

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE MIAN SAQIB NISAR

MR. JUSTICE MANZOOR AHMAD MALIK

CIVIL APPEAL NO.417-L OF 2009

*(Against the judgment dated 16.3.2004 of
the Lahore High Court, Lahore passed in
C.R.No.368-D/1998)*

Province of Punjab through Secretary to Government of the Punjab,
Communication & Works Department, Lahore and another

...Appellant(s)

VERSUS

M/s Muhammad Tufail & Co. through Muhammad Tufail (deceased)
through Legal Heirs

...Respondent(s)

For the appellant(s): Mr. Subah Sadiq Wattoo, A.A.G. Punjab

For respondent No.1(ii): In person

Amicus Curiae: Mr. Rassal Hassan Syed, ASC
Ms. Ayesha Hamid, ASC

Date of hearing: 06.09.2016

...

JUDGMENT

MIAN SAQIB NISAR, J:- In this appeal, with leave of the Court, the only legal point involved is, which Court shall have the territorial jurisdiction in terms of Section 2(c) and Section 31(1) of the Arbitration Act, 1940 (*the Act*) where an Arbitration Award could be filed and the same could be made Rule of the Court.

2. In the above context, the brief facts are that on 16.12.1982 the work of widening and strengthening of Jhang-Toba Tek Singh Chichawatni Road in Toba Tek Singh District was awarded to the respondent by appellant No.2 which (*work*) was completed on 30.12.1984. Thereafter a dispute arose on account of the respondent

challenging an amount deducted by the appellant no.2 from its final bill. The respondent invoked the arbitration Clause 25-A of the agreement inter se the parties. On 29.6.1993 the Chief Engineer (South) of the Highways Department appointed Mr. Muzaffar Iqbal Sheikh Director (Admin) of the Highways Department as the Sole Arbitrator. The learned Arbitrator entered upon the reference and arbitral proceedings were held at Lahore. Appellant No.2 filed an annotated reply to the respondent's claim and was represented by the Executive Engineer in person at the arbitral proceedings. On 1.11.1993 the Arbitrator passed an Award at Lahore in favour of the respondent and directed appellant No.2 to pay a sum of Rs.57,534.73 to the respondent within two months. The respondent filed an application under Sections 14 and 17 of the Act before the Civil Court at Lahore for the purposes of making the Award the Rule of the Court which was resisted by the appellant *inter alia* on the ground that the Courts at Lahore did not have the territorial jurisdiction, however *vide* judgment and decree dated 23.10.1995 the Civil Court, Lahore dismissed the said application on merits. Civil Appeal No.8/1996 of the respondent against such judgment and decree succeeded and *vide* order dated 5.5.1997 the learned Additional District Judge, Lahore made the Award the Rule of the Court. The present appellants challenged the decision *ibid* through Civil Revision No.368-D/98 before the Lahore High Court, Lahore which was dismissed *vide* the impugned order dated 16.3.2004. *Vide* order dated 17.06.2009 leave was granted by this Court inter alia to consider the question(s) mentioned in the opening portion of this opinion (*the point about the award not being properly stamped was not pressed by the appellants' counsel*).

3. The learned AAG Punjab has argued that the impugned judgment was illegal as it was based on Section 20 of the

Code of Civil Procedure, 1908 (CPC) which (*provision*) is inapplicable to arbitral proceedings as the jurisdiction of the Court in such a case is exclusively governed by Section 2(c) and Section 31(1) of the Act (*being special law on the subject*). He argued that the Courts at Lahore lacked jurisdiction in the matter as the subject matter of the reference was related to Toba Tek Singh because the contract was signed and executed at Toba Tek Singh. He relied on Ravi Glass Mills Ltd., Lahore Vs. I.C.I. Pakistan Power Gen Ltd. (2004 YLR 250 = PLJ 2004 Lah 1818), M/s Nalanda Ceramic & Industries Ltd. Vs. M/s N. S. Choudhury and Co. (P) Ltd. (AIR 1977 SC 2142) and Hitachi Limited and another Vs. Rupali Polyester and others (1998 SCMR 1618).

4. The learned counsel for the respondent contended that the courts at Lahore would have jurisdiction on account of the fact that the award was made at Lahore and because the head office of the appellant department was located at Lahore. He relied on Habib & Sons Ltd. & another Vs. Chaudhry Chiragh Din (NLR 1984 UC 352), Faqir Muhammad Vs. Pakistan through Secretary, Ministry of Interior and Kashmir Affairs Division, Islamabad (2000 SCMR 1312), Messrs Kadir Motors (Regd.), Rawalpindi Vs. Messrs National Motors Ltd., Karachi and 3 others (1992 SCMR 1174), Abdul Qayyum Khan Vs. Government of Punjab, Local Government and Rural Development Department through Secretary and another (PLD 2003 SC 536) and Federation of Pakistan through Secretary-General, Ministry of Defence and another Vs. Sqn. Ldr. (R) Muhstaq Ali Tahirkheli and another (PLD 2003 SC 930).

5. Mr. Rassal Hassan Syed, learned *amicus* contended that in Section 31(1) of the Act the words "the matter" precede the word "reference" and therefore the place of the arbitration proceedings is not

relevant and what matters is that the cause of action occurred at Toba Tek Singh and the "matter" which is the subject of the reference relates to Toba Tek Singh, therefore it is the Courts there which will have jurisdiction on the basis of the cause of action arising there **but** Section 31(1) of the Act requires that the application to make an Award the Rule of the Court be filed where the suit in respect of the dispute or the subject matter of the reference may have been filed and in this regard the courts at Lahore do have jurisdiction as the principal office of the appellant was located at Lahore. He relied on Province of the Punjab through Secretary to the Government of Punjab, Communication and Works Department and 2 others Vs. Messrs Unique Traders through Najam Maqsood, Government Contractor (MLD 2007 Lah 531), Messrs Lilley International (Pvt) Ltd. Vs. Messrs National Highway Authority (PLD 2012 Sindh 301), Messrs Bakhtawar Singh Balkrishan Vs. Union of India and others (1989 MLD 1277) (*Supreme Court of India judgment*), Madhao Deshpande Vs. Madhav Dharmadhikaree (1989 MLD 2389) (*Supreme Court of India judgment*), Messrs Trade Masters (Pvt.) Ltd. through Chief Executive Vs. Messrs Shel Pakistan Ltd. through Chief Executive (2010 CLD 670) and Ghulam Abbas Vs. Trustees of the Port of Karachi (PLD 1987 SC 393).

6. Ms. Ayesha Hamid, learned *amicus* argued that Section 31(1) of the Act is subject to the provisions of the Act which means that the definition of a Court given in Section 2(c) of the Act is to be read into the substantive provisions of Section 31(1) which sets out which Court is to exercise jurisdiction in respect of an application to file an award in Court; the plain reading of Section 2(c) *ibid* requires an exercise of imagination whereby it should be considered which Court would exercise jurisdiction in the absence of an arbitration agreement.

According to her the Courts at Lahore would have jurisdiction on account of Section 20 CPC which is predicated on the residence or place of work of the defendants **and** on the place of occurrence of the cause of action. The Act is a special law governing arbitration and therefore it carves away a portion of the original jurisdiction of the courts of plenary jurisdiction with respect to arbitration/the subject matter of the Act. Admittedly, the provisions of the special law will override and prevail over those of the general law, but only where there is a conflict between the provisions thereof. In case there is no conflict, then the provisions of the CPC will be applicable to the proceedings under the Act in terms of Section 41 thereof. She argued that when the government participates in commercial activities it is to be treated at par with other private commercial enterprises and Section 20(a) and (b) CPC will apply thereto. She relied on Hitachi Limited (*supra*), Lilley International (*supra*), Harbans Singh Vs. Union of India (AIR 1961 Calcutta 659), M. A. Jalil Vs. Group Capt. (Retd.) Salah-ud-Din Khan (1983 CLC 1685), Mian Fazal Muhammad Nizam-ud-Din Baig & Co. Vs. The Province of West Pakistan and others (PLD 1969 Lah 453), Bakhtawar Singh (*supra*), Province of Sind through the Secretary, Education Department, Karachi and 2 others Vs. Ghulam Rasul and 35 others (1976 SCMR 297).

7. Heard. There are a plethora of judgments that the Act is an exhaustive and complete codification of the law governing arbitration. Three modes have been prescribed by the Act for resorting to arbitration: (1) without the intervention of the Court (*Chapter II of the Act*) (2) with the intervention of the Court where no suit is pending (*see Section 20*) (3) during the pendency of a suit (*see Sections 21 to 24*). In the first category, the parties to a civil dispute are free to enter into an

arbitration agreement and without any recourse to the Court may refer the matter to the arbitrator. However the Court has certain powers which are exercised under the provisions of the Act, e.g. Sections 5, 8, 11, 12 and 33 etc. These powers can be exercised by the Court in certain circumstances even before a reference has been made to arbitration or during the pendency thereof, while Sections 14 to 19 forming part of Chapter II deal with post arbitration i.e. when the award has been passed by the Arbitrator. The Court in the context of the above proceeding shall be the one which has been defined in Section 2(c) of the Act.

For the second mode of arbitration too, it shall be the same Court as envisaged by Section 2(c) *ibid*. However, it may be mentioned here that according to Sub-section (5) of Section 20, after reference has been made to the Arbitrator by the Court, arbitration shall proceed in accordance with and shall be governed by the other provisions of the Act as far as they can be made applicable.

The third kind of arbitration is covered by Chapter IV (*Sections 21 to 24*) and from the clear language of these provisions reference to arbitration can be made when a civil suit is pending before the Court. Section 25 of the Act enables the application of other provisions of the Act (*like sub-Section (5) of Section 20*) to this mode of arbitration and also provides for the authority of the Court to supersede arbitration under Section 19 of the Act and to proceed with the suit. In this category there is no ambiguity that it is the **Court** where the suit is/was pending and which has referred the matter to Arbitrator that shall have exclusive jurisdiction to deal with and decide all the issues which arising between the parties within the scope of the Act and no other Court.

8. In order to elucidate in which **Court** the proceedings under Chapters II and III or the miscellaneous provisions of the Act should initially be initiated, if for example the case falls within the purview of Sections 11, 12, 13 and 33 and/or if a Court has already taken cognizance and passed some order in these proceedings; where should the subsequent proceeding be filed such as, an application for seeking extension of time for pronouncing the Award or an application for an Award being made Rule of the Court, etc.? In this context Sections 2(c) and 31(1) of the Act and Section 20 CPC are relevant. Section 2(c) reads as under:-

“2(c). “Court” means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court.”

The above definition implies the following:-

- i) It must be a Civil Court;
- ii) It must have the jurisdiction to entertain a suit with respect to the subject matter of the reference.

In other words it shall be the Court in which a civil suit could be initiated by the plaintiff for the enforcement of any of his right(s) and/or for the redressal of his grievance(s). Thus for the purposes of determining the jurisdiction of the Court where a civil suit should lie the provisions of Sections 16 to 20 CPC are relevant (*note: the relevant section shall be discussed in proceeding part of this opinion*). The other relevant provision, i.e. Section 31(1), prescribes as under:-

“31. Jurisdiction.--*(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.”*

According to the predominant view of the superior Courts regarding the nature and object of this section, it is not an enabling provision, rather one which identifies and defines the jurisdiction of the Court in which an Award should be filed. The object of this section is to clothe a single Court with jurisdiction in the matter so as to avoid conflict of jurisdiction which may arise between different Courts so that all the matters pertaining to arbitration, once having been initiated and dealt with by one Court, should subsequently continue to be determined by the same Court. The third relevant provision is Section 20 CPC which reads as follows:-

“20. Other suits to be instituted where defendants reside or cause of action arises.--*Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction--*

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation I.--- Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.--- A corporation shall be deemed to carry on business at its sole or principal office in Pakistan or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.”

9. It is settled law that in the absence of an arbitration agreement inter se the parties, the dispute regarding the rights and obligations that arise out of the contract including payment(s) or amount(s) due under the contract would have been liable to be adjudicated at the first instance in a Civil Court competent to entertain a suit and jurisdiction would in those circumstances be governed by the provisions of Sections 15 to 20 CPC. The question which requires to be settled is in which manner are Sections 2(c) and 31(1) of the Act to be interpreted in order to determine which Court would take cognizance of an application to make an arbitral Award a Rule of Court and whether Section 20 CPC would be applicable in its entirety in the process of such determination. The further related question which emerged during the course of hearing of the appeal was whether the “government” is exempted from the purview of Section 20(a) and (b) CPC.

Before we proceed to answer the above questions let us examine the case law referred by the learned counsel and *amici curiae*.

10. As regards the case law referred to by learned counsel for the appellant, **Ravi Glass Mills** (*supra*) elaborates the doctrine of forum non-conveniens which means the power of a Court to decline

jurisdiction when the convenience of the parties and the ends of justice would be better served if actions were brought and tried before another forum. This doctrine is not applicable to the facts and circumstances of the present case as it is not the case of either party that the Civil Courts at Lahore amounted to a forum of non-conveniens. Reliance on **Nalanda Ceramic** (*supra*) is misplaced for the reason that the facts in that particular case were different and this is founded upon the question where the cause of action has arisen and Section 20(a) and (b) CPC was not a moot point. The case of **Hitachi Limited** (*supra*) does not advance the case of the appellant for the reason that the judgment considers whether and in what manner the provisions of private and public international law may affect the jurisdiction of Courts in Pakistan where either the arbitration proceedings take place outside Pakistan and/or where one of the parties to the dispute referred to arbitration is not resident in Pakistan.

11. Adverting to the case law referred by learned counsel for respondent, **Muhstaq Ali Tahirkheli** (*supra*) does not advance the respondent's case for the reason that the issue of jurisdiction was decided on the basis of where the cause of action arose. Similarly, the cases of **Abdul Qayyum Khan** (*supra*), **Faqir Muhammad** (*supra*), **Kadir Motors** (*supra*) and **Habib & Sons Ltd.** (*supra*) are patently distinguishable on their own facts and the question of law herein involved was not an issue in those matters therefore a detailed analysis of these dicta is not required.

12. Mr. Rassal Hassan Syed, *amicus* referred to **Unique Traders** (*supra*) in which the point in issue was whether the Civil Courts at Lahore or Jhelum would have jurisdiction with respect to an application under Section 17 of the Act arising out of arbitration. The

finding of the Court was that as the property which was the subject matter of the dispute was located at Jhelum, the agreement was executed at Jhelum, and the alleged breaches occurred at Jhelum therefore the Courts at Jhelum would have jurisdiction. The argument in favour of the exercise of jurisdiction by the Civil Courts at Lahore on account of the fact that the part of the arbitration proceedings were conducted at Lahore was rejected. This judgment is distinguishable for the reason that a close reading of the same discloses that at no point was jurisdiction for the Civil Courts at Lahore claimed on account of the fact that it was either the place of residence or place of work of the defendant(s).

In **Trade Masters** (*supra*), the point in issue was whether the parties, through in agreement, could confer exclusive jurisdiction on one Court in preference to another and it was held, *inter alia*, that the parties can validly agree to confer territorial jurisdiction to one out of two or more Courts which otherwise had/have jurisdiction and that such an agreement would be valid and enforceable. The question of electing to submit to the jurisdiction of one Court in preference to another is not at issue in the instant appeal.

Ghulam Abbas's case (*supra*) is not relevant to the facts and circumstances of the present appeal.

In the case of **Madhao Deshpande** (*supra*) the point in issue was which of two Courts within the territorial jurisdiction of which the properties which formed the subject matter of the dispute referred to arbitration were situated, would exercise jurisdiction for the purposes of making an arbitral Award the Rule of the Court. This is not at issue in the instant appeal.

The cases of **Lilley International** (*supra*) and **Bakhtawar Singh** (*supra*) were referred by both learned *amicus* and will be referred to later in this opinion.

13. The case law referred by the learned *amicus* Ms. Ayesha Hamid shall be discussed and reflected in our opinion.

14. It is to be noted that Section 20 CPC confers jurisdiction on a Court in two ways. Firstly, on the basis of where a defendant(s) resides, carries on business or works for gain within its local limits. Secondly on the basis of where the cause of action wholly or in part arose within its local limits. Jurisdiction means the authority to decide. The concept of jurisdiction of a Court encompasses (i) territorial jurisdiction, (ii) pecuniary jurisdiction and (iii) subject matter jurisdiction. The concept of jurisdiction has its genesis in the physical power of a Court to issue process to persons within the reach of the Court. Shorn of all extraneous 'frills', this is the essence of jurisdiction. A Court is to decide matters when persons relating thereto are within its reach. This basic jurisdiction is then regulated by defining the limits of that 'reach' by setting pecuniary limits, or by assigning different 'subjects' within one territory to different Courts, for example, by assigning banking and environmental matters to different Courts within one territory. In **R. Viswanathan and others Vs. Rukn-ul-Mulk Syed Abdul Wajid since deceased and others** (AIR 1963 SC 1) it was *inter alia* held "*an action in personam lies normally where the defendant is personally within the jurisdiction or submits to the jurisdiction or though outside the jurisdiction may be reached by an order of the Court*"¹. This principle resonates in a judgment of the U.S. Supreme Court, **Dennis Burnham Vs. Superior Court of California, Country of Marin** [110 S. Ct. 2105 (1990)]

¹ Hitachi Limited case (*supra*), p.1638.

wherein it was held “*Historically the jurisdiction of Courts to render judgment in personam is grounded on their de facto power over the defendant’s person*”.² This concept was further developed in the case of Lulu B. McGee Vs. International Life Insurance Company (2 L ed 2nd 233) where the U.S. Supreme Court initially accepted and then abandoned ‘consent’, ‘doing business’ and ‘presence’ as the standard for measuring extent of said judicial power over corporations and instead the Court decided that “*due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’*”³.

15. Section 41 of the Act provides as under:-

“Procedure and Powers of Court.--*Subject to the provisions of this Act and of rules made thereunder--*
(a) *the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals under this Act, and*
(b)
Provided that...”

Section 41 *ibid* makes the provisions of the CPC applicable to the proceedings in respect of arbitration before the Court.

16. As the question arises on what basis are Courts to exercise jurisdiction in terms of Sections 2(c) and 31(1) of the Act, it is instructive to consider the case of M. A. Jalil (*supra*) wherein it was held:-

² *Ibid*, p.1639.
³ *Ibid*, p.1640.

*“...section 31 of the Act deals with the jurisdiction of the Court. It provides that all matters relating to the reference should be made before the same Court in which the first application in connection with the arbitration matter was made and that it will be the said Court which alone be competent to decide all questions in relation to that particular arbitration. It also provides for the Court where an award is to be filed. By reading section 31 with the definition of the term ‘Court’ given in section 2(c) of the Act, it is plain that the award is to be filed in that Court which will have jurisdiction to decide the question forming the reference if the same had been the subject matter of the suit. Thus, to determine the question whether the Court before which the applications under the provisions of Arbitration Act, 1940, for instance under sections 31, 32 and 44, are filed, has jurisdiction to entertain them or not, one should first of all ascertain what the questions are which form the subject-matter of the reference to arbitration. **Then one is to ask, supposing these questions had arisen in a suit which is the Court which would have jurisdiction to entertain the suit? That would be the Court having jurisdiction under the Arbitration Act also.**”*

(Emphasis supplied)

Further:-

“Moreover, in view of the provisions of section 14 read with section 31 of the Arbitration Act, it is reasonable to construe that the award is to be filed in that Court which will have the jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit”.

17. The relevant facts of Lilley International's case (*supra*) are that a construction contract with respect to the Hyderabad-Hala Highway was executed in Islamabad between NHA and a contractor, where the NHA head office was situated. A dispute arose which was referred to arbitration. The Arbitrator entered upon the reference in Karachi, with the consent of the parties, and made the Award at Karachi which he filed in the Sindh High Court, Karachi. Meanwhile NHA filed objections in respect of the Award before the Civil Court at Islamabad (*which was subsequently transferred to the Islamabad High Court*). The judgment holds that for the purposes of determining which Court is to assume jurisdiction with respect to the Award it needs to be determined which Court, in the absence of an arbitration agreement, would have jurisdiction over the subject matter of the reference if instead, a civil suit was to be filed. Further, it held that the place where arbitration is held or where the Award is made is irrelevant and the courts at such place will not assume jurisdiction on account thereof.

18. It is settled law that in terms of Section 20 CPC different Courts may assume jurisdiction on the basis of the defendant's place of business or residence and/or where the cause of action wholly or partly arises. Section 2(c) read with Section 31(1) of the Act requires that we suspend the existence of the arbitration agreement to consider which Court(s) may have jurisdiction with respect to the "subject matter of the reference" if a civil suit were to be filed in respect thereof. The subject matter of a reference cannot be limited to the physical construction of the road at Toba Tek Singh as contended by the appellants. The subject matter of the reference is an inclusive term which would cover the physical road constructed at Toba Tek Singh, the contract executed at Toba Tek Singh, the arising of all the disputes regarding the violation

and enforcement of the terms and conditions of the contract, and the rights emerging and based thereupon, including payment of/deduction from the final bill of the respondent. In these circumstances, in the absence of an arbitration agreement, the respondent could have filed a civil suit at Toba Tek Singh on the basis that the cause of action accrued therein. Could the respondent have filed a civil suit at the Civil Courts at Lahore (*on the basis that the head office of the Highways Department was situated at Lahore*)? In **Union of India and another Vs. Sri Ladulal Jain (AIR 1963 SC 1681)** it was held that the provisions of Section 20 CPC with respect to 'carries on business' or 'personally work for gain' do apply to the Government. It was observed:-

“Running of railways is a business. That is not denied. Private companies and individuals carried on the business of running railways, prior to the State taking them over. The only question then is whether the running of railway ceases to be a business when they are run by Government. There appears to be no good reason to hold that it is so. It is the nature of the activity which defines its character. Running of railways is such an activity which comes within the expression ‘business’. That fact as to who runs it and with what motive cannot affect it”.

It was further observed that the profit element was not necessary for carrying on business.

19. In the case of **Fazal Muhammad** (*supra*) it was held, *inter alia*, that:-

“It is admitted before us that the words “actually and voluntarily resides” or “personally works of gain.” In (sic) this section are applicable to natural persons and

not to legal entities like a Government. We have only to see if it can be said in the case of the Government that it “carries on business” (sic) at its principal office in Pakistan for the purpose of this section”.

Fazal Muhammad (*supra*) cites from the judgment reported as **R. J. Wyllie and Co. Vs. Secy. of State (AIR 1930 Lah 818)** and held in this connection that the words ‘actually and voluntarily resides’ “refer only to natural persons and not to legal entities such as limited companies and Governments and that ‘business’ in this section meant the commercial business and not the business of Government”. The following passage from **Pratap Chandra Biswas Vs. Union of India (AIR 1956 Assam 85)** is reproduced in **Fazal Muhammad** (*supra*):-

*“It is difficult to hold that even commercial ventures of the Government assume the colour of its ordinary administrative or Governmental functions. **In its commercial undertakings the Government is entering into contracts with the citizen. These contracts are governed by the ordinary law of the land and they are enforceable between the parties. The Government has no privileged position in regard to these contracts nor can it have any privileged position for purposes of clause 12 of the Letters Patent or section 20, C.P.C.** unless the law lays down expressly that these provisions or parts of these provisions have no application to business undertakings of the Government”.*

(Emphasis supplied)

However, the case of **Fazal Muhammad** (*supra*) relies on an **obiter dicta** from **Pakistan Vs. Waliullah Sufyani (PLD 1965 SC 310)**, wherein

Kaikaus J held that “...a Government neither resides anywhere nor carries on business nor works for gain”, and concluded that:-

“These activities which may be truly commercial in the hands of the private agencies may not necessarily partake of the same character after they are undertaken by the Government in pursuit (sic) of its welfare policies. A private person may run a hospital as a business venture. But it may altogether cease to retain that character in the hands of the State running the same for the welfare and service of its people. In our opinion, the dominant, if not the sole object in running a business is to make profits. In contradistinction to this, the immediate and paramount consideration before the Government in providing for these facilities and services, is the welfare of its people. “They have to be operated for use and not for profit,” according to H. J. Laski, in his “Grammar (sic) of Politics”, at p.436. This then is the essential difference in the nature and character of these two activities...From the above discussion it follows that those words in section 20 of the Code have been used in their primary business and natural meanings and connote a business carried on for pecuniary profits and gains by the business and trading houses. These have no application to the case of the Government engaged in commercial activities as a part of its duties for the welfare of its people”.

20. **Fazal Muhammad**'s case (*supra*) was challenged in due course before this Court but through the judgment cited at **Mian Fazal Muhammad (deceased) through his legal heirs Vs. Province of West Pakistan and others (1975 SCMR 312)** this Court declined to decide the questions raised in the leave granting order as, for reasons recorded, the matter had become infructuous and there remained no live issues to be decided. In this view of the matter, we find that there is

no definitive finding by this Court as to whether the Government, when it undertakes commercial activities, is to be treated as a creature apart or at par with other commercial undertakings.

21. In the case cited at Khawaja Ahmad Tariq Rahim Vs. The Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs, Islamabad and another (PLD 1992 SC 646) (12 member bench) it was held that Government means:-

“...“the whole class or body of office-holders or functionaries considered in the aggregate upon whom devolves, the executive, judicial, legislature and administrative business of the State”...

In Tariq Rahim's case (*supra*) the following extract from Master Khusrow Amir Khan Niazi Vs. Province of Punjab and 2 others (PLD 1975 Lah 819) was cited:-

“...the word “Government” includes in its ordinary connotation, legislative, judicial and executive functions, and the ordinary connotation should be adopted in the absence of any indication to the contrary.”

22. The commercial activities undertaken by a government are not included in the “ordinary connotation” of the word “Government”. Indeed we are not persuaded by the reasoning of the learned High Court in Fazal Muhammad's case (*supra*) to the effect that commercial activities are undertaken by Government for welfare purposes and for that reason they are to be treated as part of its functions. The commercial activities do not form a part of the core functions of a government which remain its executive, judicial, legislative and administrative functions. When a government enters into the domain of

business and commerce it cannot be given a premium of its position and must be treated at par with its competitors or near competitors in the private sector. It must be subject to the laws of the land. Its commercial activities must be regulated in the same manner as those of the private sector. It cannot be exempted therefrom simply by the dint of being a "government". Hence when a government is engaged in the 'business' of road building through the vehicle of construction contracts with a private contractor then it cannot be allowed to claim privileges on account of being the government. In these circumstances it would be liable to be treated as a corporation in terms of Explanation II to Section 20 CPC. In the case of **Bakhtawar Singh** (*supra*) the Supreme Court of India upheld the decision of the Delhi High Court dismissing an the application of a contractor under Sections 14 and 17 of the Indian Arbitration Act by holding that the phrase 'actually and voluntarily' resides, 'carried on business' or 'personally works for gain' do not apply to legal entities like the Union of India and only to natural persons. **But this inapplicability is only in reference to the sovereign functions of the State** (*as the contract pertained to maintaining armed forces therefore it was considered to be a sovereign activity of the State*). When the State carries on commercial activities then Section 20 CPC would apply, as held in **Ladulal Jain**'s case (*supra*). We find ourselves in agreement with this subtle but important distinction. The Government in the exercise of its core functions *viz*, its executive, legislative, judicial and quasi-judicial, and administrative roles exercises sovereign powers. But when it engages in commercial activities it is not exercising sovereign power, rather it is engaging in business/commercial activities and merits no undue advantage over ordinary litigants: it is subject to Section 20 CPC in its entirety. Therefore, the Civil Courts at Toba Tek Singh and Lahore

would have had concurrent jurisdiction with respect to the putative civil suit. Having established the concurrent jurisdiction of the Civil Courts at Toba Tek Singh and Lahore in case a civil suit were to be filed by the respondent, we can now return to the circumstances as they existed inter se the parties i.e. the arbitration agreement was a part of the contract between the appellant and the respondent. A conjunctive reading of Sections 2(c) and 31(1) of the Act would therefore confer jurisdiction, for purposes of filing an application under Sections 14 and 17 of the Act for making an Award a Rule of the Court on both the Civil Courts at Toba Tek Singh and Lahore. Therefore, the Award was competently filed before the Civil Court at Lahore to be made a Rule of Court.

23. During the course of the hearing of the instant appeal we asked the learned counsel for the appellant whether in the absence of an arbitration agreement a civil suit in respect of the dispute inter se the parties could have been filed in the Civil Court at Lahore. He agreed that such a civil suit could indeed have been competently filed at Lahore. In light of the above, this appeal has no merits and is hereby dismissed.

In the case of Ghulam Rasul (*supra*) it was held:-

“As to the second ground, if we may say so with due respect we are rather surprised at the objection taken on behalf of the Government. Courts expect the Government to be the noblest of litigants and would not engage in litigation in vain much less against its own employees. In the instant case the matter was covered by express provision of the Constitution and the amount involved was trivial. Any attempt to avoid justice being done on a

technical plea, unless any high principle is involved, should be avoided”.

We endorse the aforesaid view: Governments should litigate only where necessary and the might of the State should not be employed to make an ordinary litigant run from pillar to post. In the present and peculiar circumstances of the instant case we are persuaded to direct the appellants to make immediate payment of a sum of Rs.57,534.73/- to the respondent as per the Award dated 1.11.1993. Before parting we appreciate the valuable assistance provided by the learned *amici curiae*.

JUDGE

JUDGE

Lahore, the
6th September, 2016
Approved For Reporting
Waqas Naseer/*