

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 734 of 2012

Present :
Mr. Justice Nadeem Akhtar

Date of hearing : 11.01.2013.

Plaintiff : through Mr. Z. U. Mujahid, Advocate.

Defendant No.1 : through Mr. Mustafa Lakhani, Advocate.

Defendant No.2 : through Mr. Iqbal Khurram, Advocate.

ORDER on CMA No. 6612 of 2012

NADEEM AKHTAR, J.- This application has been filed by defendant No.1, praying that the proceedings of this Suit be stayed and the dispute between the parties be referred to the Arbitrator(s) or to their Umpire in accordance with the arbitration agreement contained in Clause 15 of the Agreement dated 22.02.2011.

2. The relevant facts of the case are that defendant No.1 is the sole and absolute owner of Plot No. J. M. 574, Catholic Society, Survey Sheet No.2, Jamshed Town, Karachi, measuring 1,259 sq. yds. (the property), with construction of ground plus one upper floor thereon. The plaintiff and defendant No.1 entered into an Agreement dated 22.02.2011 (the Agreement), whereby the parties agreed to develop the property into a residential project, and to undertake all the building and development activities in respect thereof on the terms and conditions mentioned in the Agreement. Vide Clause 15 of the Agreement, the parties to the Agreement agreed to refer to Arbitrator or Arbitrators or to their Umpires, any dispute that may arise between them. Thereafter the plaintiff and defendant No.1 formed a partnership firm in the name and style of 'Ventura Builders' (the firm) through a Deed of Partnership executed by them on 24.03.2011 (the Deed). The partnership was a partnership at will. It may be noted that the Agreement was particularly in respect of the property, whereas the partnership / the Deed was general in nature for development of other lands and construction of other projects. The Deed *inter alia* provided the role of both the partners, their shares in the partnership, and the manner in which the books of accounts were to be maintained.

3. It is the case of the plaintiff that the property was handed over to him by defendant No.1 in pursuance of the Agreement, whereafter he applied for and obtained necessary approvals of the building plans ; he paid a sum of Rs.575,000.00 to defendant No.1 ; the construction on the property started in April 2001, when the plaintiff, as the Managing Partner, started investing money from his own resources ; he started booking units ; he collected money from his investors and paid the same to defendant No.1 in order to complete the project ; and in June 2011, another property bearing J. M. No. 552 belonging to defendant No.1 was included in the firm / business at the request of defendant No.1, and the plaintiff started construction on the said other property also. It is also the case of the plaintiff that, upon completion of a substantial portion of the construction on the property defendant No.1 attempted to reduce the share of

the plaintiff's profit, which was refused by the plaintiff. Thereafter, defendant No.1 attempted to dispossess the plaintiff from the property, and also started creating hurdles in the construction work. The plaintiff has alleged that the firm has suffered losses due to the illegal acts of defendant No.1, and also those of defendants 2 to 4 who are the investors of the plaintiff and who are interfering in the affairs of the firm because of their investments.

4. In the above background, this Suit has been filed by the plaintiff, seeking a direction against defendant No.1 to perform his part of the contract and not to interfere in the plaintiff's rights and obligations under the Agreement and the Deed. The plaintiff has specifically prayed for damages and permanent injunction jointly and severally against defendants 1 to 4, and for cancellation of seven cheques allegedly obtained from him forcibly by defendants 2 to 4.

5. The listed application has been filed by defendant No.1 praying the proceedings of this Suit be stayed and the dispute between the parties be referred to the Arbitrator in accordance with the arbitration agreement contained in Clause 15 of the Agreement. Mr. Mustafa Lakhani, the learned counsel for defendant No.1, submitted that the execution of the Agreement, the existence of an arbitration agreement between the parties, and the existence of a dispute between the parties, have not been disputed by the plaintiff. He further submitted that the language of the undisputed arbitration agreement is very clear and unambiguous, and that the same provides reference of dispute(s) between the parties to Arbitrator(s) or to their Umpire. He argued that the whole object of the arbitration agreement will be defeated in case the dispute is not referred to arbitration.

5. Mr. Z. U. Mujahid, the learned counsel for the plaintiff, vehemently opposed the present application mainly on the ground that this Suit has not been filed against defendant No.1 only, but the same has been filed against

defendants 2, 3 and 4 also, who admittedly were not parties to the arbitration agreement. In continuation to his above submission, he argued that the Suit cannot be stayed against defendants 2, 3 and 4, nor the dispute between the plaintiff and the said defendants / third parties can be referred to arbitration. In support of his submission, the learned counsel cited and relied upon (1) *Mst. Surriya Rehman V/S Siemens Pakistan Engineering Company Ltd. and another, PLD 2001 Karachi 571*, and (2) *Shell Pakistan Ltd. V/S Aero Asia International (Pvt.) Ltd. and another, PLD 2008 Karachi 429*. In *Mst. Surriya Rehman* (supra), it was held *inter alia* by this Court that the staying of a Suit under Section 34 of the Arbitration Act, 1940, is discretionary and not mandatory, and that if the portion of the claim that falls within the scope of the arbitration clause is small as compared to the overall claim, then the Suit ought not be stayed, even with regard to the claim that may be referable to the arbitration. In *Shell Pakistan Ltd.* (supra), it was held by this Court that for deciding the application under Section 34 of the Arbitration Act, 1940, the pleadings in the Suit are to be considered, and that from the contents of the plaint, it appeared that the cause of action pleaded in the plaint was an independent cause of action not related to the dispute under the arbitration Clause in the Agreement.

6. The aforementioned Single Bench reported cases relied upon by the learned counsel for the plaintiff are applicable in the present case. However, I would like to refer to an authority of the Hon'ble Supreme Court ; namely, *Messrs M.A. Nawaz & Co. (Regd.) and 5 others V/S National Bank of Pakistan, 1970 SCMR 234*. In the said case, the customer had pledged its factory, goods, stocks, etc. with an Insurance Company, as it had obtained an over-draft facility from the bank. The claim preferred against the Insurance Company by the customer was referred to arbitration under the arbitration clause contained in the Insurance Policy. In the recovery Suit filed by the bank, the customer moved an application under Section 34 of the Arbitration Act, 1940, for stay of the proceedings in the said Suit relying on the arbitration clause in the Insurance Policy. The application was rejected on the ground that, although the bank may be a beneficiary as the pledgee, but it was not a party to the contract of

insurance to be obliged to refer its dispute with the customer to arbitration. It was further held by the Hon'ble Supreme Court that the bank was not concerned with the adjudication of the customer's claim against the Insurance Company in arbitration proceedings.

7. It is an admitted position that defendants 2, 3 and 4 are not parties to the Agreement that contains the arbitration clause, nor are they the partners of the plaintiff and defendant No.1 as per the Deed. A perusal of the plaint shows that the plaintiff has not only made specific allegations in the plaint against defendants 2, 3 and 4, but specific and separate reliefs have also been sought against them by the plaintiff. In view of the said specific allegations and separate reliefs against defendants 2, 3 and 4, independent, separate and distinct cause of action has accrued against the said defendants according to the plaintiff. In terms of the arbitration clause, only a dispute between the plaintiff and defendant No.1 can be referred to arbitration, and not any such dispute that is or that may be between the plaintiff and third parties, who in this case are defendants 2, 3 and 4. Applying the law laid down by the Hon'ble Supreme Court in Messrs M.A. Nawaz & Co. (supra), defendants 2, 3 and 4 shall have no concern with the adjudication of the plaintiff's claim against defendant No.1 in arbitration proceedings. The present application for staying the proceedings of the instant Suit and referring the dispute between the plaintiff and defendant No.1, therefore, cannot be allowed.

In view of the above discussion C.M.A. No. 6612 of 2012 is dismissed.

J U D G E
