IN THE HIGH COURT OF SINDH AT KARACHI

J.M. No.32 of 2012

Coniston Ltd Hong Kong----------Applicant

Versus

Pakistan Steel Mills Corporation (Pvt) Ltd.
Bin Qasim, Karachi. ---------- Respondent

J.M. No.58 of 2014

Coniston Ltd Hong Kong----------Applicant

Versus

Pakistan Steel Mills Corporation (Pvt) Ltd.
Bin Qasim, Karachi. ---------- Respondent

J.M. No.40 of 2012

Pakistan Steel Mills Corporation (Pvt) Ltd----------Applicant

Versus

Coniston Limited---------- Respondent

Date of hearing:	**17-03-2016**
Date of Judgment	**25.04.2016**
Applicant:	**Through Mr. Shaiq Usmani, Advocate in J.M. No.32 of 2012 & 58 of 2014 and for Respondent in J.M. No.40 of 2012.**
Respondent:	**Through Mr. Aga Zafar Ahmed, Advocate in J.M. No.32 of 2012 & 58 of 2014 and for Applicant in J.M. No.40 of 2012**.

O R D E R

Muhammad Junaid Ghaffar, J. All the aforesaid Judicial Miscellaneous Applications (**J.Ms**) are being decided through this common Order. In J.M. No.32 of 2012, the applicant in terms of Section 8(2) of the Arbitration Act, 1940, (**"Arbitration Act"**) has prayed for appointment of Umpire and in J.M. No.58 of 2014 for extension of time under Section 28 read with 1st Schedule, Clause 3 of the Arbitration Act, in the Arbitration

proceedings continuing between the parties as the learned Arbitrators appointed by the respective parties have differed and have given separate Awards. In J.M. No.40 of 2012, the Applicant under Section 33 of the Arbitration Act, has sought a declaration that the Arbitration Agreement in respect of Contracts of Affreightment between the parties had been executed through corrupt and fraudulent practice, hence it is null and void from the very inception and therefore, no Arbitration proceeding can be continued. For ease of reference, hereinafter, the applicant in J.M. No. 40 of 2012 would be referred as "**Applicant**" and the applicant in J.M. No. 32 of 2012 & 58 of 2014 would be referred as "**Respondent**".

2. Precisely the facts as stated are that during the years 2008 and 2009 three charter parties/contracts of Affreightment all dated 20.08.2008 were entered between the applicant and the respondent for transportation of coal from various ports of the world to Port Qasim, Karachi. It is further stated that due to some dispute between the parties, the respondent on 22.10.2009 invoked the Arbitration clause and appointed its Arbitrator, whereas, on 04.11.2009, the applicant also appointed its Arbitrator. Thereafter on 05.12.2009, the Arbitration Tribunal was constituted under the Agreement and the respondent filed its claim on 25.02.2010, whereas, applicant filed its reply on 27.03.2010. On 28.08.2010 the Arbitration Tribunal settled the Issues, whereupon objections were filed by the applicant and an order was passed on 13.11.2010 by the Tribunal. The learned Tribunal after hearing the aforesaid applications delivered their separate awards/decisions on 28.05.2012, whereby, the Arbitrator appointed by the applicant held that the matter be fixed for evidence, whereas, the Arbitrator appointed by the respondent held that submission of original documents can be done away with and that the respondent must be paid their 10% balance freight. It is further stated that after passing of the Order dated 16.05.2012 by the Hon'ble Supreme Court in Suo Moto Case No.15 of 2009 FIR's bearing No. 36, 37 & 38 of 2009 were registered by Federal Investigation Agency under Section 409 and 34 PPC read with Section 5(2) of the Prevention of Corruption Act, 1947 against various persons including the representative of the respondent, and subsequently the matters have now been transferred to the Accountability Court. It is the case of the applicant that since the matter is now pending before the Accountability Court, whereas, Agreements in question were obtained

through fraud and collusion, therefore, they are void under the law having been obtained and executed malafidely and through corrupt practices, hence instant application.

3. Learned Counsel for the applicant has contended that under Section 33 of the Arbitration Act, a party to an Arbitration Agreement can approach for the relief as claimed through instant application at any stage of the proceedings as in this matter according to the applicant, the Agreements in question were obtained with collusion and by practicing fraud, malafidely and without following the due process. He has further submitted that the dispute is in respect of the Agreement of Affreightment to the extent of 10% as balance 90% has already been paid, and notwithstanding the participation in the Arbitration proceedings, the applicant can seek such relief from this Court. He has further submitted that since now cognizance has been taken by the Accountability Court pursuant to the Order of the Hon'ble Supreme Court in the aforesaid Suo-moto proceedings, it would be appropriate and fair that the Arbitration proceedings are stayed till the decision is given by the Accountability Court. He has further submitted that the applicant is required only to show a prima-facie case and in the instant matter, substantial material has been placed on record, therefore, even this Court can refer the matter to record evidence as to whether the allegations of corrupt practices are correct or not. He has also referred to the F.I.R'sas well as certain orders, passed by the Accountability Court. In support of his contention he has relied upon the cases reported as **PLD 2000 SC 841** (**The Hub Power Company Limitd (Hubco) Versus Pakistan Wapda**), **PLD 2013 SC 641** (**Maulana Abdul Haque Baloch and others versus Government of Baluchistan and others**), **(2010) 1 SCC 72** (**N. Radhakrishnan Versus Maestro Engineers And Others**) and **PLD 2012 SC 610** (**Suo Motu Case No.15 Of 2009**) (**Corruption in Pakistan Steel Mills Corporation**).

4. On the other hand, Learned Counsel for respondent has contended that insofar as the order passed by the Hon'ble Supreme Court in Suo moto proceedings is concerned, there is no mention of the respondent in the said order, whereas, the observations are even otherwise general in nature. He has further submitted that the FIR's referred to by the counsel for the Applicant are in fact against the Chairman as well as some Directors of the Applicant-Company and against an individual, who is the local agent of the respondent, and further, that the case registered

is in fact in respect of the material supplied to the applicant, whereas, the contract of Affreightment has got nothing to do with such dispute. He has further contended that the respondent is a foreign company, who has provided the services of affreightment through Charter Party Agreement(s) and has got nothing to do with the alleged corruption of the applicant's officials. In view of such submission he has prayed that an Umpire be appointed in the matter and the time for completion of the Arbitration proceedings be also extended.

5. I have heard both the Learned Counsel and perused the record. It is an admitted position that the Contracts of Affreightment were entered into by the applicant with respondent on 20.08.2008, whereafter, the parties have appointed their Arbitrators during proceedings before the Arbitration Tribunal, and subsequently, an application was moved by the respondent for hearing of preliminary issue as the claim of the respondent is only to the extent of balance 10% of the freight charges, which are withheld by the applicant. On such application, both the Arbitrators have given their separate awards/decisions on 28.05.2012, whereby, the Arbitrator appointed by the applicant has directed to fix the matter for evidence, whereas, on the other hand the Arbitrator appointed by the respondent has been pleased to hold that the respondent must be paid 10% balance freight. Since the facts, as stated in the matter, are not in dispute, therefore, it is not necessary to discuss the same as it appears to be an admitted position that pursuant to clause-55 of the Agreement in question, the Arbitration proceedings were initiated, wherein, the applicant fully participated and the Arbitration Tribunal has given two separate decisions dated 28.05.2012, whereafter, the matter is pending before this Court as both the parties have filed aforesaid J.Ms. The only ground, which has been urged upon on behalf of the applicant is that since the Agreement in question was collusive in nature, whereas, the then management of the applicant was involved in corrupt practices, in league with the local representative of the respondent, hence the Agreements in question may be declared as void ab-initio and resultantly, the proceedings so far undertaken may also be declared as being without any authority and void ab-initio. In support of his contention, Counsel has relied upon Section 33 of the Arbitration Act, which reads as under:-

> **"33. Arbitration Agreement or award to be contested by application. –**Any party to an Arbitration Agreement or any person claiming under him desiring to challenge the existence or validity of an Arbitration Agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavit:
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> Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

6. Perusal of the aforesaid provision reflects that any party to an Arbitration Agreement desiring to challenge the existence or validity of an Arbitration Agreement (here the challenge is only to the extent of agreement), or an award, or to have the effect of either determined, shall apply to the Court and the Court shall decide the question on affidavit; provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a Suit. Though it has been provided under Section 33 that any party to an Arbitration Agreement can challenge the existence or validity of an Arbitration Agreement, but it is not that when pursuant to such Agreement any Arbitration proceedings are initiated, and the parties have participated substantially and after that an award is passed, the party can even challenge the Agreement at such a belated stage. If this is permitted then it would defeat the entire intent and purpose of an Arbitration Agreement which otherwise is meant to facilitate settlement of disputes outside the Court in an expeditious manner. An agreement if challenged on the premise of "fraud" must ordinarily be done at the very first instance. The sanctity attached to such Arbitration Agreement(s) cannot be taken away so lightly and in a causal manner as is being pleaded on behalf of the applicant. In the instant matter, the applicant has not denied that an Agreement was entered into, whereafter in terms of clause 55 of the Arbitration Agreement, the proceedings have been initiated, wherein, the applicant has fully participated without raising any such objection as is being raised now. It may also be noted that the F.I.R on which much stress has been laid by the Counsel for the applicant pertains to the year 2009, whereas, the Arbitration proceedings in this matter have commenced thereafter. In the circumstances, the plea taken on behalf of the applicant is belied by the facts on grounds. It is further noted that insofar as the Respondent-Company is concerned they are not nominated in the F.I.R, registered by FIA and nor thereafter any proceedings have been initiated against it either by the NAB authorities or by the

Accountability Courts. Learned Counsel has also placed on record an Order dated 22.05.2013, passed by the Accountability Court No.IV, at Karachi in Reference No.16 of 2012, whereby, the said local agent of the respondent-company has not been sent to face trial and the learned Judge while admitting the supplementary reference of NAB has been pleased to discharge the said local agent. In fact the NAB authorities have themselves requested the Court to drop the name of the local agent of respondent as an accused in the proceedings. Hence the argument of the learned Counsel for the applicant that proceedings are pending before the Accountability Court against respondent's local agent also fails.

7. Insofar as the case law relied upon by the learned Counsel for the applicant is concerned, it may be observed that the facts and circumstances of instant case are materially different from the facts of all those cases including the case of ***HUBCO (supra)***, wherein, the objections were raised on behalf of WAPDA at the very initial stage by challenging the main Agreement as well as the amendments made in such Agreements, whereas, in that case WAPDA had never participated in the Arbitration proceedings. On the contrary, in the instant matter it only appears to be an afterthought on behalf of the applicant, whereby, resistance is being shown in proceeding further with the Arbitration proceedings.

8. In the case of ***Haji Ghulam Mohyuddin Vs. Federation of Pakistan*** (**PLD 1967 Lahore 204**) a learned Division Bench of the Lahore High Court has been pleased to observe that "*on the other hand the conduct of the appellant in not taking objection to the appointment of the Arbitrator and in submitting to his jurisdiction, leading evidence before him and taking the choice of a favorable decision from the said arbitrator show that he accepted the appointment of Mr. Chughtai as an arbitrator and ratified clause 11 of the Arbitration Agreement.*" Similarly in the case of ***Government of Sindh & Others Vs. Tausif Ali Khan*** (**2003 CLC 180**), a learned Division Bench of this Court while distinguishing the case of ***WAPDA Supra*** on facts, (which is the case here as well) has been pleased to observe that, *"from the document placed on record, although a show cause notice has been issued but no finding of guilt against any officer, any prosecution nor even an F.I.R. is available on record. The allegation of fraud has not been substantiated in the present case. Merely by an allegation of fraud by the appellant at this stage, the respondent cannot be deprived to have the dispute resolved through arbitration".* Similar observation were recorded by a learned Single Judge of the Lahore High Court in the

case of ***Communication and Works Department through Secretary Vs. Messrs Pavital / Pivato Joint Venture & 2 Others*** (**2003 CLC 1798**) that "*when there were no adverse allegations as to the conduct of the arbitrators or the proceedings in the circumstances leaves a strong impression that it was an afterthought aimed at to hinder and delay the proceedings of the Arbitral Tribunal*".

9. In view of hereinabove facts and circumstances of the case, J.M No.40 of 2012 is hereby dismissed, whereas, J.M. No.32 of 2012 & 58 of 2014 are allowed by appointing Mr. Justice ® *Muhammad Athar Saeed*, former Judge of the Hon'ble Supreme Court, as an Umpire in the matter, who shall settle his terms and conditions with the parties directly, whereas, the period for completion of the Arbitration proceedings is extended for a period of four months from the date of announcement of this judgment. Office is directed to intimate and send copy of this order to the learned Judge / Umpire.

Dated: 25.04.2016

Judge