

IN THE HIGH COURT OF SINDH AT KARACHI

Present:-

Mr. Justice Sajjad Ali Shah, C.J.

Mr. Justice Muhammad Junaid Ghaffar.

HCA No. 55 of 2013

Muhammad Ather Hafeez Khan ----- Appellant

Versus

M/s Saangyong & Usmani J.V. ----- Respondents

HCA No. 57 of 2013

Muhammad Ather Hafeez Khan ----- Appellant

Versus

M/s Saangyong & Usmani J.V. ----- Respondents

**Date of hearing: 16.10.2015, 25.4.2016, 2.5.2016, 23.5.2016,
3.10.2016 & 24.10.2016**

Date of judgment: 28.10.2016

Appellant: Through Mr. Mansoor-ul-Arfain Advocate.

Respondent No2: Through Mr. Kazim Hassan Advocate.

**Respondent No3: Through Mr. Muhammad Masood Khan
Advocate.**

ORDER

Muhammad Junaid Ghaffar, J. Through this common judgment we intend to decide both the aforesaid appeals which arise out of a common order dated 1.4.2013, whereby the objection raised by the appellants in respect of limitation and delay in filing of two separate set of objections by the respondents against the Award of the Arbitrator were dismissed.

2. Briefly the facts as stated are that pursuant to an agreement between the parties a Sole Arbitrator was appointed by order dated 31.8.2010, whereafter the proceedings were conducted by the learned Sole Arbitrator and the learned Sole Arbitrator gave his Award on 15.3.2012, whereby the claim of the appellant was allowed. The learned Sole Arbitrator then sent the Award to the Registrar of this Court with a covering letter dated 15.3.2012 and had also given notice to the contesting parties which notices were received admittedly by the parties on 16.3.2012. Thereafter two separate set of objections were filed on behalf of the respondents, and in response, the appellant raised a preliminary objection that the objections to the Award are time barred and therefore, such issue may be decided before proceedings on merits of the case. The learned Single Judge through the impugned order has decided the issue of limitation independently and has been pleased to hold that the objections to the Award were within time.

3. Learned Counsel for the appellant has contended that admittedly the learned Arbitrator's notice of filing of Award was received by the respondents on 16.3.2012, and therefore, the objections to the Award were required to be filed within a period of 30 days as provided under Article 158 of the Limitation Act, 1908, on or before 15.4.2012, whereas, such objections were filed by the respondents on 17.4.2012. Learned Counsel has further submitted that the learned Single Judge has failed to appreciate the true intent and meaning of Section 14(2) of the Arbitration Act, 1940, read with Article 158 of the Limitation Act, as the period of 30 days is to be calculated from the date of notice of filing of the Award given by the Arbitrator, and not from the date of service of notice through the Court after filing of the Award in the Court by the Arbitrator. Learned Counsel has further contended that the period of limitation is not dependent from the date of notice received from the Court, but from the date of notice given by the Arbitrator himself, and since admittedly such notice was in the knowledge of the respondents, they were required to file their objections within 30 days form such knowledge. In support of his contention learned Counsel has relied upon the cases reported as *Messrs Shafi Corporation Ltd. V. Government of Pakistan (PLD 1994 KARACHI 127)*, *Muhammad Mushtaq Saigal & others V. Muhammad Wasi Saigal (2001 SCJ 96)*, *Messrs Shafi Corporation Ltd. V. Government of Pakistan through Director General of Defence Purchase (PLD 1981*

KARACHI 730), Nilkantha Sidramappa Ningashetti V. Kashinath Somanna Ningashetti and others (AIR 1962 SC 666), Government V. Brig. Muhammad Aslam Khan (PLD 1972 AJ&K 70), Muhammad Ramzan Wagey and another V. Mohammad Baba and others (AIR 1978 J&K 27), Tharpal V. Arjunsingh (AIR 1957 MB 22), Sri Krishn and another V. Radha Kishen and another (AIR 1952 ALLAHABAD 652), H. Chandanmull and Co. V. Mohambal M. Mehta and others (AIR 1953 MADRAS 561) and Messrs Tribal Friends Co. V. Province of Baluchistan (2002 SCMR 1903).

4. Conversely, learned Counsel for respondent No.3, at the very outset objected to the maintainability of instant appeal as according to the learned Counsel, the impugned order is not an order under Section 39 of the Arbitration Act, 1940 and therefore, no appeal lies in the instant matter. Learned Counsel has also referred to Section 46 of the Arbitration Act and submits that no independent appeal lies on an issue of limitation and such objection if any, and without prejudice, could have been taken once the case is decided on merits against the appellants and therefore, per learned Counsel, instant appeal may be dismissed in limine. Insofar as the question of limitation is concerned, learned Counsel contended that the notice of filing of Award given by the Arbitrator is not a notice under Section 42 of the Arbitration Act and it is only a notice of the Court upon filing of the Award from which the period of limitation provided under Article 158 of the Limitation Act has to be computed. Learned Counsel further submitted that notice issued by the Court after filing of the Award was received by the respondents on 20.3.2012 and therefore, the objections filed on 17.4.2012 were within time. Counsel has further referred to Section 12(1) of the Limitation Act and has submitted that the first and the last date has to be excluded while computing the period of limitation, and therefore, even otherwise, if the period of limitation is calculated from the date of notice given by the Arbitrator, the objections were within time. In support of his contention learned Counsel has relied upon the cases reported in *Messrs Tribal Friends V. Province of Baluchistan (2002 SCMR 1903), Messrs Shafi Textile Mills and 3 others V. Askari Bank Limited (2011 CLD 995), Messrs Shafi Corporation Ltd. V. Government of Pakistan through Director General of Defence Purchase (PLD 1981 KARACHI 730), Province of Punjab and 2 others V. Messrs Usman & Sons (2002 MLD 414), Makshwar Misra V. Laliteshwar Prasad Singh and others (AIR 1967 PATNA 407), Rahim Jan V. Mrs. Z. Ikram Gardezi and*

others (PLD 2004 SC 752) and Punoo Ram V. Nebh Raj (AIR 1930 LAHORE 228).

5. Similarly, the Counsel for respondent No. 2 has adopted the arguments of Counsel for respondent No. 3, and has further submitted that there is a complete procedure and mechanism provided for issuance of notice in such matters under Rule 282 and 283 of the Sindh Chief Court Rules (Original Side) and therefore, this matter is required to be decided by this Court in line with such procedure.

6. While exercising his right of rebuttal, the learned Counsel for the appellant as to maintainability of instant appeal as objected on behalf of the respondents, has contended that the impugned order is in fact not an order under the Arbitration Act, 1940, and therefore, the bar contained in Section 39 of the Arbitration Act, would not apply as the impugned order is an independent order under the Limitation Act

7. We have heard all the learned Counsel and perused the record. By consent of all, instant appeals are being decided finally at Katcha peshi stage.

8. First we would like to respond and decide the objection raised on behalf of the respondents that whether instant appeals are maintainable against an order which appears not to be a final order under the Arbitration Act, whereby, the objection raised on behalf of the appellants regarding delay in filing of objections to the Award has been taken up by the learned Single Judge and decided independently without adverting to the merits of the case. Though instant appeal has been filed by the appellant under Section 15 of the Civil Procedure Code, and it has been urged and contended that the impugned order is an independent order under the Limitation Act, and therefore, is appealable. Whereas, the respondent's argument is that the main proceedings pending before the learned Single Judge were under the Arbitration Act, wherein the Award was filed before the Court and was converted into a Suit for making the Award as a rule of the Court or otherwise, and therefore, no independent appeal would lie in respect of limitation only. To have a better understanding of the controversy before us, it would be advantageous to refer to the provision of appeal i.e. Section 39 of the Arbitration Act which reads as under:-

“39. Appealable orders.—An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order:--

- (i) Superseding an arbitration;
- (ii) On an award stated in the form of a special case,
- (iii) Modifying or correcting an award;
- (iv) Filing or refusing to file an arbitration agreement;
- (v) Staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) Setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to [the Supreme Court]”

9. Perusal of the aforesaid provision reflects that an appeal under the Arbitration Act can only be filed in respect of the orders stated hereinabove, whereas, it further provides that an appeal shall only lie from the orders hereinabove passed under this Act (and from no others) to the Court authorized by law to hear appeals from the original decrees of the Court passing the order. It reflects that the orders passed under the Arbitration Act are only appealable if they fall within the category of orders provided under Section 39, whereas, admittedly the order impugned before us is not an order passed under the Arbitration Act. In fact this is precisely the contention of the learned Counsel for the appellant that the order is not an order under the Arbitration Act but under the Limitation Act and therefore, precisely the question to be addressed by us is that can there be an independent order under the Limitation Act, whereby, the objection in respect of limitation has been decided against the appellant who had raised such objections. It appears to us that the learned Single Judge perhaps, at the insistence of the appellant has taken up the question of limitation independently, on the basis of their objection raised while filing reply to the objections of the respondents to the award, without hearing the main objections to the Award and has also decided it separately through the impugned order and after having come to the conclusion that the objections to the Award are within time, is proceeding further by hearing objections to the Award. With respect, we may observe at the very outset, that though it is the duty of the Court to take up legal objections first, more particularly the limitation issue, however if any legal objection is not sustainable, then the Court must not pass a separate order independently on such an issue as has been done in this matter. The Court should always hear the

legal objections as well as merits and while deciding such legal objections if it comes to the conclusion that they are to be sustained, then perhaps the Court on its own may not decide the merits of the case and give its findings on the legal issues, but, if the Court after hearing the matter on legal issues as well as on merits comes to the conclusion that the legal objections are not to be sustained, then the matter has to be decided on its own merits. The Court must not take upon itself, either on its own or even at the request of any of the parties, to take up legal issue including limitation for hearing independently and then pass a separate order on the legal question or on limitation (specially when no evidence at all is required), and thereafter, on merits separately. This would indeed burden the Court as well as the parties with multiple litigations. This procedure and mechanism is required to be more strictly followed in cases where the Court is prima facie of the opinion that the question of limitation raised or any other legal question on behalf of any of the parties is not sustainable and the matter is to be decided on merits of the case.

10. After having come to the conclusion as aforesaid, we are of the view that the proceedings pending before the learned Single Judge are proceedings under a special enactment i.e. Arbitration Act which provides a complete mechanism as to how the matters are to be referred for arbitration, to the passing of the Award, filing of objections to the award and then further proceedings including but not limited to the award being made as a rule of the Court and further appeals. The order impugned before us as rightly contended by the Counsel for appellant is not an order under the Arbitration Act, though it has been contended by the learned counsel for the appellant that this is an order under the Limitation Act, however, with respect we do not agree with such proposition. To our understanding no independent orders could be passed under the Limitation Act. The Court hearing matters or proceedings emanating in and under the Arbitration Act is though, a Civil Court, but has to be regulated and is to proceed under the Arbitration Act as provided under Section 2(c) of the Act which states that the Court means a Civil Court having jurisdiction to decide the question forming the subject matter of the reference, if the same had been the subject matter of the Suit, but does not, except for the purpose of Arbitration proceedings under Section 21, include a Small Cause Court. Whereas, the term Civil Court has not been defined and explained under the

Arbitration Act, and therefore, the Civil Court would mean a Civil Court of general jurisdiction competent under the law as contemplated under Section 3 of the West Pakistan Civil Court Ordinance, 1962 which includes the Courts of the District Judge, the Court of the Additional District Judge and the Court of Civil Judge. Therefore, the Civil Court deciding and hearing the matter under the Arbitration Act can have resort to enabling powers conferred under the Code of Civil Procedure, whereas, under Section 41 of the Arbitration Act, provisions of CPC are also applicable to all proceedings before the Court, but even such courts under the Civil procedure do not pass any orders under the Limitation Act. The Civil Court would decide the issue of limitation emanating from proceedings under different statutes but such orders would not be orders under the Limitation Act, but under the Civil Procedure Code. Therefore, since a restriction has been placed by the Arbitration Act itself with regard to category of orders which are appealable under the Arbitration Act, the orders passed by such Court cannot be termed as orders under the Civil Procedure Code, whereas, specially in the instant matter the impugned order is in respect of the question of limitation only and that too without their being any application on behalf of the appellant in this regard. The case law referred to by the learned Counsel for appellant in this regard is distinguishable in facts as in those matters the impugned orders were not passed under the Limitation Act, and were in fact orders passed under the Civil Procedure Code and the respective Courts came to the conclusion that these are orders against which appeal lies under the Civil Procedure Code. In the alternative, if the learned Single Judge would have accepted the objections in respect of limitation by holding them to be time barred, then certainly there was a possibility of an order by the Court by dismissing such objections and the award would have been made rule of the Court and such order would then be an order appealable under Section 39 of the Act, *ibid*, but not vice versa. It may further be observed that this is not a case where no objections have been filed, but a case wherein the appellant objects that such objections are time barred. The objections would remain pending until decided by the Court finally, either holding it to be time barred or on merits of the case and an appeal would be competent in both the situations and not otherwise.

11. In view of hereinabove facts and circumstances of the case, we are of the view that instant appeals are not maintainable under the Arbitration Act, whereas, the order(s) independently are not orders against which an appeal lies; therefore, the same is dismissed accordingly. However, the appellant would be at liberty to raise the issue of limitation if the objections to the Award are decided against him and he prefers an appeal against the final order under Section 39 of the Arbitration Act. Appeal stands dismissed with the aforesaid observations.

Dated: 28.10.2016

J U D G E

CHIEF JUSTICE

ARSHAD/