**Form No. HCJDA - 38**

# JUDGMENT SHEET
# IN THE LAHORE HIGH COURT, LAHORE
# JUDICIAL DEPARTMENT

***F. A. O. No. 79041 of 2023***

***Punjab Mashhad Meat Complex and another***

***Versus***

***Mashhad Meat Industrial Complex***

***J U D G M E N T***

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|---|---|
| ***Date of hearing:*** | ***12.03.2024*** |
| ***Appellant(s) by:*** | ***Mr. Muhammad Naeem Sehgal and Mr. Huzaifa Naeem Sehgal, learned Advocates.*** |
| ***Respondent by:*** | ***Mr. Ijaz Ali Akbar Sabzwari, learned Advocate.*** |

***Sultan Tanvir Ahmad, J:***– Through this appeal order dated 24.11.2023 has been challenged, whereby, application dated 30.10.2023 of the appellants filed under section 34 of the Arbitration Act, 1940 (the '***application***'), for staying the proceedings in suit titled "*Mashhad Meat Industrial Complex versus Punjab Mashhad Meat Complex and*

*another*" and directing the parties to pursue their remedies in terms of the arbitration clause, has been rejected.

2. On 25.09.2023 the respondent / M/s Mashhad Meat Industrial Complex instituted a suit for recovery of Rs.4,550,862,285/- being the cost of various machineries and equipment, installation and training expenses, loss of profits, damages arising out of breach of commitments and rendition of accounts against the appellants with the averments that in the year 2010, appellant No. 2 and the respondent agreed to establish a modern slaughterhouse in Lahore; that in pursuance thereof the various arrangements were made, however, the disputes arose that resulted into filing of suit by the respondent for recovery of Rs.2,731,906,812/-; that during pendency of the suit meetings and deliberations took place in Mashhad, Iran and Lahore, Pakistan that resulted into a new arrangement in the shape of partnership deed dated 07.01.2015 (the '***partnership deed***') between the respondent and appellant No. 2; the earlier suit was withdrawn on 16.02.2015 but even after, the relationship could not improve, therefore, the respondent was forced to make a decision to withdraw investment from Punjab Mashhad Meat Complex / appellant No. 1 for which notice dated 29.04.2019 was given in terms of clause 4.3.12 of the *partnership deed* offering to purchase the share of the respondent in the *partnership deed*, before selling or transferring of the share to a third party; upon which through letter dated 13.04.2022 the Punjab Agriculture & Meat Company Limited / appellant No. 2 showed

willingness to purchase its share as per clause 4.3.12 of the *partnership deed* but then after making excuses turned hostile towards the respondent. It is also pleaded in the suit that the entire venture was actually a ploy to acquire technical awareness and expertise from respondent as well as the appellants have failed to adhere the terms of the *partnership deed*; that the appellants have violated their duties and obligations in connection with the affairs of the partnership imposed under clause 4.2 of the *partnership deed*. Several other illegalities on the part of the appellants have also been alleged in the suit.

3. On 30.10.2023 the *application* was instituted, which was contested by the respondent raising objections that the appellants by their conduct and by seeking an adjournment for filing written statement have taken steps in the proceedings, therefore, they have abandoned their right to invoke the arbitration clause in the *partnership deed*. The learned Special Court for commercial cases (the '***Commercial Court***') vide its order dated 24.11.2023 concluded that the matter cannot be stayed under section 34 of the Arbitration Act, 1940 (the '***Act***') and dismissed the *application*. Being aggrieved of the same, the present appeal has been preferred.

4. Mr. Muhammad Naeem Sehgal, learned counsel for the appellants, has submitted that while passing the impugned order, the learned *Commercial Court* has failed to appreciate that the appellants have not taken any step in the proceedings rather the opportunities availed before the said learned Court were primarily for the purposes of filing an

application under section 34 of the *Act*; that the learned *Commercial Court* failed to apply judicial mind. It is further submitted that the learned *Commercial Court* has wrongly made reference to the previous suit which has no nexus with the alleged violation of the terms of the *partnership deed* and it is also ignored that clause 15 of the *partnership deed* clearly stipulates that the same constitutes the entire understanding between the parties with respect to the subject matter. It is further submitted that arbitration clause in the *partnership deed* covers the entire aspects of the disputes raised in the suit, thus, the learned *Commercial Court* fell to an error while rejecting the *application*. Learned counsel for the appellants has relied on various judgments in order to support his arguments.

5. Conversely, Mr. Ijaz Ali Akbar Sabzwari, learned counsel for the respondent has submitted that even before filing the suit, several notices and reminders including notices dated 29.04.2019, 07.05.2019, 13.04.2022 and email dated 23.04.2022 with respect to sale of the shares have been issued, however, initial inaction, then false excuses and finally the hostile attitude of the appellants are sufficient to show that they are not inclined to proceed with the arbitration. It is further argued that it is settled law that defender of a suit must show intention to invoke arbitration clause on the very first opportunity and without delay; that even seeking an adjournment to file a written statement amounts to a step in the proceedings of the suit, precluded the

defendant to insist upon arbitration clause, as already elaborated in several judgments.

6. I have heard the arguments and record has been perused with the able assistance of learned counsel for the parties.

7. The precise questions before this Court emerging out of the contest are if the appellants have taken such steps in the proceedings of the suit that preclude them from invoking the arbitration clause in the *partnership deed* or if the proceeding in the suit is required to be stayed under section 34 of the *Act,* in the circumstances of the case. For ready reference and convenience, the relevant provision of *Act* is reproduced as under: -

> *34. Power to stay legal proceedings where there is an arbitration agreement.-- Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred,* ***any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings****: and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary, to the proper conduct of the arbitration such authority may make an order staying the proceedings.*
>
> (Emphasis Supplied)

8. The above provides that a party to the legal proceedings can file an application to stay the proceedings against him before filing a written statement. Besides filing written statement, the above provision envisages that the application under section 34 of the *Act* should be filed *before taking any other steps in the proceedings*. There appears to be a judicial consensus amongst the Courts that there has to be unequivocal and unambiguous intention on the part of the defendant to proceed with the suit and to give up the right to invoke the arbitration clause. An application seeking time to file written statement is normally taken as displaying such intention and an act or step in the proceedings to preclude a party to seek stay on the basis of arbitration clause, in the absence of anything contrary. In case titled "*Pakistan International Airlines Corporation versus Messrs Pak Saaf Dry Cleaners"* (**PLD 1981 Supreme Court 553**) the Supreme Court held that an application for adjournment providing time to file written statement *prima facie* is a step towards proceedings but subject to a chance to the applicant and burdening him to show as to why effect should not be given to this *prima facie* meaning or presumption. Here, I would like to reproduce the following extract from the said judgment: -

> "*In my opinion, the* ***true tests*** *for determining whether an act is a step in the proceedings is not so much the question as to whether the party sought an adjournment for filing the written statement although of course that would be a satisfactory test in many cases but* ***whether taking into consideration the contents of the application as well as all***

> ***the surrounding circumstances that led the party to make the application display an unequivocal intention to proceed with the suit, and to give up the right to have the matter disposed of by arbitration. An application of such nature, therefore, should prima facie be construed as a step in the proceedings within the meaning of section 34, and the whole burden should be upon the party to establish why effect should not be given to the prima facie meaning of the application****."*
>
> (Emphasis Supplied)

9. In case titled "*Rachappa Guruadappa, Bijapur versus Gurusiddappa Nuraniappa and others"* (**1990 MLD 1383**) it has been held that a step taken in the suit, disentitling a party from obtaining stay of a proceeding, has to be a step that should display unequivocal intention to proceed with the suit and to abandon the benefit of arbitration agreement or the right to get the dispute resolved by the arbitration. It is also resolved that not every step in the proceedings would come in the way of enforcement of arbitration agreement and the step must be clear and unambiguous that manifest the intention to waive off the right under the arbitration agreement. It will be beneficial to reproduce paragraphs No. 11 and 12 of *Rachappa Guruadappa, Bijapur* case (***supra***): -

> *"11. In our opinion, that is a correct position in law as declared by this Court, and it is in consonance with the principles that have been followed under S. 4 of the English Arbitration Act, 1889. At page 106 of the said report this Court observed that the "general words "taking any other steps in the proceedings' just follow the specific expression 'filing a written*

> *statement 'and both are used for achieving the same purpose". Hence, this Court was of the opinion that the latter expression must be construed ejusdem generis with the specific expression just preceding to bring out the ambit of the latter. The expression 'written statement' is a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff. The expression 'taking any other steps in the proceedings' does not mean that every step in the proceedings would come in the way of enforcement of the arbitration agreement. The step must be such as would clearly and unambiguously manifest the intention to waive the benefit of arbitration agreement.*
>
> *12. From the order-sheet in this case and as noted by the learned trial Judge, it appears that the counsel appearing for the petitioner had sought adjournment "specifically for filing written statement" and obtained time for more than one occasion for such purpose. It was not only the time taken to consider whether written statement should be filed as a defence to the plaint to enter into an arena of controversy, but it was time taken to have the matter decided by the suit."*
>
> (Underlining is mine)

10. In case titled "*Dunichand Sons and Co. v. Fort Gloster Industries Ltd."* (**A.I.R. 1962 Calcutta 541 (V 49 C 116**), test was laid down to determine if a particular act or a step in the proceedings displays requisite intention to proceed with the suit. Just appearance in a suit without disclosing a clear intention to discard the contractual right to get a matter resolved through arbitration has been categorized as *not a step in the proceedings* for the given purpose. In case titled "*Badsha Meah Sowdagar versus Nurul Haq and others"* (**PLD 1967 Dacca**

**250**), where a defendant, of suit for dissolution of partnership and for accounts, moved an application with the prayer for time to file objection to an application for appointment of receiver and then instead filed an application under section 34 of the *Act,* learned Division Bench of Dacca High Court held that merely the prayer to file an objection to an application for appointment of receiver, under the given circumstances, does not amount to acquaintance in the proceedings, therefore, was not very material so that the party could be excluded to file an application for stay.

11. In case titled "*Messrs Pakistan Associates Construction Ltd. versus WAPDA and another*" (**1989 MLD 203**) a formal order was passed by the learned Court for filing written statement, after an adjournment was sought by the defendant. This Court reached to the decision that a routine adjournment may not necessarily ascribe to be a step in the proceedings, in the absence of any written application for that precise purpose. No intention to waive off the right to get the matter resolved through arbitration was inferred by the Court. It is appropriate to reproduce the following extract from *Messrs Pakistan Associates Construction Ltd. case* ***(supra)***: -

> *"...Reliance was placed on Board of Intermediate and Secondary Education, Sargodha and another v. Messrs Akhtar Brothers (1981 CLC 221) for the view that even an oral request for adjournment amounted to a step in aid of proceedings and submission to the jurisdiction of the Civil Court. The record does not support this contention inasmuch as there was no request proceeding from the respondents for*

*adjournment.* ***It appeared to have been an order passed in the routine without showing that the adjournment was being granted on a pointed request made by the respondents in that behalf. The rule on the point is more succinctly stated in Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners (P L D 1981 SC 553 (564)) where a definite test was laid down to see if the intention really was to submit to the jurisdiction of the Civil Court and not abide by the Arbitration clause. Indeed in that case much turned upon the application made for adjournment and it was held that there was no indication on the part of the defendants to acquiesce in the proceedings before the Civil Court****. In this case, as already remarked, there was no such application so as to determine the true intent of the respondents to take part in the suit by filing a written statement. The adjournment granted in routine may not be necessarily ascribed to a sort of oral request of the respondents. In the absence of any written application for that purpose, it is not easy to infer against the respondents. In fact there are a few other cases like Island Textile Mills Ltd., Karachi v. V./o Techno-expert and another (1979 CLC 307) and Province of Punjab through Secretary to Government of Punjab, Communication & Works Department, Lahore and 4 others v Ehsan Fazal & Company, Lahore through Partner (1986 CLC 2800) wherein even applications for temporary injunction etc. etc. were held not to be steps in aid of the proceedings in the suit. Acting upon that analogy, one may well observe that in the case in hand where no application either for adjournment or for temporary injunction or for any other ancillary relief was made, the respondents did not disclose an intractable intention to file written statement...''*

(Emphasis Supplied)

12. Returning to the facts of the case. The respondent filed the suit on 25.09.2023 when notices

were issued to the appellants and the case was fixed for 28.09.2023 but till then the summons were not received back either served or unserved. Resultantly, this process was repeated for 11.10.2023 when for the first time the appellant-side entered appearance and filed power of attorney. The order of the said date reflects that only copies of the suit were handed over to the learned counsel of the appellants and at the same time direction was issued by the learned *Commercial Court* to the respondent / plaintiff to provide all the documents appended with the suit. The said order reads as follows: -

"11-10-2023 کونسل مدعی حاضر۔
کونسل مدعا علیہم حاضر۔
مدعا علیہم کی جانب سے مسٹر محمد نعیم سہگل ایڈووکیٹ نے وکالت نامہ داخل کیا ہے۔ کونسل مدعا علیہم نے صرف کاپی دعویٰ وصول پایا ہے۔ مدعی کو ہدایت کی جاتی ہے کہ کاپی دستاویزات فراہم کرے ۔ بغرض انصاف ملتوی ہو کر برائے ادخال کاپی دستاویزات دعویٰ منجانب مدعی مسل آئیندہ بتقرر 17-10-23 کیلئے پیش ہووے۔"

13. On the next date of hearing, the copies of those documents which were directed to be given to the appellants were handed over. At the same time a request of the appellants has been recorded for an adjournment to file written statement. Since both sides have raised dispute by giving different meanings to this particular order, therefore, I would like to reproduce order dated 17.10.2023 that reads as under:-

> *"ORDER*
> *17.10.2023*
> *Present Learned counsels for the parties. Copies of annexures have been*

> *received by the representative of defendants. As per request, adjourned for submission of written statement written reply of application u/o 40 rule 1 r/w Sec. 94 & 151 CPC for 30.10.2023."*

14. Mr. Muhammad Naeem Sehgal, learned counsel for the appellants, has clarified that on the said date of hearing, just the copies of the annexures were received and no particular request to file written statement was made. Learned counsel for the appellants has contended that this request was recorded as a routine matter. He has also explained that signatures on the margin of the order-sheet were given in order to confirm that the annexures have been received and when the case was fixed on 30.10.2023 an application under section 34 of the *Act* was moved. Mr. Ijaz Ali Akbar Sabzwari, learned counsel for the respondent, has submitted that the above is sufficient to be construed as a step towards proceedings.

15. Admittedly, till 17.10.2023 the appellants were not even handed over the entire attachments of the suit, in terms of the previous direction dated 11.10.2023. On the crucial date, much focused by the learned counsel for the respondent, the appellants were not in possession of the entire material enabling them to form an opinion or to make a desire to file the written statement and / or to waive off the right of arbitration. The appellants after having an opportunity to go through the entire documents have not wasted any time and instituted the *application* on the very next date of hearing. Though applications

seeking time to file written statement in some cases are taken as a requisite intention to waive off a right to get the causes resolved through arbitration but as already discussed above, the Supreme Court of Pakistan in *Pakistan International Airlines Corporation* case ***(supra)*** has not taken such step as conclusive proof of this intention rather as *prima facie* indication only and burdening the one making request to stay to show otherwise.

16. The request for adjournment for submission of written statement is recorded by the learned *Commercial Court* on the day when the said learned Court is also confirming that the entire attachments to the suit were not available with the appellants and the same were handed over to them on the given day, therefore, I am of the opinion that the learned *Commercial Court* has wrongly construed the intention of the appellants to discard their right to invoke arbitration clause available in the *partnership deed*. The facts, circumstances of the case and explanation given by the appellant are so that any initial presumption arising against the appellants stands dislodged.

17. Mr. Ijaz Ali Akbar Sabzwari has next submitted that arbitration clause does not cover the matter in dispute. In case titled "*POSCO International Corporation through Authorised Officer versus Rikans International through Managing Partner / Director and 4 others"* (**PLD 2023 Lahore 116**) it has been observed that an arbitration agreement does not only impose 'positive' obligation upon the parties to proceed with the disputes but also creates negative

undertaking for the parties which obligates them not to bring any claim within the arbitration agreement's scope in a forum other than arbitration. Similar view was adopted by the Supreme Court of Pakistan in case titled "*S. M. Hashim Hussain versus Pakistan Defence Officer's Housing Authority"* (**2005 SCMR 1782**). Mr. Sabzwari though has adopted the above stated stance but I have not found that his stance has any support from the record. The clause in question (clause 6 of the *partnership deed*) reads that in case of any dispute or difference arising between the parties in connection with the *partnership deed* or the transaction contemplated therein, the dispute is to be referred to the arbitration as provided in clause 4.3.17 and the venue of the arbitration is settled to be the city of Lahore. Clause 4.3 of the *partnership deed* relates to the management of the partnership. The suit, besides other, contains allegation of mismanagement. This very clause (more particularly sub-clauses 4.3.12 and 4.3.13) also provides for the mechanism if one of the parties to the partnership desires to sell or assign or withdraw from its share in the partnership. Sub-clause 4.3.17 which is being referred in dispute resolution / arbitration clause provides that in case of any deadlock in mutual consultation process between the parties, the matter is to be referred to a committee comprising of the Secretary Livestock & Dairy Development Department Punjab and Counsel General of the Islamic Republic of Iran in Lahore, for amicable resolution. Learned counsel for the respondent has failed to convince if there is any issue between the parties that is not capable of being

handled or resolved by the arbitrators or if it is not covered under clause 6 i.e. the arbitration clause of the *partnership deed*.

18. The learned *Commercial Court* somehow observed that in some previous suit the application under section 34 of the *Act* was not filed. The learned Court also referred to certain letters or emails by the respondent-side, which were written prior to institution of the suit. The referred communication, prior to institution of the suit has no bearing, as section 34 of the *Act* clearly provides that an application for stay can be instituted at any time after commencement of legal proceedings. Similarly, the suit being relied for ascertaining the intention to waive off the right of arbitration relates to the period prior to the *partnership deed* which now requires the disputes to be resolved through arbitration. The said suit of the respondent pertains to the year 2014 which was disposed of on 16.02.2015 on the basis of the *partnership deed* which was formally executed on 07.01.2015, thus, the present suit cannot be termed as a continuation of the earlier suit, for the purposes of ascertaining the situation in hand, as mistakenly has been observed by the learned *Commercial Court*. The preamble of the *partnership deed* gives it a superseding effect besides the fact that clause 15 of the *partnership deed* provides that the same constitutes the entire understanding between the parties with respect to the subject matter of the *partnership deed*.

19. For the reasons given above, this appeal is ***allowed*** and the order assailed is *set-aside*. The

proceedings in the suit are stayed. No order as to costs.

**(**Sultan Tanvir Ahmad**)**
Judge

Announced in open Court on 16.04.2024.

Approved for Reporting

*Iqbal**

Judge