

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

### **SUIT NO.1725/2000**

Plaintiff : Pakistan State Oil Company Limited.,  
through Mr. Ghulam Muhammad Dars,  
advocate.  
Defendant No.1 : M/s. Gillani (Private) Limited.  
(Nemo for Defendant No.1)  
Defendant No.2 : Trustees of the Port of Karachi  
through Mr. Abdul Razzak, advocate.  
Date of hearing : 15.03.2018  
Decided on : 26.04.2018

### **J U D G M E N T**

**NAZAR AKBAR, J.** By order dated **16.02.2018** this Court has raised the question of jurisdiction of this Court in view of the order dated **25.11.2002** whereby on an application under **Section 34** of the Arbitration Act, 1940, the suit was stayed and Arbitrators were appointed to pass an award within (4) four months. After almost six years on **9.4.2007** the plaintiff filed an application under Section 151 CPC (CMA No.2885/2007), seeking restoration of the suit as if it had been dismissed for non-prosecution. The said application was allowed by order dated **15.9.2008** and the office on **03.5.2010** fixed the suit in Court for framing of issues though by that date neither defendant No.1 has filed written statement nor he was debarred from filing the written statement. It is obvious because on the first date after service of summons on **28.10.2001** defendant No.1 has filed an application under **Section 34** of the Arbitration act, 1940 and such an application has to be filed ***“before filing written statement and taking any steps in the proceedings”***. In view of above facts, I thought the plaintiff has avoided arbitration agreement and by misrepresentation and concealment of facts and law got the suit restored, therefore, on **16.2.2018**, I had directed learned counsel for the plaintiff to satisfy the Court that;

*“How a disposed of suit by referring it to the Arbitrator can be restored to its original position under Section 151 CPC. Whether in his application under Section 151 CPC he has disclosed complete facts and law or has obtained the order of restoration of suit by misrepresentation and concealment of facts”.*

Learned counsel contends that this Court has power to proceed with the suit in terms of **section 25** of the Arbitration Act, 1940 by superseding the arbitration proceeding. Therefore, according to learned counsel for the plaintiff the application under **Section 151 CPC** could be treated under the said provision of Arbitration Act and therefore, order of restoration of suit dated 15.9.2008 was justified. He has relied on a case law reported as *Satyawan Prasad vs. Kunj Behari Lal (AIR 1957 Patna 712)*. In fact this argument is an afterthought and the learned counsel has not advanced any other argument in support of so-called restoration of suit which was on dormant file as the parties have agreed to abide “arbitration agreement” and the suit was stayed once for all.

2. In the above background with the help of learned counsel when I examined the record and the provisions of **Section 25** of the Arbitration Act, 1940, the learned counsel conceded that the plaintiff in his application and even his counsel in his arguments has not requested the Court that the circumstances mentioned in **Section 8**, or **sections 10, 11 and 12** of Arbitration Act, 1940 exists, therefore, the order may be passed to supersede the arbitration proceeding. Even the order dated **15.9.2008** does not refer to **Section 25** of the Arbitration Act, 1940.

3. In fact the plaintiff from day one has been avoiding Arbitration agreement dated **25.11.1996**, and it may be appreciated from the following facts on record.

- i. The plaintiff on **30.11.2000** ignoring the arbitration agreement filed suit for recovery of Rs.25,485,524.96 from defendant No.1 and unnecessarily impleading defendant No.2 without any cause of action against them as proforma defendant.
- ii. Then the plaintiff conceded to the existence of arbitration agreement as he did not challenge the order **25.11.2002** whereby the parties were referred to the Arbitrators for passing an award within **four** months with directions to the plaintiff to nominate their arbitrator within two weeks.
- iii. The plaintiff did not nominate arbitrator within two weeks and after expiry of four months' statutory time and even without notice to defendant No.1 an statement dated **31.7.2003** was filed in Court informing the Court that they have nominated arbitrator.
- iv. Then again plaintiff slept for more than 10 months from the order dated **25.11.2002**, and filed an application on **6.9.2003** under **Section 148 CPC** (CMA No.5028/2003) for condonation of delay in nomination of arbitrator on the ground that plaintiff was in search of a suitable person to appoint as Arbitrator. The said application was allowed on **27.10.2003**.
- v. Record further shows the Mr. Ejaz Ahmed Khan, Manager Operation of Plaintiff was appointed arbitrator of the plaintiff but he never cooperated with Mr. Baqar the other arbitrator and got the proceeding frustrated as is apparent from the record of correspondence between Mr. Ejaz, Ahmed

Khan Arbitrator of plaintiff and Mr. S.M. Baqar, the other arbitrator. Ultimately Mr. Ejaz Ahmed was informed by Mr. S.M. Baqar Arbitrator through letter dated **13.3.2004** about his inability to continue with the Arbitration.

- vi. This is how the plaintiff frustrated an order dated **25.11.2002** whereby arbitration was to be completed in four months by practically delaying nomination of their Arbitrator for almost 11 months till **27.10.2003**. During the eleven months' time the plaintiff never approached the Court to enlarge time for making the Award.
- vii. Then plaintiff on **9.4.2007**, suddenly realized that arbitration has failed and, therefore, after three years from the purported letter dated **13.4.2004** of Mr. S.M. Baqar, filed an application under **Section 151 CPC** (CMA No.2885/2007) and prayed for the restoration of the suit as follows;

*“that this Hon’ble Court may be pleased to reinstate/restore the above title suit as its proceedings were stayed vide order dated 27.10.2003 (correct date is 25.11.2002) and was sent to arbitration but the arbitration proceedings have been failed and thus the suit liable to be heard and decided on merits”.*

The said application was allowed on 15.9.2008 in absence of defendant No.1 and his counsel had already.

- 4. The effect of the last letter dated **13.3.2004** of Mr. S. M. Baqar, Arbitrator, was that the vacancy of Arbitrator has fallen vacant. Therefore even if the plaintiff was sincerely willing to invoke the provision of **Section 25** of the Arbitration Act, 1940 then the plaintiff should have followed the provision of **Section 8** of Arbitration Act, 1940. The requirement of **Section 25** of the Arbitration Act is that

the Court may in any of the circumstances mentioned in **Section 8, 10, 11, and 12** of the arbitration act instead of filling up the vacancy supersede the arbitration and proceed with the suit. Therefore, the condition precedent for an order under **Section 25** of the Arbitration Act, is the existence of circumstances enumerated in various provisions of the Arbitration Act. Section 25 of the Arbitration Act is reproduced below:-

**25. Provisions applicable to arbitrations under this Chapter.**--- The provisions of the other Chapter shall, so far as they can be made applicable, apply to arbitrations under this Chapter.

Provided that **the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancies** or making the appointments, **make an order superseding the arbitration** and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

It is only **Section 8** of the Arbitration Act which is relevant in the context of the facts of the case in hand. It is also reproduced below:-

**8. Power of Court to appoint arbitrator or umpire.**— (1) in any of the following cases—

- (a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or
- (b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or
- (c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

**any party may serve the other parties or the arbitrators, as the case may be with a written**

**notice to concur in the appointment or appointments or in supplying the vacancy.**

(2) If the appointment is not made within fifteen clear days after the service of the said notice, **the Court may**, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, **appoint an arbitrator** or arbitrators or umpire, as the case may be, **who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.**

The mandate of **Section 25** read with **Section 8** of the Arbitration Act is that the plaintiff before invoking power of a Court to supersede arbitration was under an statutory obligation to serve a written notice to defendant No.1 and after fifteen days of service of notice, he should have filed an application under **Section 8(2)** of the Arbitration Act to the Court with a request to appoint an arbitrator. The plaintiff did not follow the road map given in the Arbitration Act, 1940 and instead himself declared that arbitration has failed and filed an application under **Section 151 CPC** for restoration of suit by suppressing several facts and deliberately failing to follow the legal requirement of **Section 8(c)** of the Arbitration Act for appointing an arbitrator himself and asking defendant No.1 to concur in the appointment or supply the vacancy. Not only the plaintiff has failed to send a notice in writing to defendant No.1 to appoint an arbitrator, the plaintiff also did not approach the Court in terms of **Section 8(2)** of the Arbitration Act for appointment of an arbitrator through the Court to make an Award. The reliance on the case reported in AIR 1957 Patna 712 is out of context/distinguishable on facts. In the reported judgment several reasons such as bias of arbitration or winning over had been given by the Court to exercise the discretion for superseding the arbitration but in the instant suit there is no question of such allegations against the arbitrator. In the case in

hand the whole authority was lying with the plaintiff to appoint an arbitrator of his choice or get the man of his liking appointed by Court order after notice to defendant No.1 in terms of **Section 8** of the Arbitration Act as discussed above. But the plaintiff has not even desired to appoint arbitrator as is apparent from his conduct.

5. All the proceedings in Court from **25.11.2002** onward are coram non-judice as the suit had been stayed for ever and the parties were sent to the arbitrators to resolve their disputes as it had already been agreed by them through the arbitration clause provided in the Arbitration Agreement. It is settled principle of law that once the parties are referred to the arbitrators they have to settle their dispute strictly in accordance with Arbitration Act since **Section 32** of the Arbitration Act, 1940 bars a civil suit for resolution of a dispute which is covered by the arbitration agreement. In the case in hand the order of this Court on the application under **Section 34** of the Arbitration Act has attained finality and the parties for resolution of their disputes were required to follow the mechanism provided in the Arbitration Act. It goes without saying that the proceedings under **Section 34** of the Arbitration Act presuppose existence of arbitration agreement and therefore, an order of appointment of an arbitrator by the Court on an application under **Section 34** of the Arbitration Act is akin to an order passed by the Court in a suit under **Section 20** of the Arbitration Act. Similar could have been the position had the plaintiff chosen to honestly abide by the arbitration agreement and on refusal of defendant No.1 to nominate their arbitrator he could have filed a suit under **Section 20** of the Arbitration Act for referring the dispute to the arbitrators. In either case that is under **Section 34** or under **Section 20** of the Arbitration Act, once the parties are referred to the arbitrators, the purpose/object of the Arbitration Act

is effectively achieved and the parties are prevented to obtain a decree from the Court contrary to their own agreement that their disputes are to be adjudicated by a private party as provided in the arbitration agreement. The legal effect of an order on an application under **Section 34** and / or on an application under **Section 20** of the Arbitration Act, 1940 is one and the same. The purpose of these two sections is to seek enforcement of an “arbitration clause/agreement” against the party guilty of avoiding / refusing arbitration for resolution of their dispute. The nature of Court orders under **Section 20** and **Section 34** of the Arbitration Act, can safely be equated with a decree in a suit for specific performance of a contract (arbitration) whereby the contracting parties are directed to settle their dispute according to the arbitration clause in the arbitration agreement instead of following the intricate lengthy procedure through civil Courts. The use of phrase.....”*at any time before filing written statement or taking any other steps in the proceeding*”..... in **Section 34** of the Arbitration Act, clearly manifest the intention of the law makers that an application under **Section 34** of the Arbitration Act, should be examined by the Court without looking at the pleading of the parties just like examination of a plaint in suit under **Section 20** of the Arbitration Act. The duty of the Court in both situations is to examine the arbitration agreement and if satisfied as to the existence of arbitration agreement it is mandatory for the Court to enforce the arbitration agreement between the parties. In **Section 34** the use of phrase.....and if **satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement**..... and in **Section 20(4)** the phrase....**Where no sufficient cause is shown the Court.....shall make an order of reference to the**



**arbitration.....**does not leave much room for the Court to exercise its discretion against the arbitration. The consequences of order in a suit under **Section 20** of the Arbitration Act is that the suit stand decreed/ disposed of and on passing of an award a new/fresh suit has to be filed/registered to make the Award rule of the Court. Similarly the effect of order to stay the suit under **Section 34** of the Arbitration Act before filing written statement and referring the parties to arbitration, the suit for all practical purposes stand disposed of. It is an implied submission of the parties and even the civil Court to the provisions of **Section 32** of the Arbitration Act, 1940 whereby the suit is barred for resolution of a dispute covered by arbitration agreement. On agreeing to take the matter to the arbitrator without intervention of the Court or on the orders of Civil Court in terms of **Section 20** or **Section 34** of the Arbitration Act, the existence of arbitration agreement is admitted and, therefore, the suit to resolve an issue, which could or which has been referred to arbitrators, is barred.

6. The plaintiffs were bound to honour the admitted arbitration agreement dated **25.11.1996** but they have always avoided it. In this context, I may repeat here, to begin with the plaintiff on **30.11.2000** instead of filing suit under **Section 20** of the Arbitration Act, filed suit under **Section 9 CPC**. Then the plaintiff as discussed in para-3 above frustrated the order of the Court dated **25.11.2002** under **Section 34** of the Arbitration Act referring the case to the Arbitrators by not appointing an arbitrator for an award on merits within four months as provided both in the statutes and the order dated **25.11.2002**. Then again on **13.4.2004**, the plaintiff was under a statutory obligation to file a fresh application suit under **Section 8** read with **Section 20** of the Arbitration Act, but he avoided it and

after three years on **9.4.2007** filed an application under Section **151 CPC**.

7. The above discussion clearly indicates that neither there was an occasion nor this Court has exercised discretion under **Section 25** of the Arbitration Act. It was the plaintiff who has repeatedly approached the Court by suppressing the arbitration agreement and attempted to obtain a decree from a civil Court despite the fact that the suit is barred under **Section 32** of the Arbitration Act. The crux of the discussion is that this Court has no jurisdiction to entertain the suit of the plaintiff, therefore, the same is dismissed with no order as to costs.

**JUDGE**

Karachi  
Dated:26.04.2018