, this principle is founded on equity and justness with straightforward objective to prevent fraud and ensure justice though it is described as a rule of evidence but may have effect of constituting substantive rights as again the person estopped being well-defined legal precept that impedes someone from averring a truth that is defined as contradictory to an already established truth. The catchphrase "Estoppel" is derived from the French word "estoupe" from which the word estopped in English language emerged. A man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth" (Lord coke in Co. Litt 352 (a) as cited in the case of B.L. Sreedhar v/s K.M. Munireddy (2003) 2 SCC 355 at 365). Whereas the doctrine of acquiescence is grounded upon a conduct that if a person sighted another person about to commit an act infringing upon his rights who might otherwise have abstained from it to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. In the case of Ramsden v. Dyson L.R. 1 E & I, Ap. 129(140)(1865), it was held that the common case of acquiescence is where a man, who has a charge or encumbrance upon certain property, stands by and allows another to advance money on it or to expend money upon it. Equity considers it to be the duty of such a person to be active and to state his adverse title, and that it would be dishonest in him to remain wilfully passive in order to profit by the mistake which he might have prevented. While in the case of Duke of Leeds v. Earl of Amherst 2 Ph. 117 (123) (1846), the court held that the proper sense of the term acquiescence and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or conduct."

16. According to **Russell** on the Law of Arbitration, **Seventeenth Edition, page 215”**, *if the parties to the reference either agreed beforehand to the method of appointment, or afterwards acquiescence in the appointment made with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence*". The arbitration is a forum of the parties’ own choice and is competent to resolve the issues of law and the fact between them, which opinion/decision should not be lightly interfered with by Court until a clear and definite case is made out. Both parties, having given their consent, participated in the arbitrator's proceedings and agreed on the arbitration venue, therefore, they cannot now contest the arbitrator's decision. This Court consistently upheld the principle of estopple in various context. In contract law, particularly, when parties deviate from agreed procedure without immediate objections, Court likely to hold them to that deviation. This principle is grounded in the broader doctrine of waiver where a party voluntarily relinquishes a known right, either through express agreement or by implication through conduct. Practically, this means that once parties have started and engaged in an alternative procedure, they are at an exception of adherence to this new process. The underlying principle is that of good faith and fair dealing, parties should not be allowed to *“switch or swap horses in midstream”* to the detriment of the other party. Such behavior would be considered bad

faith, which the doctrine of estopple aim to prevent. We are fortified in our view from a case *reported as F.J. Rambarts (Pakistan) LTD vs. Pakistan Steel Mills Corporation*[8]. The relevant portion of the citation is reproduced as under: -

> "…The pith and substance of all these authorities is that where a party participates in the proceedings before the arbitrator without raising objection to his jurisdiction, submits his claim and examines witnesses on disputed points without demur then in the end cannot turn back to challenge the jurisdiction of the arbitrator on such submissions…"

In the case reported as *West Pakistan through the Executive Engineer, Rawalpinid vs. Messrs. Azhar Bothers*[9], the party participating in the proceeding before an arbitrator without any objection was estopped from rising any objection at later stage. In para 13 of the report, it was held as below: -

> "13.The proposition is well established that a party participating in the proceedings before an arbitrator without any objection to his authority r competence to act as such and thus displaying an intention to be benefited by the award if it be made in his favour is estopped from raising an objection to the jurisdiction of the Arbitrator at later stage. The appellant's conduct clearly brings him under this rule. I find no merit in this appeal and dismiss it with costs."

In another case reported as *Mst. Akthar Bashir vs. Muhammad Bashir and another*[10], it was held that parties consenting to refer the matter to arbitration, joining proceedings and award are estopped from questioning validity of award on the

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[8] (1987 CLC 2198)
[9] (PLD 1977 Lahore 1013)
[10] (1981 CLC 423)

ground that the reference has not strictly been made in compliance with provision of the relevant law. For convenience, the relevant portion of the case (supra) is reproduced as under:-

> "9. In view of the above discussion the correct proposition of law appears to be that if in pending case the parties consent to refer the matter to arbitration and sign the proceedings in this behalf and the award is submitted the parties shall be estopped to question the validity of the award on the ground that the reference had not been made strictly in compliance with the provisions of section 21 of the Arbitration Act and there was no application in writing…."

An authoritative judgment from Pakistan jurisdiction also came in our consideration reported as *Chief Engineer Building Department, Provincial P. W. D. Government of Sind vs Messrs Pak National Constuction Company*[11], wherein, it has been observed as under: -

> "Now, we would first deal with the submissions of Mr. A. R. Akhtar learned counsel for the appellant. It was submitted that in accordance with the arbitration agreement only the Superintending Engineer of the Department could be appointed and no other person and since Mr. Zahid Hussain was not the Superintending Engineer of the Department his appointment was invalid and therefore the award given by him is also invalid. There cannot be any quarrel with proposition that an arbitrator named in the arbitration agreement either by name or by designation only has jurisdiction to decide the dispute between the parties under the arbitration agreement but if subsequently the parties agree to the arbitration of another person or they acquiesce with full knowledge of all circumstances in the appointment `

[11] PLD 1981 Karachi 553]

> .Participating in the arbitration proceedings without any objection or protest then they will be precluded from objecting to such appointment. In the instant case, no doubt on 18-1-1975, the appellant had objected to the jurisdiction of the arbitrator but subsequently not only he continued without any objection or protest to participate in the proceedings before the arbitrator but also consented to the application made by the arbitrator for extension not time. Thus this is a clear case of acquiescence in the proceedings and waiver of objection and the principle of estoppel would also be attracted to this case, for according to Russell on the Law of Arbitration, Seventeenth Edition, page 215", if the parties to the reference either agreed beforehand to the method of appointment, or afterwards acquiescence in the appointment made with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence."

17. In the current situation, under the rule of law established in the cited cases, the respondents are estopped from questioning the award's validity. The Additional District Judge and the High Court dismissed the Contractors' application under section 14 of the Act, 1940 and appeal, respectively, while declaring the arbitration proceedings invalid without considering relevant case law on the subject that addresses estoppel by conduct. This oversight led to the impugned judgments being handed down without due consideration of applicable legal principles. Given these circumstances, we are unanimous to remand the case for a fresh decision on its merits. Remanding a case is generally not preferred, however, it is necessary here to ensure that the lower courts may

render findings based on the evidence. Therefore, we accept the appeal, set aside the impugned judgments and decrees of the courts below, and remand the case to the Additional District Judge, Muzaffarabad. The Additional District Judge is directed to reconsider the case on its merits and issue fresh decision expeditiously after providing fair opportunity of hearing to the parties. No order as to costs.

JUDGE **JUDGE**

Muzaffarabad,
27.06.2024.