IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No 35 of 2013

Present:
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Muhammad Junaid Ghaffar.

Karachi Fisheries Harbour Authority---------- Appellant

Versus

M/s Hussain (Pvt) Limited---------- Respondent

Date of hearing:	**21.01.2015**
Date of order:	**21.01.2015**
Appellant	**Through Mr.Shaiq Usmani, Advocate**
Respondent	**Through Mr. Muhammad Masood Khan, Advocate.**

JUDGMENT

Muhammad Junaid Ghaffar, J:- Through instant appeal, the appellant has impugned order dated 14.2.2013, whereby on an application filed by the respondent under Section 41 of the Arbitration Act 1940, bearing CMA No.6286 of 2012, the matter has been referred to Arbitration by the Court.

2. At the very outset learned Counsel for the appellant has taken a legal objection with regard to sustainability of the impugned order and has submitted that if the preliminary objection raised by him is decided by this Court in favor of the appellant, he would not press the other objections so raised on behalf of the appellant. Learned Counsel has contended that the learned Single Judge has erred in law by referring the matter to the learned Arbitrator and has allowed the application under Section 20 of the Arbitration Act, 1940 filed on behalf of the

respondent, whereas, record reflects that on the very day, no such application was listed for hearing and only application bearing CMA No.6286 of 2012 filed under Section 41 of the Arbitration Act, 1940, whereby a restraining order was being sought, was fixed for hearing. According to the learned Counsel, the entire Suit has been decided by allowing the application under section 20 of the Arbitration Act, 1940 and the matter has been referred to the Arbitrator. In support of his contention, learned Counsel has placed reliance in the case of ***Qazi Muhammad Tariq versus Hasin Jahan and 3 others*** (**1993 SCMR 1949**) and ***Pehalwan Goth Welfare Council through General Attorney versus District Co-Ordination Officer (DCO) Karachi and 13*** (**PLD 2012 Sindh 110**)

3. While confronted with above objection raised by learned Counsel for the appellant, learned Counsel for the respondent has contended that since the impugned order has been passed after hearing the parties, whereas, all objections raised on behalf of the appellant have been addressed in the impugned order, therefore, the legal objection raised on behalf of the appellant is without any substance. Learned Counsel has further contended that the application Under Section 20 of Arbitration Act, 1940, is heard and decided like an ordinary Suit on the Original side of this Court, therefore, it is not necessary that such application Under Section 20 of the Arbitration Act, 1940 may also be listed for hearing on each date and can be decided any time by the learned Single Judge on the Original side. However, learned Counsel could not controvert such factual or legal position that on the fateful day i.e. 15.1.2013, when the impugned order was passed, the matter was only fixed for hearing of CMA No.6286 of 2012, whereas, the Suit itself was not fixed for final hearing or disposal.

4. We have heard both the learned Counsel on this preliminary legal objection and are of the view that before dilating upon merits of the case, objection taken on behalf of the appellant as discussed hereinabove has to be decided first. Perusal of the impugned order reflects that on 15.1.2013, the matter was fixed for hearing of CMA No.6286 of 2012 filed on behalf of the respondent/plaintiff under Section 41 of the Arbitration Act, 1940, whereby, it was prayed that during pendency of the main application, and in consequence of pronouncement of the Award by the Arbitrators, the appellant/defendants, its employees, agents should be restrained not to induct any new Consultant/Contractor on the project in dispute and also to restrain the defendant from creating any nuisance, harassment with regard to the tenants, earlier inducted as per agreement by the respondent/plaintiff at various shops/office. It was further prayed through the said application that the appellant/defendant be directed not to defame the plaintiff by addressing offensive, derogatory and uncalled for correspondence/communication against the respondent/plaintiff. It appears that there is no dispute with regard to the fact that on the very date i.e. 15.1.2013, the matter was only listed for hearing of CMA No.6286 of 2012 and not for final hearing or disposal of the entire Suit or of application Under Section 20 of the Arbitration Act, 1940. However, perusal of the operating part of the impugned order reflects that the learned Single Judge while allowing the listed application has issued directions to the appellant to file agreement in Court and the dispute between the parties has again been referred for Arbitration by the same Arbitrator, who had earlier decided the issue between the same parties. It would be advantageous to refer the said findings of the learned Single Judge, which reads as under:-

> "The terms "Arbitration Agreement" under Section 2(a) of the Act is defined to mean 'a written agreement to submit present or

> future differences to Arbitration, whether an arbitrator is named therein or not'. The definition proposes submission of present of or future differences. Plural use of difference clearly indicated that there can be more than one differences that may arise, if such is the case then each may be subject matter of separate reference. In the case in hand, there was arbitration agreement in between the parties and earlier the matter was referred to Arbitrator to resolve the dispute, who decided the same by making award, which later on made rule of the Court. In these circumstances, the grievances notified by the plaintiff on the basis of legal notice dated 06.3.2012 are substantial in nature and have arisen on account of unilateral and illegal cancellation of the agreement dated 28.2.2005, which fully covered by Clause 24 of the Agreement.. I, therefore, allow the listed application and direct the defendant to file agreement in Court. Dispute between the parties is again referred to arbitration by the same Arbitrator, who decided the earlier reference for making award within four months. Arbitrator may quote his fees for sanction and approval by this Court, as deemed fit and proper.

5. It will be relevant to examine the case of Hon'ble Supreme Court relied upon by learned Counsel for the appellant i.e. ***Qazi Muhammad Tariq versus Hasin Jahan and 3 others*** (**1993 SCMR 1949**), wherein, it has been held as under:-

> "It seems difficult to support the order dated 27.3.1986 of the trial Court and the orders of the Additional District Judge and the High Court. A perusal of the record indicates that the suit of the appellant was dismissed on a day which was not fixed for its hearing, it was a day appointed for hearing arguments on the application for temporary injunction filed by the appellant. In the absence of the appellant all that the learned trial Judge could do was to dismiss the application for temporary injunction. It could not proceed beyond that and dismiss the suit as well. Quite clearly its order in this regard was without jurisdiction and void. This aspect of the case was noticed neither by the learned Additional District Judge nor by the High Court. The order of dismissal being void all that the appellant was required to do was to call upon the learned trial Court to treat his suit as still pending. We would therefore accept this appeal, set aside the orders of the three Courts below and direct that the suit of the appellant should be treated as still pending and disposed of in accordance with law. The costs in this appeal shall abide by the final event.

6. Similarly in the case of ***Pehalwan Goth Welfare Council through General Attorney versus District Co-Ordination Officer (DCO) Karachi and 13*** (**PLD 2012 Sindh 110**), relied upon by learned Counsel for the appellant, it has been held as follows:-

> "From the perusal of the above order it is abundantly clear that the Court was fully cognizant of the fact that number of applications are fixed for hearing. Court also noted that one Imran Khan Bangash had filed an application informing the Court that the Power of Attorney executed in favour of Dilshad has since been withdrawn and so also the authority of the counsel appointed by him has come to an end yet the Court proceeded to dismiss the applications along with the Suit. It may be observed that application C.M.A No.2263 of 2004 fixed at serial No.1 for orders clearly shows that the Chairman of the appellant's Welfare Council had laid information before the Court that said Dilshad does not any more enjoy the blessing of the Welfare Council/appellant and so also the learned Advocate ought to have refrained from making such statement of no instructions. On the application fixed at serial No.1 for orders either this Court ought to have issued notice of intimation to Mr. Imran Khan Bangash and it seems that no such notice has been issued nor it is so pleaded by the respondents.
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> The crux of the case relied upon by the learned counsel for the appellant fully supports his contention. When the matter is fixed for hearing of the application the Court could attend only such applications, admittedly the Suit was not fixed either for settlement of issues nor it was fixed for evidence of plaintiff which may entail dismissal for non prosecution. Accordingly fortified by the judgment relied upon by the learned counsel for appellant we are of the view that limitation in such cases where very foundation of the order could not be sustained and could not be treated as an order under Order IX, Rule 8, C.P.C. therefore, restoration application would lie under section 151, C.P.C and not under Order IX, Rule 9, C.P.C and limitation governed by the residuary Article 181 of the Limitation Act, and not by Article 163 of the Limitation Act. For the foregoing reasons we would allow this appeal. The application C.M.A No.386 of 2007 stands granted. Consequently order dated 11.8.2004 stands set aside. The matter will be deemed to be at the same stage as on 11.8.2004.

7. It therefore follows that when a matter is listed for hearing of an application before the Court, and not for final disposal or hearing of the main Suit, the Court shall not decide the entire Suit on merits and can only deicide the applications listed before the Court, however, the exception being that the applications not listed are taken up for hearing with the consent of the parties, which admittedly is not the case in the instant matter. Keeping in view hereinabove facts and circumstances of the instant case, and the case law as discussed hereinabove, we are of the view that the objection taken on behalf of the appellant must sustain as on the fateful date when the impugned order was passed on the application Under Section 41 of the Arbitration Act, 1940 filed on

behalf of the respondent, the main suit was not listed for final hearing or disposal. Therefore, while hearing this application, the matter could not have been referred for Arbitration as it amounts to finally deciding the main application / Suit under Section 20 of the Arbitration Act, 1940. In view of such position on 21.1.2015, we had allowed the instant appeal by a short order in the following terms:-

> "For the reasons to be recorded later, instant High Court Appeal is allowed. The matter is remanded back to learned Single Judge to decide the application U/S 20 of Arbitration Act 1940, afresh, after providing reasonable opportunity of being heard to both learned counsel for the parties, preferably, within a period of two months".

8. Above are the reasons in support thereof.

JUDGE

JUDGE

Talib