

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 568/2013
SUIT NO. 670/2013
SUIT NO. 708/2013
SUIT NO.1260/2013

JUDGMENT

DATE OF HEARING : 12.12.2013

Pakistan International Bulk Terminal Limited.,
Plaintiff in Suit No.568/2013 & Defendant No.1 in suit No.670/2013.

Maqbool Associates (Pvt) Ltd.,
Plaintiff in Suit No.670/2013&Suit No.708/2013, Defendant No.1 in
Suit No.568/2013 and sole Defendant in suit No.1260/2013.

Siyahkalem Engineering Construction Industry & Trade Company
Ltd.,Plaintiff in Suit No.1260/2013, Defendant No.2 in suit No.568/2013and
Defendant No.2 in Suit No.670/2013and only Defendant in Suit
No.708/2013.

Allied Bank Limited
Defendant No.3in Suit No.568/2013

HSBC Bank Middle East Limited
Defendant No.4 in Suit No.568/2013

Bank AlFalah Limited
Defendant No.5 in Suit No.568/2013

Mr. Khalid Anwar, Advocate for Plaintiff in Suit No.568/2013 & for
Defendant No.1 in Suit No.670/2013

Mr. Abdul HafeezPrizada, Advocate for Plaintiff in Suit No.670/2013 &
708/2013 and for Defendant No.1 in Suit No.568/2013 and for sole
defendant in Suit No.1260/2013.

Mr. Makhdoom Ali Khan, AdvocateforPlaintiff in suit No.1260/2013,for
Defendant No.2 in Suit No.568/2013and Defendant No.2 in Suit
No.670/2013 and for sole defendant in Suit No.708/2013.

NAZAR AKBAR, J. By this order I intend to dispose of an
application under Order XXIII Rule 1 & 3, C.P.C. bearing CMA
No.11110/2013 jointly filed by plaintiff and defendant No.1 in Suit
No.670/2013 as well as four suits bearing Suit No.568/2013, Suit
No.670/2013, Suit No.708/2013 and Suit No.1260/2013. These are

Arbitration Suits under Section 20 of the Arbitration Act, 1940 (hereinafter referred to as “the Act, 1940”).

1. The precise facts of these cases are that Pakistan International Bulk Terminal (PIBT) was established as subsidiary company of Pakistan International Container Terminal Ltd., (PICT) for the purpose of executing an implementation agreement with Port Qasim Authority to establish a dry bulk cargo terminal (the Project) at Port Muhammad Bin Qasim on Build, Operate and Transfer (BOT) basis. With a view to complete the project, on 15.3.2012 the PIBT entered into an agreement jointly with M/s. Siyahkalem Engineering Construction Industry & Trade Company Limited, a foreign investor in Pakistan incorporated under the laws of Turkey having their head office at Istanbul and branch office at Islamabad (called Siyahkalem) and M/s. Maqbool Associates (Pvt.) Ltd. incorporated under the laws of Pakistan, inter alia, for engineering, procurement, supply, construction, installation, testing and commissioning of the Project at a cost of approximately Rs.6.7 billion (hereinafter called EPC contract). The EPC contract was signed by the representative of PIBT as party of the first part and by a common and joint representative of joint venture parties namely Syed Masood Hussain Shah on behalf of both M/s. Maqbool Associates (Pvt.) Ltd., and M/s Siyahkalem as Contractor’s representatives for the purposes of dealing with PIBT under EPC contract. In the EPC contract, both M/s Siyahkalem and M/s Maqbool Associates were collectively referred to as the “Contractor”.

2. The differences arose between PIBT and the “Contractor” which compelled PIBT to file an application under Section 20 of the Act, 1940 with the prayer that EPC contract may be filed in Court and dispute / issues may be referred to Arbitrator in accordance with the parties’ agreement. The said application was registered as Suit No.568/2013 and on 03.05.2013 ad-interim orders were obtained by M/s. PIBT on an application under Section 41(b) read with Schedule II, paragraph 4 of the

Act, 1940 bearing CMA No.5517/2013. The operative part of the interim order is reproduced as under:-

Let notice be issued to the defendants for 23.5.2013. Till the next date of hearing, the defendants No.1 and 2 are hereby restrained from seeking the release/withdrawal and the defendants No.3 to 5 from releasing any collateral / security given by the defendants No.1 and 2 to secure the obligations of the defendants No.3 to 5.

On 09.5.2013 M/s PIBT in their suit No.568/2013 filed another application (CMA No.5817/2013) and obtained the orders relevant part thereof is as under:-

Issue notice to the defendants for 23.5.2013 when the matter is already fixed. Till next date of hearing defendants are restrained from creating any hindrance or restraining the plaintiff or any of its "Contractor" from accessing the project site.

3. On 22.5.2013 M/s. Maqbool Associates, the defendant No. 1 in Suit No.568/2013, under the same EPC contract filed an arbitration suit under Section 20 of the Act, 1940 of course seeking the same relief. Their application was registered as Suit No.670/2013. They impleaded their own joint venture partners namely M/s. Siyahkalemas defendant No.2 and obtained interim orders, the relevant part whereof is reproduced as under:-

The counsel for the Plaintiff has shown grave apprehension that if interim orders are not passed, the defendant No.1 shall create third party interest to frustrate the rights and interest of the Plaintiff. Issue notice to the defendants for 29.5.2013. Meanwhile, the defendant No.1 (M/s PIBT) is restrained from creating any third party interest till next date.

The record of suit No.568/2013 shows that M/s. Maqbool Associates (Pvt.) Ltd. were served with the notices and orders on 20.5.2013. However, on 22.5.2013 when they filed suit No.670/2013, they did not disclose that the Defendant No.1 namely PIBT has already filed similar arbitration suit under Section 20 of the Act, 1940 before this Court and certain orders have already been passed by this Court in the said suit.

4. On 29.5.2013 the same M/s. Maqbool Associates (Pvt.) Ltd., filed yet an arbitration suit under Section 20 of the Act, 1940 seeking arbitration

on the disputes arising out of joint venture agreement dated 26.3.2012 between Maqbool Associates and Siyahkalem. This application was registered as Suit No.708/2013 and status quo orders were passed and the relevant portion of such orders is reproduced hereunder.

In this application the plaintiff apprehends that if defendant is not restrained from taking/moving/shifting or transferring any of its properties from the jurisdiction of this Court, the plaintiff shall be seriously prejudiced. Issue notice to the defendant. Meanwhile the defendant is directed to maintain status-quo.

5. In both the suits bearing No.568/2013 and No.670/2013 the subject matter of the dispute is EPC contract dated 15.3.2013 and in both the suits the parties are M/s. PIBT, M/s. Maqbool Associates (Pvt.) Ltd., and Siyahkalem and they want their dispute under the said EPC contract to be referred to the Arbitrator. Whereas in suit No.708/2013 M/s.PIBT is not party and the dispute has arisen out of the joint venture contract dated 26-3-2012 and status quo orders are only against Siyahkalem. Pending these three suits, on 03.10.2013 the parties to the Suit No.568/2013 and Suit No.670/2013 entered into a FULL AND FINAL SETTLEMENT AGREEMENT (hereinafter the "settlement agreement") and it has been placed before the Court with an application under Order XXIII Rule 1 & 3 CPC read with Section 151 CPC (CMA No.11110/2013) in Suit No.670/2013 for endorsement as a "decree" by the Court. This application has been jointly filed by plaintiff and the defendant No.1 and the defendant No.2 namely Siyahkalem has seriously contested it when on 07.10.2013 they have filed their counter affidavit to this application.

6. M/s. Siyahkalem on the same date i. e 07.10.2013 have also filed Misc. Application bearing CMA No.11191/2013 in Suit No.670/2013 seeking restraining orders against the plaintiffs (M/s Maqbool Associates) and Syed Masood Hussain Shah, who has signed/executed EPC contract on behalf of both M/s. Maqbool Associates and Siyahkalem on the ground

that the authority of said representative, Syed Masood Hussain Shah was revoked by them prior to the execution of the settlement agreement. M/s. Siyahkalemon 10.10.2013 have also filed reply to the main application under Section 20 of the Act, 1940 in suit No.670/2013 and M/s. Maqbool Associates on 6.11.2013 have filed rejoinder to the reply of M/s. Siyahkalem. However, M/s Maqbool Associates have not filed counter affidavit to CMA No.11191/2013 in suit No.670/2013. Learned counsel for M/s. Maqbool Associates has contended that their reply to the objection filed by M/s. Siyahkalem covers the reply of CMA No.11191/2013.

7. M/s. Siyahkalem on 07.10.2013 in addition to an application under Section 41(b) of the Act, 1940 in suit No.670/2013, have also filed an arbitration suit under Section 20 of the Act, 1940 for referring their disputes with M/s. Maqbool Associates under the joint venture agreement dated 26-3-2012 to the Arbitrator. It was registered as Suit No. 1260/2013. In Para 20 of their plaint of arbitration suit, they have disclosed that M/s. Maqbool Associates is already in Court on the same agreement through Arbitration Suit No.708/2013 for appointment of Arbitrator. In their Suit No.1260/2013, M/s. Siyahkalemon an application (CM No.11194/2013) have also obtained the following interim orders and relevant part of the order is reproduced hereunder:-

Since interim order has already been passed today in respect of same controversy which is subject matter of this suit in Suit No.670/2013, the defendant is restrained to collect pay-order in terms of the Settlement Agreement filed along with application bearing CMA No.11110/2013 in Suit No.670/2013 till the next date of hearing.

M/s. Maqbool Associates (Pvt.) Ltd. have filed their reply to the main arbitration Suit No.1260/2013. However, no counter affidavit to CMA No.11194/2013 in suit No.1260/2013 is on record. The said Suit No.1260/2013 was ordered to be fixed with suit No.670/2013.

8. The above background and the facts make it abundantly clear that the suit No.568/2013 and Suit No.670/2013 are different from suit No.708/2013 and suit No.1260/2013 in as much as the request for referring the dispute for arbitration in the suit Nos.568 & 670 of 2013 is on account of disputes arising out of EPC contract and the said EPC contract is not subject matter of suit No.708/2013 & Suit No.1260/2013. However, these last mentioned two suits have been tagged with Suit No.568/2013 and Suit No.670/2013 because the parties in these suits are partner under the joint venture agreement and they have jointly entered into EPC contract with M/s. PIBT through a common / joint representative, namely Syed Masood Hussain Shah.

9. I have very carefully perused the record and heard Mr. Khalid Anwar learned counsel for M/s PIBT, Mr. Abdul Hafeez Pirzada learned counsel for M/s. Maqbool Associates (Pvt.) Ltd., and Mr. Makhdoom Ali Khan, learned counsel for M/s. Siyahkalem.

10. Mr. Khalid Anwar learned senior counsel appearing for PIBT in his brief arguments has drawn the attention of the Court to three letters annexed with the compromise applications and marked D, E. and F all dated 03.10.2013. He contends and rightly so that these letters confirm that M/s. PIBT has fully discharged their liability under the settlement agreement. In one of these letters it is also admitted by "Contractor" that they have no dispute with the PIBT. Relevant piece from letter reads as follows:-

"Contractor" has no further claim of any nature whatsoever against you under the EPC Contract including any interest in the Project site, nor shall the "Contractor" otherwise seek to interfere in any manner whatsoever in your possession of the Project site or with the possession and occupation of any person engaged by you to undertake and execute the works necessary to complete the Project.

Mr. Khalid Anwar learned counsel for M/s. PIBT with very heavy heart has submitted that in fact the "Contractor" have put the PIBT under a very

embarrassing position in front of international donor for the project by delaying the progress at the project site therefore, his client were coerced and blackmailed to enter into the settlement to avoid further losses and even possibility of losing the international donors to complete the first ever state-of-the-art cement and clinker bulk cargo terminal at the Port Muhammad Bin Qasim worth Rs.6.7 billion. He read out clauses **2.6** of the settlement agreement and submitted “simultaneously with the execution of this agreement” M/s PIBT has already deposited with Mr. Ahsan Siddiqui of EA Consulting (Pvt.) Limited a pay-order of Rs.582,392,302/= for the “Contractor” before filing of application under order XXIII Rule 1 & 3 CPC in terms of clause **4.1** of the agreement.. His client has discharged this liability and for the last two months such a huge amount is out pocket of his client and the case is pending on account of a dispute between the “Contractor(s)” (Siyahkalem-Maqbool Associates JV) themselves. He further contended that M/s. Siyahkalem has no objection to the grant of this application. However, they have shown their reservations only with regard to the collection of pay order and distribution of settlement amount between the “Contractor” which are lying with Mr. Ahsan Siddiqui in terms of settlement agreement. He has further contended that once the liability of PIBT under the Full and Final Settlement Agreement has been discharged the EPC contract is no more in field and no dispute is left between the PIBT and the “Contractor”. Therefore, these proceedings may be disposed of accordingly.

11. Mr. Abdul Hafeez Pirzada is also of the view that once the Full and Final Settlement Agreement was executed and duly signed by the parties it has over written the EPC Contract. However, in view of the stance taken by M/s Siyahkalem with reference to the implementation of the settlement agreement regarding delivery of pay-order of settlement amount and its encashment through M/s. Maqbool Associates, Mr. Abdul

Hafeez Pirzada learned counsel has referred to clauses 2.1, 2.2 and 2.3 of the settlement agreement to stress that the compromise should be effected in letter and spirit. Since as agreed the pay order of settlement amount is in favour of M/s Maqbool Associates, it should be handed over by the third party namely M/s Ahsan Siddiqui to Syed Masood Hussain Shah as he is the representative of "Contractor", and any variation in such arrangements would be negation of the settlement agreement. He has also referred to Clause 4.1 of the settlement agreement and contended that the Suits No.670 and 568 of 2013 are to be disposed of in terms of this settlement agreement.

12. Mr. Makhdoom Ali Khan learned counsel for M/s Siyahkalem on principle has agreed that this settlement may be accepted by the Court. However, he has reservations regarding delivery of pay orders of the settlement amount to the Contractor's representative on the ground that his client has already revoked the authority of the representative even before execution of this settlement agreement on behalf of the "Contractor". He submits that the project of national importance should not be frustrated by litigation and therefore, while endorsing the settlement agreement the Court should protect the rights of his clients under the joint venture agreement with M/s Maqbool Associates since all income from the PIBT under the settlement is on account of EPC contract. His apprehension is about possible misappropriation of settlement amount by M/s Maqbool Associates though it is essentially for the benefit of M/s Maqbool Associates and M/s Siyahkalem, the "Contractor". He further submits that both in his counter affidavit to the compromise application (CMA No.11110 of 2013) and application for interim order under Section 41 (b) read with second Schedule of the Act, 1940 (CMA No.11191 of 2013) in Suit No.670/13, the stand taken by his client is one and the same that in terms of the joint venture agreement, the settlement amount should

be distributed amongst the “Contractor” as per the arrangement in the said joint venture agreement and in case the said amount is handed over to Syed Masood Hussain Shah on the pretext of joint representative the said settlement amount should not be deposited in the single account of M/s Maqbool Associates. In such an eventuality M/s Siyahkalem would suffer irreparable loss and would be deprived of his rights in terms of joint venture agreement. He further contended that in suit No. 708 of 2013 M/s Maqbool Associates and in suit No.1260 of 2013 M/s. Siyahkalem have sought the disputes arising out of the joint venture agreement to be referred to the Arbitrator and has already obtained restraining order reproduced in Para 7 above. It is pertinent to mention here that M/s. Maqbool Associates have filed suit No. 708/2013 against Siyahkalem almost four months prior to the settlement agreement with M/s PIBT. And M/s Siyahkalem has filed the Suit No.1260 of 2013 against Maqbool Associates on 10-10-2013, three days after the settlement agreement having been placed before the Court in terms clause 4.1 of the settlement. Precisely the relations between the parties to the joint venture agreement were already not very cordial even prior to the settlement agreement with PIBT. Therefore, the “Contractor”(Siyahkalem-M/s Maqbool JV) has reasons to be afraid of each other, the moment the EPC contract come to an end.

13. Therefore, before dilating upon the effect of the dispute between the parties to the joint venture agreement on the settlement agreement, I would like to examine the correctness and legality of the settlement between PIBT and its effect on the proceeding of suit No.670/2013 and 568/2013. Both, the counsel of M/s Maqbool Associates and M/S Siyahkalem, admittedly have no dispute with M/S PIBT and the arguments advanced by them only refers to the dispute amongst themselves with reference to the interpretation of certain clauses of settlement agreement.

Both the counsel have conceded that M/s PIBT have completely discharged their liability under the settlement agreement except the formal liability mentioned in clause 2.1 whereby M/s PIBT is required to deposit a sum of Rs.37,173,976 (Rupees Thirty Seven Million One hundred Seventy Three Thousand Nine Hundred Seventy Six) in the Government Treasury towards withholding tax at the rate of 6% against challan to be provided to M/s PIBT by the Contractor's representatives. It is not the case of either of them that M/s PIBT has refused or failed to fulfill its obligation in terms of clause 2.1 of the settlement agreement. The PIBT in terms of clause 2.6 of the settlement has already deposited a pay order of Rs. 582,392,302/= towards the settlement amount with Mr. Ahsan Siddiqui of E.A. Consultant (Pvt.) Ltd. Similarly the liabilities of "Contractor" under the settlement agreement as against the rights of M/s PIBT also stands discharged. In terms of settlement the "Contractor"(1) has already removed their equipments, material machinery from the project site, (2) has peacefully handed over the possession of the project site to M/s PIBT, (3) has already extended no objection in writing to PIBT that they have no further claim of any nature whatsoever against M/s PIBT in terms of EPC contract; and (4) the PIBT is free to undertake and execute the works necessary to complete the project.

14. The above admitted position by all the three contestant in Suit No.670 of 2013 and Suit No.568 of 2013 amply demonstrate that the full and final settlement agreement dated 3-10-2013 between PIBT and the "Contractor" (Siyahkalem-Maqbool Associates JV) has not only superseded the Arbitration contract dated 15-3-2012 (the EPC contract) but this subsequent contract already stand fully implemented between the executants except that withholding tax payable by M/s PIBT has not been deposited in the treasury on account of the dispute between the "Contractor" themselves. Mr. Abdul Hafeez Pirzada and Mr. Makhdoom Ali

Khan, the learned counsel of joint venture parties have left it to the discretion of the Court to decide the fate of withholding tax payable by M/s. PIBT in terms of clause 2.1 of the settlement. It may be ordered to be deposited in Court, or even in joint account of the “Contractor” or in any other way, the Court deems fit.

15. The above discussion leads us to only two propositions that; (1) why this already “acted upon contract” has been placed before the Court which is seized of a matter under Section 20 of the Arbitration Act, 1940; and (ii) whether the order on the application should be in terms of Rule 1 or Rule 3 of the Order XXIII, C.P.C. to formally dispose of Suit No.670/2013 and Suit No.568/2013. In my humble view since the settlement agreement has already been fully and specifically performed by both the parties to the agreement, the “decree” would be like putting the cart before the horse. There is nothing to be done by M/s. PIBT to facilitate the “Contractor” to enjoy the benefit of the settlement. Similarly the “Contractor” has discharged liabilities towards PIBT under the settlement agreement. Therefore, the Court is not required to pass a decree with any binding direction to either of them to do/perform anything pursuant to the settlement agreement for which a compromise “decree” may be of some consequences. The controversy is not between the contracting parties to the settlement agreement rather the controversy is amongst the party of the second part (the “Contractor”) comprising of the two partners namely M/s Siyahkalem and M/s Maqbool Associates-JV. I believe to appreciate the first proposition reference to Clause 4.1 of the Settlement Agreement is enough which is reproduced below:-

ARTICLE IV
WITHDRAWAL OF LEGAL PROCEEDINGS.

- 4.1 As soon as practicable after the date on which this Agreement and its counterparts have been signed as provided in Article II, PIBT and Maqbool Associates shall cause the filing of this Agreement in Suit No.670 of 2013 under cover of an application seeking its

disposal in terms of this Agreement. On the same date Suit No. 568 of 2013 shall also be withdrawn as having become infructuous in view of the order passed in Suit No.670 of 2013.

16. The perusal of clause 4.1 of the settlement agreement shows that the filing of application under Order XXIII Rules 1 & 3, C.P.C. is ceremonious / formal expression of declaration that the controversy between the parties under the EPC contract stand resolved. The under lining portion in the above clause 4.1 is for emphasis to appreciate that the contracting parties have taken the Court for granted to endorse the settlement agreement once it is placed before the Court in Suit No.670 of 2013. The lawfully entered contracts by and between the parties are definitely binding upon them irrespective of placing such contracts before the Court of law by means of joint applications under Order XXIII Rules 1 and 3 CPC. The language of clause 4.1 leaves no room for the Court to apply its judicial mind, rather the parties to the settlement agreement want a mechanical order from the Court endorsing the settlement. In the last two lines even an order in Suit No.568 of 2013 prior to making a formal application for withdrawal seems to have already been incorporated. The prayer in the application is that:-

“This Hon’ble Court may be pleased to decree the above stated Suit (670/2013) in terms of the agreement dated 3rd October 2013.”

Where is that agreement? The agreement dated 03.10.2013 as observed above already stand fully performed by the contracting parties. Why a decree for performance of an already acted upon agreement (contract)?

17. The real question is that when the Court is seized of an arbitration suit under Section 20 of the Act, 1940, can it pass a “decree” prior to referring the dispute to the Arbitrator in terms of arbitration clause provided in EPC contract dated 15.3.2013. The final order in an arbitration suit under Section 20 of the Act, 1940 is not and cannot be equated with a “decree” because the Court in an arbitration suit is not empowered to pass judgment to be followed by a decree to “conclusively

determine the rights of the parties with regards to all or any of the matters in controversy in the Suit” (Section 2(2) C.P.C.). In terms of sub-sections (1) to (4) of Section 20 of the Act, 1940 an application is filed under sub-section (1) which is registered as a suit under Sub-section (2) and after show cause under Sub-section (3) to the parties, the matter is referred under Sub-section (4) to the Arbitrator to proceed in terms of sub-section (5) in accordance with the Arbitration Act, 1940 to decide the dispute between the parties and that is compliance of the mandate of Section 20 of the Act, 1940 by the Court. Thus the Court is only a gateway to the adjudication of the dispute between the parties and not the adjudicator in its own right. It is not a regular suit under common law. Dispute resolution is not possible by a Court of Law under Section 20 of the Act, 1940. The Court is not empowered to examine and even comment on the “dispute/issues” between the parties. Lest it may prejudice the case of either party.

18. To appreciate the nature of proceedings and limited powers of a court seized of an arbitration suit under Sub-section 20 of the Act, 1940 as distinct and different from the powers of civil court dealing with regular civil suit under Section 9 of Civil Procedure Code, 1908, one may refer, to begin with, to the case of *Mohamed Abdul Latif Faruqi v. Nisar Ahmed* and another reported in **PLD 1959 (W.P.) Karachi 465**. In this case Mr. Justice Qadeeruddin Ahmed, (as he then was) while dealing with the question of limitation for filing an (suit) application under Section 20 of the Arbitration Act, 1940 has observed as under:-

*“Before deciding what relief may be granted, I have to dispose of the last objection. Counsel for the defendant has brought to my notice no provision of law under which this “suit” can be said to be time-barred. This is a suit for purposes of number and registering it as such and therefore also for purposes of the comparatively more elaborate procedure which may be followed in it but it is not a suit for purposes of the Limitation Act. “Suit” is defined negatively in clause (10) of section 2 of the Act, but the expression “suit” is otherwise clear as pointed by the Privy Council in *Hansraj Gupta* and*

others v. Official Liquidators of Dehradun (reported in ILR 54 All. 1067), that unless there be something to the contrary in the context it means a Civil proceeding instituted by the presentation of a plaint. An application made under section 20 of the Arbitration Act, 1940, is not a suit when it is presented and therefore no period of time, as is computable under section 3 of the Limitation Act for presentation of plaints can be applicable to it. The present suit thus is not time barred as a suit.”

19. This Court while relying upon the dictum laid down in PLD 1959 (W.P.) Karachi 465 and on other case law on the same proposition time and again held that the scope of the power conferred on the court under Section 20 is merely limited to determination of the factum of a real dispute and no more as held by his lordship Mr. Justice Zafar Hussain Mirza in the case of Jamia Industries Limited v. Pakistan Refinery Ltd (**PLD 1976 Karachi 644**). Then in China Harbour Engineering Co. v. Water and Power Development Authority and others (**2001 YLR 1781**) it was held that “the proceedings under section 20 of the Act, 1940 is to be treated as a civil suit vides Sub-section (2) of Section 20. It is not a full fledged civil suit in strict sense, it is legal proceedings with limited scope.” Similar views have been expressed in Manzoor Construction Co. Ltd v. University of Engineering and Technology, Taxila (**1984 CLC 3347**) and M/s. Time N Vision International (Pvt.) Ltd. versus Dubai Islamic Bank (**PLD2007 Karachi 278**).

20. Coming back to the arbitration Suit Nos.670/2013 and 568/2013, this Court is required to examine the “factum of a real dispute” for referring the same to the Arbitrator in accordance with arbitration clause in the EPC contract. Show cause notices to the parties under Sub-section (3) of Section 20 of the Act, 1940 have already been served on the parties. However, before the Court exercise its power under Sub-section (4) of the Act, 1940, the Court has been informed that the parties to these suits have perished the very EPC contract by having substituted the same with a new contract called the “Full and Final Settlement Agreement.” This settlement

agreement is totally a new contract between the parties and without reservation it has superseded the EPC contract. The very fact that all the parties to this settlement agreement have even discharged their liabilities under the settlement agreement relieving/releasing each other of the earlier EPC contract is fatal to the proceedings of Suit Nos.670/2013 and 568/2013. The learned counsel appearing for the parties have consensus on the legal effect of the “Full and Final Settlement Agreement” on the EPC contract is that it has overwritten the “EPC contract.”

21. Now the parties to these arbitration suits under Section 20 of the Act, 1940 have themselves placed this new agreement (contract) before the Court with an application under Order XXIII Rules 1 & 3, C.P.C. with a prayer to “decree” their dispute (I must say dispute not suit) as settled in terms of this new contract. The Court is required to see the effect of this new contract on the proceedings in hand. The first thing that comes to our mind on examining the settlement agreement dated 3.10.2013 (contract), as also agreed, by the learned counsel for the parties is that this new contract has substituted the original EPC agreement (contract) dated 15.3.2012 between the parties. This new contract does not contain arbitration clause nor there is mention of anything to be done by the parties in case of failure of either party to discharge their obligation under the settlement agreement. In fact it has been executed and entered into by and between the parties at a point of time when its performance was already accomplished i.e. to say “As soon as practicable after the date on which this agreement and its counterpart have been signed as provided in Article II”. The rest was just a formality, including withdrawal of legal proceedings.

22. Thus the legal effect of settlement agreement on the EPC agreement is that the later “need not to be performed” as provided under Section 62 of the Contract Act, 1872. As a result of novation of the EPC

contract, the arbitration suit filed with the prayer for direction to file the said “EPC Contract” dated 15.3.2013 in Court has developed a “formal defect”. The EPC contract dated 15.3.2013 is buried in the graveyard of settlement agreement dated 3.10.2013 and therefore there is no live dispute/issue between the parties to be referred to the Arbitrator.

23. The plaintiff and the defendant No.1 in Suit No.670/2013 were probably aware of the intricacy of law of arbitration, therefore, when they filed a joint application in terms of clause 4.1 of the settlement, they have relied on and referred to both Rule 1 and Rule 3 of Order XXIII, C.P.C. However, they have not prayed for simple withdrawal of the proceedings though it could have served the purpose. These provisions are below:-

ORDER XXIII
WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim.

(1) At any time after institution of a suit the plaintiff may as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied:--

(a) that a suit must fail by reason of some formal defect, or

(b)

(3).....

(4).....

3. Compromise of suit. Where it is proved to the satisfaction of the Court that the suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded; and shall pass a decree in accordance there with so far as it relates to the suit.

24. In view of the above facts and circumstances as well as the law referred above the Suit No.670 of 2013 and Suit No.68/2013 “must fail” as by virtue of novation of arbitration agreement (EPC contract), the suit has developed a “formal defect” which is fatal. Therefore, the application (CMA

No.11110/2013) can be allowed only for withdrawal of suit, if so desired by the parties in terms of Rule 1 of Order XXIII, C.P.C. for the reason that once the settlement agreement was executed and even implemented, the proceedings under Section 20 of the Act, 1940 for filing the EPC Contract in Court have become infructuous. The provisions of Rule 3 of Order XXIII, C.P.C. are not applicable to the Arbitration Suit under Section 20 of the Act, 1940. The suit cannot be decreed in terms of agreement dated 30.10.2013 for the simple reason that the parties never intended to get their dispute/issues adjudicated by the Court as they have approached the Court under Section 20 of the Act, 1940 which, as discussed in the case law referred above, does not empower the Court to go beyond the “determination of factum of a real dispute.” In the case in hand the Court has not even determined the factum of real dispute between the parties and, therefore, there is no question of prove of anything to the satisfaction of the Court that even by a lawful settlement agreement the defendant has satisfied the plaintiff in respect of whole or any part of the subject matter of the dispute to attract the provisions of Rule 3 of Order XXIII of the C.P.C.

25. This brings the discussion on the fate of Suit No. 670 of 2013 and Suit No.568 of 2013 to an end and before I pass consent order as agreed by the counsel for the plaintiffs in Arbitration Suit No.708/2013 and in cross Arbitration Suit No.1260/2013, I would like to refer to the last Paragraph of last part of settlement agreement which is reproduced herein below:-

**ARTICLE VII
MISCELLANEOUS**

- 7.1
- 7.2
- 7.3
- 7.4 Notwithstanding anything contained in this Agreement and, in particular, its Sections 2.7 and 4.4, it is expressly understood and agreed that the “Contractor”, or any one of them, shall not be precluded from asserting any right, interest or claim *inter se* whether currently pending, accrued or un-accrued. It is further expressly acknowledged, understood and agreed that if any part

comprising the "Contractor" should choose to pursue any right, interest or claim against the other, it shall not involve PIBT in such proceedings unless it is a necessary and proper party for the purposes of such proceedings in which case the parties in their capacity as the "Contractor" vis-à-vis PIBT shall be responsible for all any and costs incurred by PIBT as a result of such proceedings including but not limited to the professional charges of counsel of PIBT's choice engaged by it for the purpose of such proceedings.

The above clause indicates that both the plaintiff and the defendant No.1 in Suit No.670/2013 had a gut feeling that some of the clauses in the settlement agreement may well be objected to by any part comprising the "Contractor".

26. Therefore, while anticipating "proceedings" from any of the "Contractor" to assert his rights or claim inter se, an implied indemnity was extended to PIBT to protect the rights purchased by PIBT against consideration of settlement amount already paid to the "Contractor." The contents of counter affidavit to the CMA No.11110/2013 in terms of clause 4.1 of the Settlement, the contents of CMA No.11191/2013 in Suit No.670/2013 and the contents of Arbitration Suit No.1260/2013 filed by M/s. Siyahkalem are confirmation of the need of incorporating the above quoted clause 7.4 in the much needed settlement in the larger national interest. Mr. Makhdoom Ali Khan, learned counsel for M/s. Siyahkalem has taken full care of this clause 7.4 in drafting the pleadings to raise inter se claim of his client on the benefits acquired by the "Contractor" under the Settlement Agreement. The rights of M/s. PIBT have not been questioned, threatened or even indirectly involved in whatever proceedings so far initiated by M/s. Siyahkalem. This conduct of the parties re-affirms my belief that the contracting parties to the settlement agreement namely the PIBT and the "Contractor" have faithfully fulfilled their respective duties under the settlement agreement and have no dispute. No dispute, no case under Section 20 of the Act, 1940.

27. In Suit Nos.708 of 2013 filed by M/s. Maqbool Associates and Suit No. 1260 of 2013 filed by M/s. Siyahkalem, applications bearing No.CMA No.6726/2013 and CMA No.11194/2013 respectively under Section 41(b) read with IInd Schedule of the Act, 1940 are pending for confirmation of interim orders. On 30.5.2013 and 07.10.2013 this Court has passed certain interim orders each on these applications which are reproduced in Paras 4 and 7 of this order. In view of the consent of the parties to send their dispute arising out of the joint venture agreement dated 26.03.2012. Pending arbitration the representative of the Contractor namely Syed Masood Hussain Shah shall not receive the pay order handed over by M/s. PIBT to Mr. Ahsan Siddiqui towards settlement amount in terms of the settlement agreement for the benefit of "Contractor" as both the parties to Suit Nos.708 and 1260 of 2013 jointly form Contractor. However, since Mr. Ahsan Siddiqui of E.A. Consultant (Pvt) Ltd., is not party to these proceedings, therefore, Syed Masood Hussain Shah, after notice to M/s. Siyahkalem's counsel namely Mr. Makhdoom Ali Khan, shall facilitate Mr. Ahsan Siddiqui to hand over the same to Nazir of this Court within 7 days of passing of this order under proper receipt. Nazir is directed to take appropriate steps for encashment of said pay order and invest the amount in some profit bearing government scheme for the benefit of the parties on final settlement of their disputes by the Arbitrator or otherwise. M/s. PIBT is also directed to deposit the pay order in the name of Nazir of this Court in the sum of Rs.37,173,977/= towards withholding tax with Nazir within 7 days of passing of this order. M/s. PIBT is further directed to assist the Nazir of this Court, if so required, for encashment of the pay order of settlement amount issued by them in the name of M/s. Maqbool Associates. I have purposely refrained from commenting on the arguments advanced by the respective counsel for M/s. Maqbool Associates (Pvt.) Ltd and M/s. Siyahkalem, with reference their respective interpretation of the various clauses of settlement agreement for the

benefits of their respective clients. The interpretation of the clauses of settlement agreement and the factual and legal position of revocation of authority of Syed Masood Hussain Shah by M/s. Siyahkalem as joint representative of the Contractor would, among other, be a core issue between the parties for determination by the Arbitrator once the joint venture agreement dated 26.3.2012 is filed in Court.

28. In view of the foregoing, CMA No.11110/2013 is disposed off in terms of the observation made in Para 24 above. Consequently, Suit No.670/2013 and Suit No.568/2013 are dismissed along with all the pending applications. CMA No.6726/2013 in Suit Nos.708 of 2013 and CMA No.11194/2013 in Suit No. 1260 of 2013 are disposed of in terms of findings in para 27 above. The Suit No.708/2013 and Suit No.1260/2013 by consent of the parties are allowed and the parties are directed to file original joint venture agreement dated 26.3.2012 in Court within 7 days. Rest of the applications in both the suits are dismissed as infructuous. Consequently, Mr. Justice (Retd.) S. A. Sarwana is appointed Sole Arbitrator for resolution of the dispute between the parties in terms of arbitration agreement and the fee of the Arbitrator shall be decided by the parties in consultation with the Arbitrator.

J U D G E

Karachi, dated
January 13th, 2014

Approved for reporting.

J U D G E