

THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Adnan Iqbal Chaudhry

Suit No. 1074 of 2019

[Ever Shine Constructors versus Khairpur Special Economic Zone]

Plaintiff : Ever Shine Constructors through M/s. Muhammad Masood Khan and Zakaullah Rana, Advocates.

Defendant : Khairpur Special Economic Zone through Mr. Ashfaqe Nabi Qazi, Advocate.

Dates of hearing : 08-09-2021 & 28-09-2021

Date of Decision : 23-05-2022

ORDER

Adnan Iqbal Chaudhry J. - The suit is an application under section 20 of the Arbitration Act, 1940 for referring the dispute to arbitration. By CMA No.8579/2020 under Order VII Rule 10 CPC, the Defendant prays for return of the plaint.

2. The background is that by Letter of Acceptance dated 13-06-2012 the Plaintiff, a partnership firm with its principal office at Karachi, was declared successful bidder for a project described as '*Infrastructure Development at Khairpur Special Economic Zone (KSEZ), Power Distribution and Street Lighting – Package III*', which was then followed by a Contract Agreement dated 22-06-2012 awarded by the Defendant to the Plaintiff. Per the Plaintiff, the Defendant's Engineer did not act independently and refused unlawfully to clear/certify certain bills of the Plaintiff leading to a breach of contract by the Defendant. The Plaintiff first placed the dispute before the Engineer as required by clause 50.1 of the Conditions of Contract, but since the dispute remained un-resolved, the Plaintiff invoked the arbitration clause set-out in clause 50.4 of the Conditions of Contract. It is not the case of either party that the Plaintiff is a 'developer' or 'zone enterprise' within the meaning of the Special

Economic Zones Act, 2012 so as to attract section 38 thereof, nor did either counsel raise such point during arguments.

3. The Defendant contends that only the civil court at Khairpur has jurisdiction to decide the application under section 20 of the Arbitration Act. Learned counsel for the Defendant submitted that for the purposes of section 20 CPC, the Defendant carries on business at Khairpur; so also that the offer/bid made by the Plaintiff was accepted by the Defendant at Khairpur by way of the Letter of Acceptance, and thus in terms of section 4 of the Contract Act, 1872 the contract between the parties was established at Khairpur. Learned counsel then submitted that the provisions of the Arbitration Act, 1940 will have overriding effect, and referring to section 2(c) and section 31 of the Arbitration Act, learned counsel submitted that the 'subject-matter of the reference' were matters at Khairpur inasmuch as the work/project in relation to which the dispute arose, was carried out by the Plaintiff at Khairpur. In support of his submissions learned counsel for the Defendant placed reliance on *Province of Punjab v. Muhammad Tufail and Company* (PLD 2017 SC 53).

4. Learned counsel for the Plaintiff submitted that the case of *Muhammad Tufail* relied upon by the Defendant in fact supports the contention of the Plaintiff that since part of the cause of action arose at Karachi within the meaning of section 20 CPC, both the civil court at Khairpur and at Karachi had concurrent jurisdiction. He submitted that the court at Karachi had jurisdiction inasmuch as the bids were received and opened at Karachi by the Project Manager; the contract between the parties was established at Karachi as the Letter of Acceptance was received by the Plaintiff at Karachi; the contract was scribed and stamped at Karachi; it was signed by the Plaintiff at Karachi; the bills of the Plaintiff were submitted to the Engineer of the Project for certification who was based at Karachi; and that the venue of arbitration agreed under the contract was Karachi.

5. Heard the learned counsel and perused the record with their assistance.
6. The relevant part of section 20 of the Arbitration Act, 1940 is as follows:

“20. Application to file in Court arbitration agreement.—(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceedings under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.”

Section 2(c) of the Arbitration Act defines ‘Court’ as :

“2(c). “Court” means a civil court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court.”

Learned counsel for the Defendant had also referred to section 31(1) of the Arbitration Act which reads:

“31. Jurisdiction.—(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.”

7. In my view, section 31 of the Arbitration Act would not come into play here for it governs jurisdiction of Court for the purposes of filing the ‘award’, which is done in furtherance of section 14 of the Arbitration Act for making it Rule of Court; it does not deal with the jurisdiction of Court for the purposes of filing the ‘agreement’, which is done under section 20 of the Arbitration Act with the aim of making a reference to arbitration. Needless to state that section 20 deals with pre-arbitration proceedings, whereas section 31 deals with post-arbitration proceedings. However, the definition of ‘Court’ in section 2(c) of the Arbitration Act is relevant both to sections 20 and 31(1) of said Act as both such provisions deal with the ‘Court’ having jurisdiction under the Act. The distinction then between ‘filing the agreement’ and ‘filing the award’ is relevant only

for the purposes of distinguishing pre-arbitration proceedings from post-arbitration proceedings.

8. In support of their respective submissions both learned counsel had relied upon the case of *Province of Punjab v. Muhammad Tufail and Company* (PLD 2017 SC 53), and indeed that case presents the answer. There, the facts were that the contract in relation to which the dispute arose, was for works at District 'T' and was executed at 'T'; the arbitration took place at District 'L'; and the award was filed in the civil court at District 'L'. The question was which court had territorial jurisdiction for the purposes of filing the award in terms of section 31(1) of the Arbitration Act, whether the civil court at District 'T', or the civil Court at District 'L' ?

9. After going through the case of *Muhammad Tufail*, the following principles appear to have been settled by the Honourable Supreme Court:

(i) For determining which Court has jurisdiction under section 31(1), so also under section 20 of the Arbitration Act, it is the test laid down in section 2(c) of said Act which has to be applied. That finding with regards to section 20 of the Arbitration Act is in para 7 of the judgment where the Supreme Court after noting that section 20 is the second mode under the Act for resorting to arbitration, went on to hold that: "For the second mode of arbitration too it shall be the same Court as envisaged by Section 2(c) *ibid.*"

(ii) The test laid down in section 2(c) of the Arbitration Act for determining which Court has jurisdiction entails that the arbitration agreement be kept aside and 'the questions forming subject-matter of the reference' be viewed hypothetically as if the same had been the subject-matter of a suit. To quote from *Muhammad Tufail*: "In other words it shall be the Court in which a civil suit could be initiated by the plaintiff for the enforcement of any of his rights(s) and/or for the redressal of his grievance(s). Thus for the purposes of

determining jurisdiction of the Court where a civil suit should lie the provisions of Sections 16 to 20 CPC are relevant.”

(iii) After holding that section 20 CPC was not ousted by the Arbitration Act, said provision was discussed as follows:

“It is to be noted that Section 20, CPC confers jurisdiction on a Court in two ways. Firstly, on the basis of where a defendant(s) resides, carries on business or works for gain within its local limits. Secondly on the basis of where the cause of action wholly or in part arose within its local limits.”

(iv) It was held that where the Government engages in commercial activity it was subject to section 20 CPC.

(v) After applying section 2(c) of the Arbitration Act read with section 20 CPC to the facts of the case it was concluded that both the civil courts at District ‘T’ and District ‘L’ would have concurrent jurisdiction to the subject-matter of the reference, the court at District ‘T’ because the cause of action arose there, and the court at District ‘L’ because the defendant had its principal office and carried on business there; and thus it was held that the award was competently filed at the civil court at District ‘L’.

10. Thus, the case of *Muhammad Tufail* settles that the test of section 2(c) of the Arbitration Act read with sections 16 to 20 CPC will apply in determining which civil court will have jurisdiction for the purposes of section 20 of the Arbitration Act. It has also been settled by a learned Division Bench of this Court in *Muhammad Naveed Aslam v. Aisha Siddiqui* (2011 CLC 1176) that section 120 CPC, which excludes section 20 CPC to the High Court in exercise of its original civil jurisdiction, will only be triggered when the matter does not otherwise come within the territorial limits of Karachi. That being said, I now advert to the facts of the case in hand. In doing so, I do not take into consideration the fact that the venue of arbitration had been agreed as Karachi for that does not seem to have any bearing on the question which civil court would have jurisdiction to determine the dispute had the same been brought under a regular civil suit.

11. Had the Plaintiff instituted a regular civil suit under section 9 CPC for the determination of the dispute and not an application under section 20 of the Arbitration Act, the suit would not be of a nature falling under sections 16 to 19 of the CPC. That much was accepted by both learned counsel. Thus, it is section 20 CPC that becomes relevant. It is not disputed that the Defendant 'carries on business' at Khairpur within the meaning of section 20(a) CPC, and that the works under the contract were carried out at Khairpur so as to make, at least, a part of the cause of action arising at Khairpur. The question is whether any part of the cause of action can be said to be arising at Karachi so as to enable the Plaintiff to institute the suit at Karachi under section 20(c) CPC.

12. It is not disputed that the Plaintiff was based at Karachi; the Manager and Engineer of the project namely, National Industrial Parks Development & Management Company, was based at Karachi (clause 1.1 of instructions to Bidders); and the Technical Adviser of the Defendant namely, EA Consulting (Pvt.) Ltd., was also based at Karachi. Per clause 33.2 of the 'Instructions to Bidders', which is part and parcel of the Contract Agreement, *"The Letter of Acceptance and its acceptance by the bidder will constitute the formation of the Contract, binding the Employer and the Bidder till signing of the formal Contract Agreement."* Per clause 35.1 of the 'Instructions to Bidders' *".... the Employer will send to the successful bidder the Form of Contract Agreement provided in the Bidding Documents, duly filled in and incorporating all agreements between the parties for signing and return it to the Employer."* Apparently, the Letter of Acceptance dated 13-06-2012 issued by the Defendant from Khairpur, was addressed to the Plaintiff at Karachi and required the Plaintiff to contact the Project Manager at Karachi for the execution of the Contract. The signature of the Plaintiff on the Contract Agreement and that of the attesting witness bears the address of Karachi which shows that the Letter of Acceptance was accepted by the Plaintiff at Karachi by signing the Contract Agreement at Karachi. Thus, as per clause 33.2 of the 'Instructions to Bidders' discussed above, so also section 4 of the

Contract Act, 1872, the contract between the parties was established at Karachi.

13. From the record it further appears that the running bills of the project, which is the bone of contention between the parties, were submitted by the Plaintiff for verification to the Technical Adviser of the Defendant at Karachi; and that the process of certification of the Plaintiff's bills, drawings, contract reports and method statements relating to the project was also carried out by the Project Manager/Engineer at Karachi for onward submission to the Defendant, which was in line with the procedure set out in the Contract itself. In such circumstances, it can be said that the Plaintiff's cause of action for a suit for breach of contract to recover outstanding bills, arose partly at Karachi within the meaning of section 20(c) CPC.

14. In view of the foregoing, where both the civil courts at Khairpur and Karachi had concurrent jurisdiction to entertain a regular suit against the Defendant had one been filed by the Plaintiff, the application filed by the Plaintiff under section 20 of the Arbitration Act before this Court at Karachi meets the test of section 2(c) of the Arbitration Act, 1940 and is maintainable here. Resultantly, CMA No.8579/2020 under Order VII Rule 10 CPC is dismissed.

JUDGE

Karachi
Dated: 23-05-2022