THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Adnan Iqbal Chaudhry.
Mr. Justice Abdul Mobeen Lakho.

High Court Appeal No. 97 of 2020
[Mian Ahmed Akbar and others v. M/s. Al-Dahra Agriculture Co. Pak (Pvt) Ltd. & others]

Appellants	:	Mian Ahmed Akbar son of Mian Akber Ali and two others through M/s. Khawaja Shams-ul-Islam, Zohaib Sarki and Imran Taj, Advocates.
Respondents 1-5	:	M/s. Al-Dahra Agriculture Co. Pakistan (Pvt) Ltd. and others through Mr. Mansoor Hassan Khan alongwith Mr. Noman Ahmed Langrial, Advocate.
Respondents 6-7	:	Nemo.
Dates of hearing	:	15-10-2024, 29-10-2024 & 12-11-2024.

JUDGMENT

Adnan Iqbal Chaudhry J. - This appeal is from order dated 09-03-2020 passed by a learned single Judge of this Court, whereby Suit No. 1604/2015 filed by the Appellants/plaintiffs was stayed on an application moved by the Respondents/defendants 1-3 under section 34 of the Arbitration Act, 1940.

2. The Appellant No.3, Brukfield Rice Pakistan (Pvt.) Ltd. **[BRP]**, is a company incorporated in Pakistan with its registered office at Karachi. It is engaged in the business of rice processing and export. The dispute is between the shareholders of BRP *i.e.* the Appellants 1-2 on the one hand and the Respondents 1-3 on the other. Respondents 2-3 are companies incorporated in the UAE, whereas the Respondent No.1 is a subsidiary incorporated in Pakistan. Though the suit also arrays as defendants the Chartered Accountant of BRP (Respondent No.4), the General Manager of the Respondent No.3 (Respondent No.5), the Securities & Exchange Commission of Pakistan (SECP-

Respondent No.6) and the Institution of Chartered Accounts of Pakistan (ICAP-Respondent No.7), the relief sought against them is at best consequential to the relief sought against the Respondents 1-3.

3. The relationship between the parties at different stages is reflected in the following agreements:

(a) Term Sheet dated 25.04.2011:

BRP was originally a company owned by the Appellants 1-2 and family, some of whom were also owners of Noor Rice Mills. Under the Term Sheet dated 25.04.2011, which was a MoU, it was envisaged that the Respondent No.2 or its wholly owned subsidiary would acquire 80% equity in BRP and Noor Rice Mills and make further investment therein.

(b) Share Purchase Agreement dated 23-09-2011 **[SPA]**:

By the SPA, the Appellants 1-2 and family (Group A) agreed to sell 80% shares in BRP to the Respondents 1-3 (Group B); to transfer Noor Rice Mills to BRP; and the Respondents 1-3 agreed to inject further capital in BRP. The share transfer took effect and the Respondents 1-3 became majority shareholders of BRP.

(c) Shareholders Agreement dated 21-03-2012 **[SHA]**:

Under the SHA, the Appellants 1-2 and family (Group A) and the Respondents 1-3 (Group B) agreed on terms to inject fresh capital into BRP and on terms to run the affairs of BRP. It was agreed that the family of the Appellants 1-2 would transfer their shares to the Appellants 1-2; that majority members on the Board of BRP would be of Group B while the Chief Executive would be of Group A.

(d) Term Sheet dated 23-02-2015:

By this time the shareholders of BRP had fallen out and this MoU envisaged the splitting of assets of BRP amongst the two groups and parting ways. It was agreed that by the target date of 31.03.2015 the Respondents 1-3 would transfer their shares to the Appellants 1-2,

who would transfer Noor Rice Mill to the Respondents 1-3, and the Respondents 1-3 would settle a part of BRP's bank debt.

4. Both the SPA and the SHA contained an arbitration clause whereby the parties agreed to submit to arbitration at Karachi *"any controversy or claim arising out of or relating to"* such contracts. The arbitration clauses are reproduced in the impugned order.

5. The transaction contemplated under the Term Sheet dated 23.02.2015 did not go through. It appears that the parties differed over the quantum of exchange for splitting the assets of BRP amongst the two groups. The dispute between the parties remained unresolved.

6. On 28-08-2015, the Appellants 1-2 filed suit. Though BRP was shown as a co-plaintiff, the Respondents 1-3 contended that no such authority was given. They prayers in the suit were for declarations that the Respondents 1-3 were obligated by the Term Sheet dated 25-04-2011, the SPA and the SHA to purchase the entire quantity of rice produced by BRP, and that purchases made by the Respondents 1-3 from third parties was a breach of said agreements; for specific performance of the Term Sheet dated 25-04-2011, the SPA, the SHA and the Term Sheet dated 23.02.2015; for damages; for injunction to restrain the Respondents 1-3 from purchasing rice from third-parties and to restrain them from altering the shareholding of BRP; for an injunction to the SECP to reduce the shareholding of the Respondents 1-3 in BRP on account of short-payment under the SPA; for an injunction to the ICAP to take disciplinary action against the Auditor of BRP; and to appoint another Chartered Accountant for BRP.

7. On 31.08.2015, the Respondent No.1 terminated the SHA on the ground that BRP was no longer a going concern. By Board Resolution dated 05.09.2015, majority directors of BRP removed the Appellant No.1 as Chief Executive. However, the SECP did not accept the Form 29 to record such change citing the interim order passed in the suit *viz.* that the Respondents shall not take any action against the

Appellants without due process of law. Against SECP's refusal to accept the Form 29, BRP filed W.P. No. 3633/2015 before the Islamabad High Court. That petition was dismissed on 13.11.2015 on the ground that a suit was *sub-judice* before the Sindh High Court. On 14-11-2015, the Respondents 1-3 moved CMA No. 16378/2015 to stay the suit under section 34 of the Arbitration Act, which application was allowed by the order impugned.

Submissions of counsel:

8. Mr. Khawaja Sham-ul-Islam, learned counsel for the Appellants 1-2 submitted:

(i) that the SPA had concluded upon the execution of the SHA, and thereafter the SPA and its arbitration clause had become redundant;

(ii) that once the Respondents 1-3 had terminated the SHA *albeit* unlawfully, the arbitration clause therein also stood terminated;

(iii) that by Board Resolution dated 16.11.2014 followed by the Term Sheet dated 25.02.2015, the parties had resolved their dispute in respect of the SHA by agreeing to part ways; that the Appellants 1-2 seek specific performance of that Term Sheet dated 25.02.2015 which does not contain any arbitration clause;

(iv) that the application under section 34 of the Arbitration Act was by one Muhammad Rashid who was not authorized to do so; and that the impugned order itself observes that the question to the authority of Muhammad Rashid would be determined at the trial of the suit;

(v) that before invoking section 34 of the Arbitration Act, the Respondents 1-3 had taken steps in proceedings by filing W.P. No. 3633/2015 before the Islamabad High Court, and therefore the application was not maintainable.

9. Mr. Mansoor Hassan Khan, learned counsel for the Respondents 1-3 supported the impugned order and submitted:

(i) that the Term Sheet dated 23.02.2015 was only an MoU, not a contract enforceable at law; that such MoU did not culminate in a binding contract, therefore there can be no suit for its specific performance;

(ii) that the Appellants 1-2 had no authority to file suit or appeal on behalf of BRP as majority directors had never authorized them;

(iii) that the dispute between the parties arose as the Appellants 1-2 did not fulfill their obligations under the SPA and the SHA; that since the dispute remained unresolved, the parties attempted to part ways amicably, hence the Term Sheet dated 23.02.2015; but then, the Appellants 1-2 did not transfer Noor Rice Mill to the Respondents 1-3 by the target date of the Term Sheet, nor did they pay-off the bank of BRP from the money remitted by the Respondents 1-3; therefore the Respondents 1-3 were within their right to terminate the SHA as BRP was no longer a going concern;

(iv) that notwithstanding the above, the arbitration clause in the SPA and SHA have a separate life and continue to subsist for resolution of all disputes connected therewith as held in *Sezai Turkes Feyzi Akkaya Construction Company v. Crescent Services* (1997 SCMR 1928);

(v) that even though the Term Sheet dated 23.02.2015 did not contain an arbitration clause, the arbitration clause of the SHA would apply to disputes under said Term Sheet. Reliance was placed on *Orient Power Company (Pvt.) Ltd. Sui Northern Gas Pipelines Ltd.* (2021 CLD 1069);

(vi) that W.P. No. 3633/2015 before the Islamabad High Court was by BRP against the SECP for refusing to accept the Form 29; therefore, it cannot be construed as a step in proceedings of the subject suit. Reliance was placed on *Pakistan International Airlines Corporation v. Pak Saaf Dry Cleaners* (PLD 1981 SC 553);

(vii) that Muhammad Rashid was not an Advocate, but an employee of the law firm engaged by the Respondents 1-3; that he was

duly authorized by the Respondents 1-3 by power of attorneys to file the application under section 34 of the Arbitration Act.

10. Heard learned counsel and perused the record.

Points for determination:

11. It is settled law that the Court has a certain discretion to stay or not to stay a suit under section 34 of the Arbitration Act. At the same time it is also settled that when an arbitration clause is invoked, the Court should not lightly release the parties from their agreement to resolve the dispute by arbitration.[1] We can do no better than to quote the Supreme Court of Pakistan in *Director Housing, A.G's Branch, Rawalpindi v. Makhdum Consultants Engineers and Architects* (1997 SCMR 988):

> "7. There can also be no cavil with the proposition that the existence of an agreement between the parties to refer for decision any dispute between them to the arbitrator neither ousts the jurisdiction of ordinary Courts in the matter nor the party pleading existence of an arbitration agreement has an absolute right to obtain stay of legal proceedings filed, ignoring the arbitration agreement. The Court in such cases has a discretion either to stay or refuse to stay the legal proceedings. However, in exercise of this discretion the Court is always guided by the paramount consideration that a party is bound by the terms of a lawful agreement which it enters into with another party and it cannot be relieved lightly from the obligations arising under the agreement except in very exceptional circumstances which make the enforcement of the terms of agreement unlawful or highly inequitable. Therefore, where a party enters into an agreement with another party to refer any future dispute arising between them under the agreement to the arbitration for its resolution, the Court will not generally allow continuation of any legal proceeding initiated by a party to such an agreement, ignoring the arbitration agreement, and direct the party to have recourse to the agreed forum for decision of the dispute. However, where the Court has material before it to reach a definite conclusion that the private forum selected by the parties for resolution of their dispute is not likely to decide the dispute fairly and justly, it may allow continuation of proceedings initiated in Court notwithstanding the agreement between the parties to refer the dispute to arbitration of a named arbitrator."

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[1] *Eckhardt & Co. v. Muhammad Hanif* (PLD 1993 SC 42); *Dar Okaz Printing & Publishing Ltd. v. Printing Corporation of Pakistan* (PLD 2003 SC 808); *Haji Soomar Haji Hajjan v. Muhammad Amin Muhammad Bashir Ltd.* (1981 SCMR 129).

12. It is not disputed that the Appellants 1-2 and the Respondents 1-3 had entered into an arbitration agreement which is embodied respectively in clauses 17 and 28 of the SPA and SHA. The Respondents 1-3 are still ready and willing to do all things necessary to the proper conduct of the arbitration. The relief sought in the suit against the Respondents 4-7 is at best consequential to the relief sought against the Respondents 1-3. Therefore, the presence of the Respondents 4-7 in the suit is no impediment to section 34 of the Arbitration Act.[2]

13. The point arising for determination in this appeal whether the other tests of section 34 of the Arbitration Act had been met, *i.e.* (a) whether the dispute brought to Court for adjudication was a dispute which the parties had agreed to refer to arbitration; (b) whether the Respondents 1-3 had taken steps in proceedings before invoking section 34; and (c) whether there was sufficient reason not to refer the matter to arbitration.

Scope of the arbitration clause:

14. It is averred by the Appellants 1-2 in the plaint that the Respondents 1-3 did not pay the entire amount agreed under the SPA for receiving shares of BRP, and that the net worth of those shares was also calculated unfairly (para 14 of the plaint). In that regard, the Appellants 1-2 prayed for specific performance of the SPA (prayer 'd'). Therefore, when the Appellants 1-2 allege that the Respondents 1-3 have not performed their obligation under the SPA, such dispute is clearly covered by the arbitration clause of the SPA.

15. It is also averred by the Appellants 1-2 in the plaint that the Respondents 1-3 were bound by the SPA and SHA to purchase the entire quantity of rice produced by BRP to meet export orders received by the Respondent 1-3, but instead, they made purchases from third-party competitors, thereby causing loss to BRP (paras 18 -

[2] See *Muratab Ali v. Liaquat Ali* (2004 SCMR 1124).

23); that the Respondents 1-3 had agreed to pay-off BRP's bank loan but did not do so (para 25); that the Respondents 1-3 mismanaged the affairs of BRP and damaged its profitability (paras 26-28); and that the Respondents 1-3 were trying to oust the Appellants 1-2 from the affairs of BRP (paras 33-34). In that regard, the Appellants 1-2 prayed for declarations that the Respondents 1-3 are obligated by the SHA to purchase the entire quantity of rice produced by BRP, and that purchases made by them from third parties is a breach of the SHA (prayers 'a' to 'c'); for specific performance of the SHA (prayer 'd'); to restrain the Respondents 1-3 from purchasing rice from third-parties and from altering the shareholding in BRP (prayer 'i'). Clearly, these disputes are in respect of the SHA and are covered by the arbitration clause of the SHA.

16. The thrust of the submission of the Appellants counsel was that the arbitration clause in the SPA and the SHA do not subsist. The first argument was that the SPA came to an end upon the execution of the SHA; thereafter, the SHA too was terminated by the Respondents 1-3, with the result that the arbitration clause in both contracts stood terminated. However, the submission that transactions under the SPA had concluded, is contradicted by the plaint where the Appellants 1-2 themselves have prayed for enforcement of the SPA. The submission that the arbitration clause in the SHA stood terminated, that too is contradicted by clause 25.1 thereof which provides that termination of the SHA would not deprive the terminating party to have recourse to arbitration. In any case, it is settled law that on the doctrine of separability an arbitration clause is severable from the contract in which it is embodied and survives the frustration or termination of the underlying contract. The case of *Sezai Turkes Feyzi Akkaya Construction Company v. Crescent Services* (1997 SCMR 1928) cited by the learned single Judge is directly on point. Therefore, the submission that the arbitration clause of the SPA and SHA do not subsist, is entirely misconceived.

17. The second argument of the Appellant's counsel was that disputes in respect of the SHA had been addressed by the Term Sheet dated 25.02.2015 which did not contain any arbitration clause, and that the Appellants 1-2 were seeking enforcement only of that latter contract. Firstly, and as already discussed above, the submission that the dispute is confined to the Term Sheet dated 25.02.2015 is contradicted by the plaint itself. Secondly, while the Term Sheet had set out terms and conditions for settlement of the dispute, it was an agreement arrived during pre-arbitration negotiations, a step envisaged in the arbitration clause of the SHA itself. From the case of *Orient Power Company (Pvt.) Ltd. Sui Northern Gas Pipelines Ltd.* (2021 CLD 1069) decided by the Supreme Court, the rule emerging on the interpretation of agreements is that where agreements are inter-dependent and constitute an indivisible whole, such as where one emanates from the other, one with an arbitration clause and the other silent, then the Court will look to the agreement that is the 'center of gravity', and if that agreement contains an arbitration clause it will be applicable to the dispute arising under the other agreement as well. Here also, the Term Sheet dated 25.02.2015 had emanated from the SHA. It did not supersede the SHA. The SHA was the center of gravity out of the two agreements. Therefore, applying the rule laid down in *Orient Power*, we hold that the arbitration clause of the SHA is also applicable to disputes in respect of the Term Sheet dated 25.02.2015. This, of course, is without prejudice to the argument of learned counsel for the Respondents 1-3 that said Term Sheet was not a contract enforceable at law.

The ground of 'step in proceedings':

18. The suit was presented on 28.08.2015. The application under section 34 of the Arbitration Act was made by the Respondents 1-3 on 14.11.2015. One condition for invoking section 34 is that the party doing so should not have filed written statement or taken 'other step in proceedings'. The Respondents 1-3 had not filed a written statement. The question is did they take any other step in

proceedings. As held in *Pakistan International Airlines Corporation v. Pak Saaf Dry Cleaners* (PLD 1981 SC 553), the test for determining whether an act is a step in proceedings is to see whether the act displays an unequivocal intention to submit to the jurisdiction of the Court.

19. The Respondents 1-3, who were in majority on the Board of BRP, had objected that the Appellants 1-2 could not have filed suit on behalf of BRP as said company had not authorized them to do so. After appointing an Attorney for the suit, BRP moved certain applications in the suit as *'Plaintiff No.3'*. These applications were through the same counsel who represented the Respondents 1-3. In this backdrop, one submission on behalf of the Appellants 1-2 was that the applications in the suit by BRP should be treated as steps in proceedings by the Respondents 1-3. The argument was rightly rejected by the learned single Judge as BRP was arrayed as a plaintiff, not as a defendant, and it was a party separate from the Respondents 1-3 who were its shareholders.

20. The other submission on behalf of the Appellants 1-2 was that the Respondents 1-3 had taken steps in proceedings by filing counter-affidavits to injunction applications moved by the Appellants 1-2. This submission too was rejected by the learned single Judge after observing that such counter-affidavits were filed by the Respondents 1-3 much after the application under section 34 of the Arbitration Act. We see no error in that. Such finding is supported by the case of *Uzin Export & Import Enterprises for Foreign Trade v. M. Iftikhar & Company Ltd.* (1993 SCMR 866) relied upon by the learned single Judge. We add to that by observing that it had also been held by the Supreme Court of India in *Food Corporation of India v. Yadav Engineer and Contractor* (AIR 1982 SC 1302) that merely contesting an application for interim injunction would not constitute a step in proceedings to disentitle a party to an order under section 34 of the Arbitration Act.

21. Before us, learned counsel for the Appellants 1-2 further submitted that the Respondents 1-3 had taken steps in proceedings by filing W.P. No. 3633/2015 before the Islamabad High Court. However, that petition under Article 199 of the Constitution was by BRP (the company) against the SECP for refusing to register the Form 29 of BRP. The Respondents 1-3 and the Appellants 1-2 were not even parties to that petition. Therefore, we do not see how that petition can be termed a step in proceedings of Suit No. 1604/2015 by the Respondents 1-3. The argument is rejected.

Authority of Muhammad Rashid to file the stay application:

22. Learned counsel for the Appellants 1-2 had questioned the authority of Muhammad Rashid to file the application under section 34 of the Arbitration Act on behalf of the Respondents 1-3. In that regard, he had drawn our attention to para 4 of the impugned order where the learned single Judge observed that the question to the authority of Muhammad Rashid would be determined at the trial of the suit. Learned counsel submitted that after making such observation the learned single Judge contradicted himself by allowing the disputed application.

23. As per learned counsel for the Respondents 1-3, Muhammad Rashid who gave affidavit in support of the application under section 34 of the Arbitration Act, was not an Advocate but an employee of his law firm. We note that it is not uncommon for a foreign client to appoint as agent the nominee of the local law firm engaged by it. It appears that Muhammad Rashid was given a power of attorney not only by BRP, he was also given separate power of attorneys by each of the Respondents 1-3 to pursue the suit on their behalf. The latter power of attorneys, dated 21.09.2015 and 22.09.2015, are in the compendium provide to us at the hearing by learned counsel for the Respondents 1-3. Two of those power of attorneys are executed in the UAE and are duly attested at the Embassy of Pakistan in Abu Dhabi. It appears that these power of attorneys were not brought to the

attention of the learned single Judge which led to the observation in para 4 of the impugned order. In any case, we do not see the *locus standi* of the Appellants 1-2 to question the authority of an agent appointed by the Respondents 1-3 for themselves. Therefore, we set-aside the observation in para 4 of the impugned order with regards to the authority of Muhammad Rashid to file the application under section 34 of the Arbitration Act.

24. In view of the foregoing, we conclude that:

(a) the dispute brought by the Appellants 1-2 to Court *via* Suit No. 1604/2015 is a dispute that is covered by the arbitration clauses of the SPA and SHA;

(b) the Respondents 1-3 had not taken steps in proceedings before invoking section 34 of the Arbitration Act, 1940;

(c) there is no sufficient reason not to refer the dispute to arbitration.

Resultantly, while modifying para 4 of the impugned order as above, we dismiss the appeal.

JUDGE

JUDGE

Karachi:
Signed on 22-01-2025

Announced by & on: