IN THE HIGH COURT OF SINDH, KARACHI

J.M.A - No.20/2012

Hafiz Muhammad Abdullah and others

Vs.

Hafiz Muhammad Adnan and others

Before:		**Mr. Justice Zulfiqar Ahmad Khan**
Date of Hearing	:	22.03.2017
Applicants	:	Through Mr. Badar Alam, Advocate
Respondents	:	Through Ms. Mehmooda Suleman, Advocate

ORDER

Zulfiqar Ahmad Khan, J.:- The instant J.M.A. was filed on 11.04.2012 under section 14(1)(2) of the Arbitration Act, 1940 ("the Act") for directions to the Arbitrators to file award in this Court.

Brief facts of the case are that the Applicants, as well as Respondent No.1 are the sons and daughters of Late Rehman Ellahi, who died intestate leaving behind various movable and immovable properties. Since there were a number of properties in the name of deceased, the Applicants and Respondent No.1 mutually agreed to resolve their disputes in respect of their respective shares of inheritance in the movable and immovable properties left behind their deceased through arbitration and for that purpose they jointly signed a Salisnama (Arbitration Agreement) on Stamp Paper of R.100/= dated 03.05.2011 appointing Respondents No.2, 3 and 4 as Arbitrators with written undertaking that latters' verdict shall be final and binding on them. Since the contents of the said Salisnama are of vital importance, I reproduce the same hereunder:

ثالث نامہ

ہم دستخط کنندگان ذیل اس بات کا اقرار کرتے ہیں کہ ہم نے اپنے مرحوم والدین ( ) کی جائداد / ورثہ / ترکہ کی تقسیم کا معاملہ جمیعت کے پنجابی سوداگر مصالحتی بورڈ میں شریعت کی روشنی میں حل کرنے کے لیے دیا ہوا ہے۔ یہ معاملہ طویل عرصہ سے pending ہے اور ہم نے مصالحتی بورڈ سے درخواست کی ہے کہ وہ اس معاملہ کو حل کرادے۔

ہماری درخواست کو قبول کر لیا گیا ہے جس پر ہم ادارہ جمیعت کے مشکور ہیں۔

ہم دستخط کنندگان ذیل اس معاملہ میں جمیعت پنجابی سوداگران دہلی کے صدر جناب محمد سعید پریس والا اور حضرت مفتی اعجاز صاحب اور فیروزالدین اور مشترکہ فیصلہ اور ثالث قبول اور مقرر کرتے ہیں۔

☆ہم اقرار کرتے ہیں کہ ثالث کے ہر فیصلے کو مکمل طور پر تمام جزئیات کے ساتھ قبول کریں گے۔

☆ہم اقرار کرتے ہیں کہ ثالث کے ہر فیصلے پر مکمل طور پر عمل درآمد کریں گے۔ اور اگر کسی بات میں تشریح کی ضرورت پیش آئی تو اس کے لیے ثالث سے رجوع کریں گے اور ثالث کی تشریح کو قبول کریں گے۔

☆ثالث کے کسی فیصلے کو کسی عدالت میں چیلنج نہیں کریں گے۔

ہم تمام اس ثالث نامے پر بہ ہوش و حواس دستخط کر رہے ہیں۔

دستخط	نام محمد عدنان ولد رحمان الٰہی
دستخط	نام حافظ محمد عبداللہ
دستخط	نام شیخ محمد عرفان
دستخط	نام محمد اسداللہ
دستخط	نام شیخ محمد ریحان
دستخط	نام حافظ محمد نعمان
دستخط	نام اقارنی همشیره لبنا

The Arbitral Tribunal, which was comprised of the President, Jamiat Punjabi Sodagran Delhi Mr. Muhammad Saeed Presswala, Mufti Ijaz Ahmed and Mr. Ferozuddin Lodhiana after assuming their jurisdiction under the above mentioned Salisnama proceeded with the arbitration proceedings. In the meanwhile, the Respondent No.1 filed Suit No.1448/2011 against the present Applicants for Partition, Accounts, Declaration and Permanent Injunction before this Court, wherein in para-15 of the plaint, it was disclosed that the Arbitral Tribunal has given its Award, however, the Applicants contend that they did not receive the said Award. Since the arbitration proceedings were duly attended by the present Applicants, they moved application under section 34 of the Act for stay of proceedings in Suit No.1448/2011 and at the same time they filed the instant J.M.A., making a prayer that "*Hon'ble Court may be pleased to direct the Respondents No.2 to 4 jointly and/or severally being Arbitral Tribunal to file their award dated 27.07.2011 in this Court for further proceedings as per provisions of the Arbitration Act, 1940.*"

When this JMA was filed, notices were accordingly issued to the Respondents and from the order dated 11.03.2013 it could be noted that

the Respondent No.4 filed a statement which was received by this Court on 15.05.2012, with which a copy of the Award dated 27.07.2011 was filed. At this juncture, it is pertinent to mention that the Arbitrators affirmed that the true version of the Award was dated 02.12.2011. Be that as it may the genuineness of the Award is not challenged. It seems that subsequent of the Arbitral Award being filed in the Court on 15.05.2012, the Applicants filed objections thereto on 13.05.2013 and requested that the Award be remitted to the Arbitrators. This Court vide order dated 02.03.2015 notwithstanding that the objections were filed after the expiry of the period of limitation of 30 days provided under Article 158 of the Limitation Act, 1908, ordered for remittal of the award to the Arbitrators. In the meantime, the counsel for the Applicants moved application being CMA No.3244/2016 under section 28 of the Act, in terms of which extension of time of four months was sought for the submission of the Award, which application was granted through order dated 29.02.2016, subsequent thereto, the counsel for the Applicants filed an application being CMA No.994/2017 on 23.01.2017 under section 41 of the Act, praying to restrain Respondent No.1 from selling or disposing etc. of the properties left behind by their deceased father Rehman Ellahi and their deceased mother Mst. Nasreen Rehman. Through another application made under sections 5, 8 and 89 of the Act being CMA No.995/2017, the Applicants named two individuals to replace the Arbitrators being Respondents No.2 and 3 on the contention that the current Respondents have refused to re-adjudicate the matter. When this application came up to this Court on 21.02.2017, a preliminary question was posed as to the very maintainability of these applications and the learned counsel for the Applicants sought time to assist this Court. After hearing the instant JMA, this Court on 07.03.2017 passed the following orders:

> *"Heard the counsel for the applicants at length, who very eloquently described the mechanism and scheme provided by the*

Arbitration Act, 1940 and advised under what circumstances, provisions of this Act operate to assist parties who prefer to settle their disputes by the alternate mode of arbitration rather resorting to court proceedings.

It was pointed out that under Section 3 of the said Act, a mechanism has been built where arbitration could be achieved without the intervention of the Court. While responding to the question, that when agreement does not contain "arbitration shall be governed by..." proper law provision, and the intention of the parties (as in the instant case is evident) is that matter be arbitrated without court's intervention (page 17), how the present request for the substitution of arbitrators is maintainable when the Award has already been given? The learned counsel made reference to First Schedule which, per counsel, is applicable to such agreements which fail to specify intentions.

This contention does not seem to be well founded as the very intention of Section 3 is to keep the matters away from Court and have them arbitrated without court's intervention. Rather of specific importance is provision 7 of the First Schedule which clearly states that 'The award shall be final and binding on the parties and persons claiming under them respectively." Meaning thereby leaving no room for Courts to interfere with such awards unless the conditions specified in Section 16 are satisfied, which is beyond the scope of the prayers made.

Counsel seeks time to assist this Court as to how the instant J.M. (where the sole prayer is that Arbitrators be directed to file their award dated 27.07.2011) is maintainable when parties not only consented to the name(s) of the Arbitrators, they further agreed that they will completely be abided by each any and every decision of the Arbitrators; and even if any queries are raised, they will be addressed by the parties to the designated Arbitrators alone and that parties will agree to the explanation given by the Arbitrators."

The matter was adjourned for 14.03.2017, on which date a brief was held for the learned counsel for the Applicants and the matter was accordingly adjourned to 21.03.2017, even on that date a brief was held for the counsel and the matter eventually was adjourned to 22.03.2017, where

for the reasons to be recorded, the instant JMA on account of maintainability was dismissed.

Before I proceed any further, it would be pertinent to give a brief review of the Act which deals with broadly three kinds arbitration: viz,. (1) arbitration without intervention of a court: (2) arbitration with intervention of a court where there is no suit pending and (3) arbitration in suits. Except as provided either by the Act (or any other Act) the Act applies to all arbitrations, including statutory arbitrations. It is worth recollecting that it was through this Act passed on 01.07.1940 an alternate mechanism of dispute settlement was provided which improved upon the earlier law relating to arbitration contained in the Indian Arbitration Act, 1899. But what has been made of it, is left to be answered in the later part of this order.

Coming back to the facts of the case, it in undisputed that parties had agreed to have their disputes resolved through arbitration without the intervention of court. The parties even did bind themselves that the decision of the arbitrators (as given in the light of Sheria) will be final and not be challenged in the court of law, and in case any explanation is sought, the parties will only revert to the arbitrators. As mentioned earlier, parties fully participated in the deliberation of the Arbitral Tribunal which passed the award, for the supply of a copy of which the instant JMA was initially filed, however by making one application or another, the instant JMA was distorted from its earlier objective to the extent that orders were sought not only for forcing the arbitrators to pass the award afresh, rather in the event when the arbitrators (rightly) refused to re-hear the matter afresh, prayers have been made to substitute the earlier arbitrators with new set of arbitrators with the full intervention of court, an act which at the face of it is contrary to the terms agreed in the Salisnama. On this account, a query was raised for the attention of the learned counsel for the Applicants as to when the parties through Salisnama (Arbitration

Agreement) dated 03.05.2011 made a very clear determination that they will be bound by the award given by the Arbitrators including each and every ingredient thereof, coupled with the fact they agreed that the decision of the Arbitrators would not be challenged in the Court of law, as well as, if there was any need for explanation, such explanation will only be sought through the earlier selected Arbitrators and the parties further agreed that the explanation given by those Arbitrators would be accepted as final by the parties. Having given such undertaking and made covenants, how the applications moved by the learned counsel of the Applicants where not only the Award has been challenged, rather prayer is made to have the Award remitted and be adjudicated by a new set of Arbitrators are competent?

The learned counsel in response thereto drew Court's attention to Section 30 of the Act. Full contents of the said section are reproduced hereunder:

> ***"30. Grounds for setting aside award.*** *An award shall not be set aside except on one or more of the following grounds, namely:-*
>
> *(a) that an arbitrator or umpire has misconduct himself or the proceeding;*
>
> *(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings has been invalid, under section 35; and*
>
> *(c) that an award has been improperly procured or is otherwise invalid."*

It is abundantly clear through a plain reading of the above quoted section that the said section clearly enumerates grounds for setting aside an award. The three conditions as evident from the aforesaid section were discussed at length during the course of the arguments and it was evident that neither condition (a), (b), nor (c) of the above section were satisfied then how the award could have been declared invalid? When this question was posed to the

counsel for the Applicant, no satisfactory explanation was forthcoming.

At this juncture, the attention of the counsel was drawn to Section 16 of the Act, which provides reasoning for the remittal of an award as a part of the Chapter of the Act dealing with Arbitration without intervention of a Court which is more applicable to the case at hand. Full text of Section 16 is reproduced in the following:

> ***16. Power to remit award.*** *(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit__*
>
> *(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or*
>
> *(b) where the award is so indefinite as to be incapable of execution ; or*
>
> *(c) where an objection to the legality of the award is apparent upon the face of it.*
>
> *(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:*
>
> *Provided that any time so fixed may be extended by subsequent order of the Court.*
>
> *(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.*

Accordingly, section 16 of the Act was discussed at length and it was agreed that neither clause (a), nor clause (b) is satisfied, whereupon the counsel stated that most likely clause (c) is applicable, which provides that an award could be remitted when an objection to the legality of the award is apparent from the face of it. When the award was read in the four corners of the above referred clauses, no such ground was satisfied. The fact is that section 16 is more appropriately applicable (as compared to section 30) where the intention of the party is to have the award remitted,

as in the case at hand parties agreed that the arbitration would be conducted without intervening of the Court, thus provisions of Chapter 2 of the Act would be attracted within which section 16 falls. Having failed to satisfy any of the grounds for remittal of the awards under section 16 of the Act, the attention was focused to section 3 of the Act, which provides that in arbitration agreements, unless a different intention is expressed, the agreements shall be deemed to have been included provisions set out in the First Schedule of the Act. It is therefore now relevant that contents of the First Schedule of the Act be considered which Schedule has 8 clauses, which are reproduced hereunder:

1. *Unless otherwise expressly provided, the reference shall be to a sole arbitrator.*

2. *If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.*

3. *The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.*

4. *If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.*

5. *The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.*

6. *The parties to the reference and all persons claiming under them shall subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.*

> 7. *The award shall be final and binding on the parties and persons claiming under them respectively.*
>
> 8. *The cost of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.*

As it could be seen from the above, the clause 7 requires that all arbitration agreements where the parties agree that arbitration would be conducted without intervention of a Court, they bind themselves that the award as declared would be final and binding on them. With regards finality of an award and its binding force, notwithstanding even that the award had not been made a rule of court, to see the extent of its force while keeping in mind provisions of clause-7, reference could be made to the case of Sathish Kumar and others v. Surinder Kumar and others, reported in AIR 1970 SC 833 where effect of section 14 read with section 3 and clause 7 of the First Schedule were elaborated. Supreme Court held that the award becomes final and binding on the parties as soon as the same is signed by the arbitrator, notwithstanding the fact that it has not been made a rule of the court. The same was a three member bench decision. Two of the Judges wrote one judgment and the third Judge wrote a separate judgment, agreeing with the other two Judges, but adding a few words by his own in support of the judgment of the other two Judges which makes a legal position explicitly clear. It is held thus therein:

> HEDGE, J. I agree. But I would like to add few words. Arbitration proceedings, broadly speaking may be divided into two stages. The first stage commences with arbitration agreement and ends with the making of the award. And the second stage relates to the enforcement of the award. Clause 7 of the First Schedule to the Arbitration Act lays down that "the award shall be final and binding on the parties and persons claiming under them respectively."

The leaned counsel when posed with this legal challenge placed reliance on 2014 CLC 1519, where Court was pleased to intervene by extending the statutory time limit of four months as stipulated under 3rd

clause of the above First Schedule on the ground that the act of the party has given consent to the arbitrator for extension of such term, undoubtedly the said proposition is not existing in the instant case. The case before this Court is once parties have agreed to have their disputes settled through arbitration with affirmation that the award will not be challenged in the Court they have contractually bond themselves with full force of law. Then in those cases, the award can only be remitted under section 16 of the Act (if a case is made for such a remittal) and the arbitrators cannot be changed without mutual consent of the parties, as it would be in violation of the initial arbitration agreement, where the parties agreed that the arbitration conducted by the three individual arbitrators would be final and binding. The learned counsel for the Applicants agitated against the said proposition and contended that it is the right of the parties to object to any award and to have the same re-adjudicated through a new set of arbitrators. When posed with a challenge that how such an act would not be violative of the initial bounding agreement of arbitration, where the parties initially agreed that they wouldn't do so, and at the same time, will not that create a non-conclusive perpetual situation where no award could ever be finalized and enforced since there would always be one party who would prefer to challenge an award and to have it re-arbitrated? The learned counsel could not provide any satisfactory answer to this proposition, as the fact is the above acts have created a sorrow state where nearly all such awards are challenged in Courts. It is exactly on this account that even in cases where parties agree to have speedy disposal of their disputes through arbitration, malicious and ill-conceived applications drag courts to deter the finality of the awards, which mischievous acts have rendered the Arbitration Act to a greater extent almost otiose.

For the aforesaid reasons, in the case at hand where the parties agreed to have their disputes adjudicated through Salisnama dated

03.05.2011 and they agreed to be bound by the award passed by the arbitrators and not to approach courts even in cases of any explanation, and where an award has already been made by the duly appointed arbitrators and where no case has been made out for the remittal of the award under section 16 and the award becoming a final adjudication by a court of the parties' own choice is conclusive upon the merits of the controversy submitted by the parties, and until unless the parties had intended that the award shall not be final (which is not the case at hand) the award attained all the elements of vitality and is competent to be relied upon in disputes between the parties relating to the same subject-matter, it could not be challenged or re-arbitrated in the manner requested by the Applicants. While the sole prayer seeking the Arbitral Tribunal to file their award dated 27.07.2011 having been met, making the instant JMA infructuous, and the CMAs being dismissed for the reasons specified hereinabove, the instant JMA was dismissed by the short order dated 22.03.2017, and these are the reasons of the said order.

Judge