

*Form No: HCJD/C-121.*

**JUDGEMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**

**JUDICIAL DEPARTMENT**

**F.A.O. No. 52 of 2015**

Oil & Gas Company Development Limited  
**Vs**  
Agha Muhammad and Brothers, etc

**APPELLANT BY:** Barrister Umair Majeed Malik, Advocate.  
**RESPONDENTS BY:** Raja Abid Hussain, Advocate.  
**DATE OF HEARING:** 18-06-2015.

**ATHAR MINALLAH, J.-** The instant appeal is

directed towards order dated 06-05-2015, passed by the learned Civil Judge First Class, Islamabad (West), whereby the application filed by the respondent No.1 under Section 20 of the Arbitration Act 1940 (hereinafter referred to as the “*Act of 1940*”) was allowed.

2. The facts, in brief, are that the appellant is a public listed company, inter-alia, engaged in the business of exploration, production and sale of oil and gas within Pakistan. The respondent No.1 filed an application under Section 20 of the Act of 1940. A reply was filed by the appellant wherein a preliminary objection regarding limitation under Article 181 of the Limitation Act 1908 was raised. According to the appellant, the limitation period for filing the application under section 20 of the Act of 1940 had expired in the year 2011, while it was filed on 09-09-2014 i.e. after more than three years. The learned Civil Judge, Islamabad, while passing the impugned order dated 06-05-2015, acknowledged the objection relating to limitation but referred the said question to be determined by the Arbitrator.

3. The learned counsel for the appellant has contended that; the learned Civil Judge, Islamabad, was required to decide the question of limitation rather than referring the same to the Arbitrator; the learned Civil Judge failed to exercise jurisdiction vested under Section 20 of the Act of 1940; referring to Para-7 of the application filed by the respondent No.1 under Section 20 of the Act of 1940, the learned counsel emphasized that the dispute, according to the assertion of the respondent, had arisen in 2008 and, therefore, the application was hopelessly time barred; parties are bound by their pleadings; reliance has been placed on “Rehmatullah and another vs. Salehan and others” 2007 SCMR 729 and “Syed Abbas Taqi Mehndi vs. Syeda Sbahat and another”, 2010 SCMR 1840; even if the letter dated 9-02-2011 is taken into consideration, the limitation period of three years expired on 8-02-2014, while the application under Section 20 of the Act of 1940 was instituted on 09-11-2014.

4. The learned counsel for the respondent No.1 has submitted that the parties were in the process of negotiation and the last letter received from the appellant was dated 23-05-2013 and, therefore, the application under Section 20 of the Act of 1940 was not barred by time; the question of limitation has been referred to the Arbitrator and, therefore, the learned Court exercised its jurisdiction in accordance with law; reference has been made to paragraph 3.2 of the memo of appeal in support of the contention that the application filed under Section 20 of the Act of 1940 was within time.

5. The learned counsels have been heard and the record perused with their able assistance.

6. It is settled law that the period of limitation for filing an application under Section 20 of the Act of 1940 is to be reckoned in accordance with the provisions of Article 181 of the Limitation Act, 1908. The august Supreme Court in “M. Imam-du-Din Janjua vs. The Thal Development Authority

through the Chairman, T.D.A, Jauharabad’, PLD 1972 Supreme Court 123 has held as follows:-

*“Having examined these decisions with care, we, too, have come to the conclusion that, after the incorporation of Articles 158 and 178 in the First Schedule to the Limitation Act, which make specific provision for applications under the Arbitration Act, 1940, it is no longer possible to say that the Articles contained in the Third Division of the First Schedule to the Limitation Act apply only to applications under the Code of Civil Procedure, because, all the other Articles contained in this Division apply to such applications. With the incorporation of Articles 158 and 178, that reason no longer holds good, and therefore, the scope of Article 181, which is in the nature of a residuary Article, must necessarily be extended to all kinds of applications for which no specific period of limitation has been provided for either in the First Schedule to the Limitation Act or in any other Statute. To hold otherwise would lead to the anomalous result that for applications which have not been expressly provided for in the Third Division of the First Schedule to the Limitation Act there will be no period of Limitation at all. This could not have been the intention of the Legislature.”*

7. The august Supreme Court further held that the point of time at which the right to apply under Section 20 accrues is the point of time when a 'difference or dispute' has arisen between the parties. Could the learned Civil Judge have left the determination of the

question of limitation of the application under section 20 to the Arbitrator? The learned Civil Judge allowed the application under Section 20 of the Act of 1940 and, thereafter, referred the matter to the Arbitrator, including the question of limitation of the application. The High Court of Sindh in ‘Pakistan Insulations (Pvt) Ltd. Vs. Messrs Ranhill Engineers and constructors DDFC Group of Companies through General Pakistan Operations Manager and 2 others’, **2009 CL D 1077** has aptly enumerated the conditions which have to be met before an application under Section 20 of the Act of 1940 may be granted. The conditions as enumerated in the said judgment are as follows:-

- (a) *“that there should be a pre-existing arbitration agreement between the parties;*
- (b) *that the parties should not have taken any steps under sections 3 to 19 of the Arbitration Act prior to the institution of the section 20 application;*
- (c) *that differences or disputes have arisen between the parties to which the arbitration agreement applies;*
- (d) *that the section 20 application is not barred by limitation; and*
- (e) *that the Court to which the section 20 application has been made has jurisdiction*

*in the matter to which the agreement relates”.*

8. Reference may also be made to “Messrs Abdul Rauf Muhammad Hanif (Pvt) Ltd through Chief Executive vs. WAPDA through Chairman and another”, *P L D 2007 Lahore 335* and “Messrs Acsys Limited vs. Associated Press of Pakistan Corporation”, *2004 CLC 1262*.

9. The question of limitation is, therefore, to be decided by the Court before granting the application under section 20 of the Act of 1940. Leaving the question to be determined by the Arbitrator is neither envisaged under section 20 of the Act of 1940, nor can the Court delegate its power under section 20 to the Arbitrator. This determination is essentially to be made by the Court, and that too before granting the application. In case the Court comes to the conclusion that the application under Section 20 of the Act of 1940 is barred by time qua the period prescribed under Article 181 of the Limitation Act, 1908, then such an application cannot be granted, nor can the matter be referred to the Arbitrator.

10. The learned Civil Judge, before passing the impugned order dated 06-05-2015 was, therefore, required to decide whether the application under Section 20 of the Act of 1940 had been filed within the time stipulated under Article 181 of the Limitation Act, 1908. There is also a distinction in making an application under section 20 of the Act of 1940 in time and the making of a claim by either party. The question of whether the claim made by either party is barred by time or not, or whether it is barred by any contractual term, falls within the scope of jurisdiction of the Arbitrator. On the other hand, the application being in time or not has to be decided by the Court itself before allowing the said application. Reference to this distinction has been made in “Oil & Natural Gas Commission Ltd vs. M/s. Dilip Construction”, *AIR 2000 Cal 140*. This view seems to be in consonance with the plain reading of section 20 of the Act of 1940

and its other provisions. The jurisdiction of the Arbitrator is circumscribed by the arbitration agreement. The question of whether a section 20 application is to be allowed or not is a statutory obligation of the Court, and the same cannot be delegated to the Arbitrator. The learned trial Court, therefore, was required to consider and decide the question as to whether the application under section 20 was in time or not. In the instant case, the Court had to determine the point of time at which the right to apply under section 20 of the Act of 1940 had accrued in the light of the law, and the principles laid down by the august Supreme Court in the case of ‘M. Imam-ud-Din versus Thal Development Authority’ supra, so as to decide whether the application was in time. It was for the Court to determine as to when the differences had arisen between the parties i.e when they did not agree on any particular question covered by the arbitration agreement.

11. The learned Civil Judge, while passing the impugned order, has not taken into consideration the expression "sufficient cause" used in subsection 4 of section 20 of the Act of 1940. It is mandatory for the Court to order that the agreement is filed and then to refer the matter to the Arbitrator, if pursuant to notices issued under sub section 3 a 'sufficient cause' could not be shown for not filing the agreement and making a reference to the Arbitrator. The Court has to be satisfied that 'sufficient cause' could not be shown before deciding the application and making an order of reference to the Arbitrator. The question that the application is not within the prescribed time is a 'sufficient cause' within the context of sub section 4 of section 20 and it is, therefore, to be decided by the Court and not the Arbitrator. Based on the facts and circumstances before the Court, the latter has to determine as to at what point of time the differences had arisen i.e when one party did not agree with another party on any particular question covered by the arbitration agreement. In my humble opinion, allowing an application under section 20 of the Act of 1940 and referring the question of whether it was filed within the prescribed time tantamounts to delegating to the

Arbitrator the authority to decide whether 'sufficient cause' in the context of sub section 4 of section 20 of the Act of 1940 exists or not. I am afraid that it is neither provided in the statute nor can it be read into its provisions. Whether 'sufficient cause' exists or not is within the exclusive domain of the Court, and a determination with regard thereto is a pre condition for making a reference to the Arbitrator. However, whether the claim was made in time is a distinct question falling within the domain of the Arbitrator. The case law relied upon by the learned counsel for the respondent is, therefore, distinguishable. Without examining the facts of the instant case the learned Court passed the impugned order and failed to advert to the question of whether 'sufficient cause' had been raised by the appellant for refusing to make a reference to the Arbitrator. It is noted that satisfaction of the Court requires application of mind after taking all the facts and circumstances into consideration.

12. Based on the foregoing discussion, the appeal is allowed and the impugned order is set-aside. The application filed by the respondent No.1 under Section 20 of the Act of 1940 shall be deemed to be pending before the learned Civil Judge. The question, whether the application was filed within the prescribed time shall be considered and decided according to the facts and circumstances of the instant case.

**(ATHAR MINALLAH)**  
**JUDGE**

Announced in open Court on **09-07-2015**

**JUDGE**

Approved for reporting

Asif Mughal \*

