

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C.M. NO. 3 OF 2023
IN
C.O. No. 48681 of 2023

Qatar Lubricants Company W.L.L. (“QALCO”) & another
Versus
Atif Naeem Rana & Others

J U D G M E N T

Date of Hearing:	24.06.2024
Applicants (in C.M. No. 3/2023) / Respondents No. 1 to 3 (in main petition):	M/s. Iftikhar-ud-Din Riaz, M. Haroon Mumtaz, Ahmad Abdul Rehman, Asfand Mir, Advocates.
Respondent No. 4 (in main petition):	Hafiz Talha, Advocate.
Respondent No. 5 (in main petition):	Zaki Rehman, Advocate.
Petitioners (in main petition) / Respondents (in C.M. No. 3/2023):	M/s. Arshad Tayebaly, Arshad Nazir Mirza, Talha Javed, Saad Amir, Amna Iqbal, Shakoh Zulqarnain, and Nadia Iffat, Advocates.

MUHAMMAD SAJID MEHMOOD SETHI, J.: This is an application filed on behalf of respondents No. 1 to 3 for a stay of proceedings before this Court in the main petition, invoking the provisions of Section 34 of the Arbitration Act, 1940 (**“the Act of 1940”**).

2. Learned counsel for respondents No. 1 to 3 / applicants submits that there is an admitted principal agreement containing an arbitration agreement, with the parties to the proposed arbitration being QALCO and petitioner No. 2 on one side, and respondents No. 1, 2, and 3 on the other. He adds that the applicants have not participated in the proceedings of the main petition prior to filing this application. He argues that this Court is empowered under Section 34 of the Act of 1940 to refer any matter to arbitration and, moreover, the applicants have expressed their willingness to arbitrate; thus, the aforementioned provision is applicable. He maintains that disputes regarding the rectification of the register are arbitrable and that only if the Arbitrator

finds that rectification is required, then should the other matters return to this Court for adjudication. He further submits that disputes concerning the rectification of the register, allegations of fraud, and fraudulent misrepresentation are arbitrable. If such allegations are proven, they render the contract voidable under Section 19 of the Contract Act, 1872 (**“the Act of 1872”**), and not void ab initio under Section 23 of the Act of 1872. He argues that the failure to challenge the arbitration clause contained in the main agreement means that any challenge to the validity or legality of the main agreement does not render the arbitration clause invalid or illegal. He submits that the principle of kompetenz-kompetenz, i.e., the jurisdiction of the arbitrator to determine his own jurisdiction, is now a recognized part of Pakistani law. He adds that international developments in jurisprudence require this Court’s review of these issues to be prima facie; the actual determination of these issues on their merits is to be done by the arbitrator. In support, he has relied upon M.A. Chowdhury v. Messrs Mitsui O.S.K. Lines Ltd. and 3 others (PLD 1970 Supreme Court 373), Messrs Jamal Jute Baling & Co., Dacca v. Messrs M. Sarkies & Sons, Dacca (PLD 1971 Supreme Court 784), Haji Soomar Haji Hajjan v. Muhammad Amin Muhammad Bashir Ltd. (1981 SCMR 129), House Building Finance Corporation v. Shahinshah Humayun Cooperative House Building Society and others (1992 SCMR 19), Messrs Eckhardt & Co, Marine GmbH v. Muhammad Hanif (PLD 1993 Supreme Court 42), M/s. Uzin Export & Import Enterprises for Foreign Trade v. M/s. M. Iftikhar & Company Limited (1993 SCMR 866), Director Housing, A.G’s Branch, Rawalpindi v. M/s. Makhdam Consultants Engieners and Architects (1997 SCMR 988), Muratab Ali and another v. Liaquat Ali and another (2004 SCMR 1124), Karachi Dock Labour Board v. Messrs Quality Builders Ltd. (PLD 2016 Supreme Court 121), Messrs Mastersons through its Partner v. Messrs Ebrahim Enterprises and another (1988 CLC 1381), Amanullah Piracha and another v. Mrs. Tasneem Baig and another (1988 MLD 1552), Messrs Aswan Tentage and Canvas Mills Ltd., Lahore v. Messrs M.A. Razzaq & Company (1993 MLD 243), Messrs M.A. Khan & Co. v. Messrs Pakistan Railway Employees’ Cooperative Housing Society Ltd. (1996 CLC 45), ORIX Leasing Pakistan Ltd. v. Colony Thal Textile Mills Ltd. (PLD 1997 Lahore 443), Pakistan Water & Power Development Authority v. Kot Addu Power Co. Ltd. etc. (PLJ 2000 Lahore 1613), Civil Aviation Authority, Quaid-e-Azam International Airport, Karachi v. AER Rainta International Pakistan (Pvt.) Ltd., Karachi (2003 YLR 1523), Lithuanian Airlines v. Bhoja Airlines (Pvt.) Ltd. and others (2004 CLC 544), Aurangzeb Khan v. Dabagh (Pvt.) Ltd. (2008 CLD 697), Messrs Gandhara Consultants (Pvt.) Ltd v. Pakistan Defence Officer’s Housing Authority, Karachi (2010 CLC 506), Mst. Surriya Rehman through Attorney v. Siemens Pakistan Engineering Company Ltd. through Chief Executive Officer/Managing Director and another (PLD 2011 Karachi 571), Karachi Water and Sewerage Board through Authorized Representative v. Messrs Karachi Electric Supply Corporation and 3 others (2012 CLD 1225), Lakhra Power Generation Company Limited (LPGCL) v. Karadeniz Powership Kaya Bey (2014 CLD 337), Shaheen Construction Company through Chief Executive v. Fauji Fertilizer Bin Qasim Ltd. through Managing Director (2015 MLD 304), BNP (Pvt.) Limited v. Collier International Pakistan (Pvt.) Limited (2016 CLC 1772), Tanzela Butt v. Additional District Judge, Sargodha and others (2018 MLD 320), Pakistan Real Estate Investment and Management Company (Pvt.) Ltd. v. Sohail

A. Khan, Associates-Assign JV through Authorized Representative and another (PLD 2018 Islamabad 115), *Orient Power Company (Private) Limited through Authorized Officer v. Sui Northern Gas Pipelines Limited through Managing Director* (PLD 2019 Lahore 607), *Ovex Technologies (Private) Limited v. PCM PK (Private) Limited and others* (PLD 2020 Islamabad 52), *Mst. Zahida Parveen v. Lamrey Ceramics (Pvt.) Limited and others* (2021 CLD 967), *Orient Power Company (Private) Limited through Authorized Officer v. Sui Northern Gas Pipelines Limited through Managing Director* (2021 CLD 1069), *Samson Group of Companies v. Panther Developers and others* (2022 CLD 932), *Russell v. Russell* [(1880) 14 Ch D 471], *Heyman and another v. Darwins, Limited* [(1942) AC 356], *Firm Karam Narain Daulal Ram and another v. Messrs Volkart Bros. and another* [AIR (33) 1946 Lahore 116 Full Bench], *Shiromani Sugar Mills Ltd. v. Debi Prasad* [AIR (37) 1950 Allahabad 805], *Harbour Assurance Co. (U.K) Ltd. v. Kansa General International Insurance Co. Ltd.* [1992 1 LILR 81 (Queen's Bench Division (Commercial Court))], *Harbour Assurance Co. (U.K) Ltd. v. Kansa General International Insurance Co. Ltd and others* [1993] 3 LI ER 897 (CA), *Intntrepreneur PUB Co. (GL) v. East Crown Ltd.* [(2000) 2 LIL Rep 611], *Fiona Trust & Holding Corporation and others v. Privalov and others* [(2007) EWCA Civ 20], *Lee Chee Wei v. Tan Hor Peow Victor and others* [(2007) SGCA 22], *Fiona Trust & Holding Corporation and others v. Privalov and others* [2008] 1 LI LR 254], *Fulham Football Club (1987) Limited v. Sir David Richards & another* [2011] EWCA Civ 855], *Lombard North Central PLC & aur v. GATX Corporation* [2012 EWHC 1067], *Chloro Controls India Private Limited v. Seven Trent Water Purification Inc. and others* [(2013) 1 Supreme Court Cases 641], *Tomolugen Holdings Ltd. and another v. Silica Investors Ltd.* [2015] SGCA 57 and *Republic of Mozambique v. Prinvest Shipbuilding SAL (Holding) and others* (2023 UKSC 32).

3. In contrast, learned counsel for the petitioners/respondents in this C.M. contends that the relevant parties to the disputes in the petition are not parties to the agreement dated 12.04.2020 or any arbitration clause encapsulated therein. He adds that matters for which Pakistani law has given exclusive jurisdiction to a special court or tribunal are not arbitrable. He contends that Section 46 of the Act of 1940 has no nexus with Section 278 of the Companies Act, 2017 (“**the Act of 2017**”). He argues that no jurisdiction in respect of arbitration has been conferred upon this Court functioning as a Company Bench under the Act of 1940, the Act of 2017, or Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973 (“**the Constitution of 1973**”). He maintains that the provisions of the Act of 2017, which confer exclusive jurisdiction over certain company-related matters to this Court, including the instant matter, have been given overriding effect—pursuant to Section 4 of the Act of 2017—over any contrary stipulation contained in any other law, including the Act of 1940. As such, the instant matter cannot be referred to arbitration. He adds that the arbitration agreement is unenforceable under the Act of 2017 read with the Act of 1940. He contends that the agreement dated

12.04.2020 is under challenge, and dispute does not fall within the scope of the arbitration clause. He argues that, in matters pertaining to fraud, any provision ousting the jurisdiction of the Court would be against public policy, and this Court is bound to address the matter itself. He maintains that this Court cannot allow the respondents to hide behind technicalities of procedural law, and that where there is a chance of miscarriage of justice, the Courts have always exercised jurisdiction instead of staying the proceedings pending before them. He argues that all company matters involving factual controversy should be settled by the Courts established under Company Law, and the Company Bench can frame issues and adduce oral and documentary evidence for the adjudication of the disputes. He relies on case law that will be referred to in the main body of this judgment.

4. Arguments heard. Available record perused.

5. The main Company Petition has been filed by the petitioners against the alleged fraudulent transfer of their shareholding to respondent No. 3, i.e. Kausar Rana Resources Private Limited (“KRR”). They seek a declaration that the agreement dated 12.04.2020 was never acted upon and, therefore, is void ab initio and of no legal effect; an investigation into the affairs of respondent No. 3; the disqualification of respondents No. 1 and 2 from the Board of Directors of the Company; and an order restraining them from selling, transferring, or creating any third-party interests in the shareholding, movable assets, and immovable assets of respondent No. 3, under various provisions of the Act of 2017.

6. The agreement dated 12.04.2020 was principally executed between QALCO (Petitioner No. 1) and KRR (Respondent No. 3). However, Fawad Naeem Rana (MD) and Atif Naeem Rana (CEO) are the signatories, acting as representatives of the said companies. As legal entities, the companies can only enter into agreements through authorized representatives or nominees. The arbitration clause also does not reflect the intention of the parties to include the natural persons,

petitioner No. 2 and respondents No. 1 and 2, as parties to it. Moreover, the name of Sameen Naeem Rana (respondent No. 2), the ultimate beneficiary of the alleged fraudulent transfer of shares, does not appear anywhere in the agreement or the arbitration clause. He is a 'third-party beneficiary,' and thus his grievance cannot be referred to arbitration in the event of a dispute. For ease of reference, the arbitration clause is reproduced below:

“13. If any dispute arises under this Agreement which cannot otherwise be amicably resolved between the parties, such dispute shall be submitted to arbitration and conclusively resolved by a single arbitrator appointed by mutual consent, who shall be a retired judge of a High Court or the Supreme Court of Pakistan. Arbitration shall be conducted in accordance with the Arbitration Act, 1940, or any other statutory modification or reenactment then in effect.”

7. The submission of the applicants / respondents No. 1 to 3 in paragraph 13.6 of their Preliminary Written Submissions, that it is also possible to argue that QALCO was acting as Fawad's agent when entering into the Agreement, and that KRR was acting as Atif and Sameen's agent, and so the Agreement is also binding on Fawad, Atif, and Sameen, is contradicted by a plain reading of the text of the Agreement. They have not substantiated such a claim even on a prima facie basis. It would be a novel interpretation to treat a company that has purported to sign an agreement through its human agent as itself being the agent of such agent. The applicants/respondents have also argued that Fawad Naeem Rana and Atif Naeem Rana were acting as agents of QALCO and KRR, respectively, and that they were also acting in their individual capacities. These are self-contradictory and inconsistent pleas.

8. It is well-settled that where all parties to the main petition are not parties to the arbitration clause, which constitutes a separate agreement as per well-established principles of law, bifurcation of judicial action cannot be allowed. This is because it will not only cause inevitable delay in the resolution of the dispute but can also lead to conflicting decisions, increased litigation costs, and harassment of the parties. The right to arbitrate cannot be enforced by anyone who is not a

party to the agreement containing the arbitration clause. In such circumstances, proceedings in the main petition cannot be stayed under Section 34 of the Act of 1940. A non-signatory cannot compel arbitration except under exceptional circumstances. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by them on behalf of their principal, nor are they personally bound by them. Reference can be made to Sukanya Holdings Pvt. Ltd v. Jayesh H. Pandaya & Anr. (AIR 2003 SC 2252), Gulf Iran & Another v. Pakistan Refinery Limited & Ors. [Sindh High Court - Division Bench] (PLD 1976 Karachi 1060), Hidayatullah & Ors. v. Shamimuddin & Ors. [Sindh High Court] (1993 MLD 993), Trading Corp. of Pakistan v. Universal Navigation Pvt Limited (2011 CLD 1642), Geoffery Noel Harry Taunton-Collins v. Robert Cromie & Ors. [England & Wales, Court of Appeal] [1964] ALL ER 332, Messrs K&N International v. Messrs Motorway Operations and Rehabilitation Engineering (Private) Limited (2019 CLC 1613), Aktiengesellschaft v. Intosex (India) Limited and Ors. (AIR 1996 Karnataka 69), Pakistan Refinery v. Transworld Oil (PLD 1981 Karachi 15), Haji Muhammad Zaffar v. Muhammad Sikandar and 2 others (2000 YLR 2503) and Messrs M.A Nawaz & Co. (REGD.) and 5 others v. National Bank of Pakistan through its Regional Manager, Multan (1970 SCMR 234), Devon MD v. Double Medical International (Hong Kong) Limited and Double Medical Technology 2023 WL 8458242 (E.D. Pa. Dec. 6, 2023) and Vingro Developers Pvt Ltd v Nitya Shree Developers Pvt Ltd (ARB.P. 667/2023).

9. Even if the arbitration clause is assumed to be valid for the resolution of the dispute at hand, respondents No. 1 and 2 and petitioner No. 2 still cannot invoke it, as they are not parties to it. The Court may refuse to stay the proceedings if it is satisfied that there is no sufficient reason to refer the matter to arbitration and that a substantial miscarriage of justice or inconvenience to the parties would occur. Staying proceedings under Section 34 is discretionary, not mandatory.

If the portion of the claim that falls within the scope of the arbitration clause is small compared to the overall claim, and essentially the same evidence (or at least overlapping evidence) would need to be presented to establish both, then the proceedings should not be stayed, even for the claim that may be referable to arbitration. There is no fixed rule for determining when a stay should be refused. Each case has different facts, and the decision to grant or refuse a stay depends on the specific facts and circumstances of each case. The Court can make an objective assessment and decide whether the stay of legal proceedings should be granted or refused. The provisions of Section 34 of the Arbitration Act, 1940, imply that the Court should first examine whether the arbitration clause applies to the dispute. If it does, the Court must determine whether the nature of the dispute is such that the ends of justice would be better served by a decision of the Court or by the private forum chosen and agreed upon by the parties. Reference is made to Vertiv Pakistan (Pvt) Ltd and Vertiv (Singapore) v. NTG Pakistan (Pvt) Ltd (2021 CLC 377), Eckhardt & Company v Muhammad Hanif (PLD 1993 Supreme Court 42), Mst. Surriya Rehman through Attorney v. Siemens Pakistan Engineering Company Ltd. through Chief Executive Officer / Managing Director and Another (PLD 2011 Karachi 571), and Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners (PLD 1981 Supreme Court 553).

10. The resolution of disputes through mediation (under Section 277 of the Act of 2017) and the referral of matters/disputes to arbitration (under Section 278 of the Act of 2017) are options available to companies. The powers to rectify the register (under Section 126 of the Act of 2017) and to award punishment for fraudulent entries (under Section 127 of the Act of 2017) lie with the Court when the rights of third parties are likely to be affected. Similarly, issues of oppression and mismanagement (under Section 286 of the Act of 2017), investigation into the affairs of the company (under Section 257 of the Companies Act), and the winding up of a company (under Sections 301

and 304 of the Act of 2017) fall within the exclusive jurisdiction of the Court when the rights or interests of third parties, who are likely to be affected and are not parties to the arbitration agreement, are involved. Besides Company Law, other matters where exclusive jurisdiction has been conferred on a special Court or Tribunal are not arbitrable, especially when the rights of third parties are likely to be affected. Examples include summary suits under Order XXXVII CPC, banking recovery suits, rent matters, and suits related to mortgages., etc.

This Court is endowed with all requisite powers under Section 6 of the Act of 2017 to determine any and all matters which come before it, including any question necessary or expedient to decide for the rectification of the register of members of a company under Section 126. The said provision has conferred wide-ranging powers to record evidence, etc. Additionally, Sections 256 and 257 of the Act of 2017 empower the Commission and the Court respectively to investigate into the affairs of a company, which is a sovereign function delegated to the Commission and the Court and thus cannot be exercised by the arbitrator.

It has been established by the Hon'ble Supreme Court of Pakistan that matters involving third-party rights and factual controversies related to companies should be resolved by the courts established under company law. The Company Court has the authority to frame issues and admit both oral and documentary evidence for the adjudication of the dispute. Reliance is placed upon Mian Javed Amir v. United Foam Industries (Pvt) Ltd (2016 SCMR 213). In an application for rectification of the register, the High Court is also empowered to decide any questions relating to the title of any party involved and may generally address any issues necessary and expedient for the rectification of the register. Reference is made to Lt. Gen (Retd) Mahmud Ahmad Akhtar v. Allied Developers (Pvt) Ltd. (2022 CLD 718).

11. Needless to say, there can be no dispute with the proposition that the existence of an agreement between the parties to refer any dispute to arbitration does not oust the jurisdiction of ordinary courts. Nor does the party asserting the existence of an arbitration agreement have an absolute right to a stay of the pending legal proceedings. In such cases, the court has the discretion to either stay or refuse to stay the legal proceedings, especially when the rights of third parties are likely to be adversely affected. This court is not inclined to address other questions raised by the learned counsel for the applicants as well as the opposing side, such as whether allegations of fraud and fraudulent misrepresentation in company matters are arbitrable? who will decide the question of arbitrability, the judge or the arbitrator or through the application of the principle of *kompetenz-kompetenz* while acting as a Company Bench? These issues shall be dealt with in other appropriate proceedings. The case law relied upon by the learned counsel for the applicants/respondents No. 1 to 3 is based on distinguishable facts and is therefore not applicable to the unique facts and circumstances of this case.

12. In view of the above, the instant application, being devoid of any substance, is hereby **dismissed**.

(Muhammad Sajid Mehmood Sethi)
Judge

APPROVED FOR REPORTING

Judge

A.H.S. / Sultan