(JUDGMENT SHEET)
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 4435 of 2021

Samsons Group of Companies
Versus
Panther Developers and others

Petitioner by: Mr. Muhammad Muazzaam Butt, Advocate.
Date of decision: 17.12.2021

SARDAR EJAZ ISHAQ KHAN, J.:- This petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, assails the order dated 27.11.2021 passed by the learned Additional District and Sessions Judge-VII, Islamabad-West ("ADJ"), whereby he dismissed the petitioner's application under Order VII Rule 11 of the Code of Civil Procedure, 1908 ("CPC") opposing respondent no.1's application under section 20 of the Arbitration Act, 1940, for filing the arbitration agreement in Court.

Order VII Rule 11 CPC in proceedings under section 20 Arbitration Act

2 Although the end result may well be the same, as it was in the case at hand, invocation of Order VII Rule 11 CPC ("O7R11") in applications under section 20 of the Arbitration Act is, in my humble opinion, not called for. The statutory test for the purposes of section 20 is 'sufficient cause'. Section 41 of the Act makes the CPC applicable to proceedings under the Act 'subject to the provisions of this Act'. When section 20 itself provides the statutory test of 'sufficient cause' for the civil Court to see whether or not it should order filing of the arbitration agreement in Court, there is no warrant to import the tests prescribed in O7R11 for rejection of a plaint for the purposes of section 20, for it is settled law that an application under section 20 is neither a plaint nor are the proceedings a suit (see, for instance, *2018 CLC 1140*). It also runs the risk of importing the jurisprudence laid down under O7R11 into section 20 proceedings conflating the two when it was not intended to be so. I am mindful of the decision of this Court in *Excel Techno Solutions FZE versus OGDCL and another, 2019 CLC 416,* where the application under O7R11 before the civil Court did not attract the disapproval of the Court, but I distinguish that judgment on the basis that the core issue which engaged the Court was the appealability of the order therein

rejecting the O7R11 application, which in itself shows good reason why O7R11 applications may not be a good route for the purposes of section 20 applications as the appealability of orders under the Arbitration Act is to be governed by section 39 of the Act and not indirectly under the CPC, and the Court did so hold in the *Excel* case. Applying O7R11 leads to unwelcome consequences. In the case at hand, the learned ADJ, proceeding as he would in a suit, after dismissing the O7R11 application passed the order "*…to come up on 14.12.2021 for further proceedings on application under section 20…*", that is, the learned civil Court treated the O7R11 application as a preliminary yet distinct stage to be crossed first to arrive at the next stage of passing an order under section 20, when section 20 envisages the Court, not having found sufficient cause, to proceed forthwith and by the same order to direct the filing of the arbitration agreement in Court. Other undesirable consequences may arise. For instance, a civil Court may decline to order the filing of an arbitration agreement where there is a named arbitrator who has died and the arbitration clause in its terms restricts arbitration by the named arbitrator only; would the Court stretch the meaning of the expressions 'the plaint not disclosing a cause of action' and 'barred by law' used in O7R11? In other words, the civil Court will be approaching the issue through a circuitous and laborious route. In the case at hand, the petitioner objected to the filing of additional documents in the respondent's reply on the basis of Order XIII CPC claiming that the leave of the Court had not been obtained to file additional documents, a ground which could only be taken in suits and, if allowed to be taken in section 20 applications, will fasten the civil Court with procedural shackles at the very outset of what should otherwise be a straightforward exercise of applying the three-fold test laid down in *A.J. Corporation versus Fauji Fertiliser Bin Qasim Limited, 2013 CLD 636,* namely, whether an arbitration agreement exists, whether a dispute has arisen and whether proceedings under Chapter II of the Arbitration Act had not been commenced. The test of 'sufficient cause' is found in numerous statutes and also at innumerable places in the CPC and is applied in its own right and not subsumed under other formulations. The law on sufficient cause for the purposes of section 20 of the Arbitration Act should develop in its own right rather than on a construct borrowed from O7R11. Although the law is settled that invoking the wrong provisions in the title to an application does not make the application invalid if it can be sustained on the basis of other provisions, it is not a neat approach to discard the 'sufficient cause' test in favour of the O7R11 formulation. It would be a better and neater approach for the civil Courts to treat applications filed under O7R11 in section 20 proceedings

as applications contesting sufficient cause and to pivot their reasoning and orders around this statutory test and also to direct filing of the arbitration agreement in Court under the same order by which sufficient cause to decline the filing of the arbitration agreement is not found. It is not merely a matter of form, as the substance may also get affected. It did not, however, get affected in the case before me, as the learned ADJ did not find a reason (read sufficient cause) to reject the section 20 application and, accordingly, the entire judgment can be read as one dealing with exploring the existence, if any, of sufficient cause to refuse the filing of the arbitration agreement.

Constitutional Petition assailing an order rejecting a sufficient cause plea under section 20 of the Arbitration Act

3 Before me is a petition under Article 199 of the Constitution of Pakistan, directly assailing a decision in the first-instance by a civil Court, for the reason that the petitioner does not have an alternate remedy. Before the Code of Civil Procedure (Amendment) Act, 2020 (Act No.VII of 2020) was promulgated on 21.02.2020 for the Federal Capital Territory of Islamabad (the "2020 Amendment"), this would have been a revision under section 115 of the CPC. Before the 2020 Amendment, the 'residual category' of orders of the civil Courts not listed in section 104 of the CPC read with Order XLIII were revisable by a superior court in a revision under section 115 of the CPC. The remedy of revision in its original conception was subject to defined parameters, elaborated by judicial interpretation for over a century that enabled a review of the record by the revisional court to correct any patent errors, and the tests for the exercise of the revisional jurisdiction were not dissimilar to the tests laid down for the exercise of judicial review of administrative action under Article 199 of the Constitution[1]. The 2020

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[1] See for instance, *Tribal Friends Company versus Province of Balochistan, 2002 SCMR 1903*. His Lordship Saleem Akhtar J, delivering the opinion of the Court, held at paragraph 8 as follows:

> "In cases where remedy has been provided by appeal within the framework of the Arbitration Act revision application will not lie but in cases where these provisions do not apply the revision jurisdiction of the High Court under section 115 CPC can be invoked. Where in cases no appeal is provided and the Court has exceeded jurisdiction, acted without jurisdiction, committed material irregularity in the conduct of the proceedings, passed order in violation of the principles of natural justice and the same cannot be assailed under the provisions of the Arbitration Act and [sic!] the High Court may exercise its supervisory jurisdiction under 115 CPC on an application made by any party or suo moto. It should be borne in mind that proceedings relating to arbitration are to be governed and regulated by the Arbitration Act. The

Amendment has with one stroke discarded the century-old jurisprudence on revisional remedy with the resultant effect of eliminating any revision against the residual category of interlocutory orders. Resultantly, the High Court is called upon in its Constitutional jurisdiction to exercise the same functions it would have exercised in revision before the 2020 Amendment. This, with respect, is not appropriate and does not sit comfortably with the objective listed in the 2020 Amendment of saving time and expense of the Courts and litigants, as neither time nor expense is saved when both the Courts and the litigants have to fall back on the Constitutional remedy in like cases and where the appeals against the decision may take a new route of either an intra-court appeal or an appeal before the Supreme Court; there was no appeal against a revisional order and entertaining a writ petition against a revisional order was a rare exception exercised on extremely limited grounds.

4 The fabled wisdom of the Legislature in eliminating the remedy of revision in like cases is so deep and unfathomable that this Court despite repeated dives has been unable to retrieve it to the surface. In eliminating the remedy of revision against the residual category of interlocutory orders that are routine in the progress of a civil case, the Legislature does great credit to the judicial system by avowing the infallibility of the courts of first instance. Unfortunately, this credit is not due yet. The courts of first instance, and even the superior courts, are not infallible and do (or are claimed to) commit errors and it then falls on the superior courts to examine the record, hear the parties and take corrective action where required. To achieve the objective of the 2020 Amendment by eliminating the remedy of revision altogether, with respect, is to throw the baby out with the bath water and is a jarring announcement that, except for a few kinds of orders, a litigant has to live with the interlocutory order come what may. And it is not even clear as to why the Legislature found the appealable orders under section 104 and Order XLIII to qualify for a further remedy of revision when the residual category qualifies for neither; what was the distinguishing criterion remains a mystery. The principles governing the exercise of Constitutional jurisdiction do not lend themselves with ease to the functions of a revisional court. But this Court cannot let go of its supervisory function which it is now called upon to exercise in its Constitutional jurisdiction. It cannot deprive the litigants of at least one opportunity of examination by a superior Court of an order that the

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applicability of CPC is in terms of section 41 and subject to the provisions of the Arbitration Act."

litigant considers to be suffering from (borrowing the criteria from the repealed section 115) *want of or improper exercise of jurisdiction or a material irregularity*. The Court will entertain such petitions by invoking the Constitutional test of *required by law to be done (or not done)* under Article 199 and in doing so will perforce end up diverting the streams of jurisprudence on the lawfulness of interlocutory orders in civil actions from the riverbed of revisional jurisdiction to the riverbed of the jurisdiction under Article 199, making this a classic instance of the law of unintended consequences whereby the sweep of the Article 199 jurisdiction, standing in the stead of the revisional remedy, will venture beyond its original design and conception on account of the 2020 Amendment. With the foregoing observations, I decide to proceed to entertain and adjudicate this writ petition.

The Record

5 This petition owes its existence to a not uncommon neglect of the formalities attendant to the execution of a contract and to a contumacious exploitation of such shortcomings in litigation. A line left blank where the parties' names were to be written in an agreement titled "Construction Agreement" (the "Agreement") made in 2018 has occasioned much loss of time and wasteful use of already stretched judicial resources of both the civil Court and this Court. Corporate entities entering into contracts worth hundreds of millions would be expected to expend some resources to have their contracts vetted by qualified legal advisors before execution, but all too often they do not, and end-up later expending many times over litigating issues which would never have arisen if the basic formalities for execution of contracts were attended to in a timely and proper manner.

6 The Agreement was meant for the construction project management for a 95,000 square feet commercial building at Malam Jabba ski resort in Swat. Respondent no.1, Panther Developers (hereinafter, "Panther") is expressly mentioned as the second party to the Agreement and is defined therein as the "Project Manager". The name of the first party, defined as the "Client" in the Agreement, is left blank at the very beginning of the Agreement where the parties are commonly identified in contracts. In the signature block, the Agreement is signed for and on behalf of the Client by one Hashim Khan, respondent no.2 in this petition, who is admitted to be an employee of the petitioner at the time the Agreement was signed. That would seem to make Hashim Khan the Client and a party to the Agreement, if the attendant

circumstances (discussed later) did not exist. The rest of the Agreement employs the terms "Client" and "Project Manager" while identifying their respective rights and obligations. The Agreement is a fairly detailed one, as construction contracts usually are. Clause 8 of the Agreement is titled "Dispute Resolution", and stipulates arbitration under the Arbitration Act, 1940, of *"...Any dispute arising between the Parties out of or in connection with this Agreement...*" (Emphasis supplied).

7 On 26.07.2021, Panther filed an application under section 20 of the Arbitration Act, 1940, before the civil Court at Islamabad[2], with the current petitioner, Samsons Group of Industries (hereinafter, "Samsons") as respondent no.1 and Hashim Khan, the signatory to the Agreement qua Client, as respondent no.2 therein, thus asserting that Samsons was in fact the "Client" and the counter-party to the Agreement. The section 20 application asserted[3] that disputes had arisen between Panther and Samsons and that, accordingly, Samsons was to be directed to file the arbitration agreement in Court. Accompanying the section 20 application were the following documents:

i) a copy of the Agreement;

ii) copies of several emails between Panther and Samsons from December 2020 to February 2021 referring to the Malam Jabba project, and aimed at a negotiated settlement of the disputes;

iii) a detailed legal notice dated 06.07.2021 issued by Panther's lawyer to Samsons identifying Samsons as the counter-party to the Agreement dated 01.05.2018, identifying the dispute in considerable detail and informing Samsons of Panther's intention to commence legal action if the dispute was not settled; and

iv) an application seeking 'preservation of the subject matter' of arbitration by way of interim injunction against removal of 50 tons of Panther's scaffolding at the construction site at Malam Jabba ski resort.

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[2] Clause 10 of the Agreement confers jurisdiction on the courts at Islamabad.

[3] In great detail, that seems to be at odds with the scope of section 20 wherein only a brief but relevant description of the dispute suffices as the court is not meant to go into the minutiae of the dispute, that task being left for the arbitrator.

8 Samsons filed an application under Order VII Rule 11 CPC before the civil Court denying altogether that it was a party to the Agreement. Samsons took the plea of *non est factum* (this is not my deed; deed meaning contract). Samsons denied that it was ever a party to the Agreement, falling back on the ill-fated blank line where Samsons' name would have been mentioned if the Agreement had been executed with care and attention.

9 Panther filed its reply to Samsons' application under Order VII Rule 11, relying on the principle applicable to such applications whereby deeper examination of the facts and the law were not to be carried out. Panther insisted that sufficient material existed to establish that Samsons was in fact the Client under and the counter-party to the Agreement and relied on:

(i) print-outs of emails attached to its section 20 application and further emails attached to its reply, which emanated from the domain 'samsonsgroupco.com', the most relevant being the email dated 01.05.2018 by one Saad Hassan, Accounts Executive, using the email address 'saad.hassan@samsonsdevelopers.com' addressed to an email address ending with the domain @ pantherdevelopers.com with the message "*Dear concerned, Today, i.e. May 01, 2018, we have signed the agreement and signatures part of below given agreement is attached*" [sic!];

(ii) copies of several cheques evidencing payment by Samsons to Panther in fairly substantial sums during the period 2018 to 2020 (the period corresponding to the period of works under the Agreement), including cheque dated 18.12.2018 for Rs. 3,239,000/-, cheque dated 23.08.2019 for Rs. 14,850,000/- and cheque dated 21.02.2020 for Rs. 2,500,000/-, along with deposit slips showing deposit of the said cheques in Panther's bank account; and

(iii) print-outs of several WhatsApp messages that appear to attest to communications between representatives of Samsons and Panther in relation to '95,000 square feet' works at Malam Jabba (corresponding to the description of the works in the Agreement).

10 By his well-reasoned decision dated 27.11.2021, which is assailed before me in this Constitutional petition, the learned ADJ dismissed Samsons' application under Order VII Rule 11 CPC. Dealing with the *non-est factum* plea, the learned ADJ found no alternative explanation coming from Samsons in relation to the cheques it paid to Panther, nor in relation to the correspondence between Samsons and Panther, but that the Agreement was in fact executed by Hashim Khan for and on behalf of Samsons and that Samsons had all along been performing – and paying – under the same Agreement. He also relied on the presumption of valid consideration received by the drawer of a cheque arising under Article 129(c) of the Qanun-e-Shahadat Order read with section 118 of the Negotiable Instruments Act, 1881, the consideration in the instant case being the performance by Panther of its obligations under the Agreement. Samsons was all along unable to adduce any evidence or material tending to show another contract or arrangement under which the cheques for substantial sums were issued by it to Panther. In reply to the rather cryptic plea of Samsons that it was a separate legal entity and the action of its employee Hashim Khan in signing the Agreement without due authorization did not bind Samsons, the learned ADJ held that a company acts through its employees and observed that "…*where acts are done by one person on behalf of another but without his knowledge or authority he may elect to ratify or to disown such acts*…", and that, even if it was to be assumed that the executant employee of Samsons was not duly authorized to execute the Agreement, by making the payments over a period of two years and allowing Panther to perform the works at the site it was to be taken that Samsons had ratified the Agreement.

Counsel's submissions at the Bar

11 I now proceed to deal with the bold submissions made at the bar before me.

I) Non est factum (it is not my/his deed)

i) The plea of *non est factum* is one of antiquity, enabling a party to a contract to avoid it on various pleas, the earliest instances being the illiteracy of a contracting party. Other doctrines such as undue influence vitiating free consent to the underlying bargain were at times employed to relieve a party of a contract which it had signed, which, with the

passage of time, got subsumed under the rubric of void and voidable contracts.

ii) In the case at hand, learned counsel relied firstly on the blank line argument (see paras 5 and 8) to plead that Samsons' name was not mentioned as a contracting party, and the Agreement was non est factum qua Samsons or, in plain English, was not Samsons' deed (deed meaning contract in this context). This plea was rejected by the learned ADJ for the reasons summarized in paragraph 10. I reject it too. The Hon'ble Supreme Court held in *Sandoz Limited vs. Federation of Pakistan and others, 1995 SCMR 1431 (at para 14)* as follows:

> "…it is well settled proposition of law that in case of any ambiguity in a contract document, the Court in order to resolve it and to ascertain the real intention of the parties, can have resort to the correspondence preceding and/or subsequent to the execution of the contract document, conduct of the parties and the attending circumstances."

iii) The alleged ambiguity in the Agreement, that is, whether Samsons was in fact a party to the Agreement signed by its employee without mentioning Samsons' name, was resolved by the learned ADJ by resort to the attendant circumstances being the cheques and the email correspondence referred to in paragraph 9 above. Samsons could not proffer any alternative contract or arrangement with Panther, neither before the learned ADJ nor before me, that could rebut the inexorable inference that the Agreement was in fact *the only agreement* pertaining to works in Malam Jabba between these two parties to which Samsons' email dated 01.05.2018 referred in jubilation as having been signed 'today' between the two of them.

II) Agreement invalid for lack of authority to sign

i) Learned counsel for Samsons pleaded in the alternative that the Agreement was not validly executed and was therefore not binding on Samsons. He relied in this regard on sections 201 and 208(4) of the Companies Act, 2017. Section 201 of the Companies Act reads as follows:

> Section 201. Method of Contracting –
>
> (1) A contract or other enforceable obligation may be entered into by a company as follows:
>
> (a) an obligation which, if entered into by a natural person, will, by law, be required to be by deed or otherwise in writing, may be entered into on behalf of the company in writing signed under the name of the company by a director, attorney or any other person duly authorised by the board and may affix common seal of the company;
>
> (b) an obligation which, if entered into by a natural person, is not, by law, required to be in writing, may be entered into on behalf of the company in writing or orally by a person acting under the company's express or implied authority.
>
> (2) All contracts made according to sub-section (1) shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives as the case may be.

ii) Section 201 is substantially similar to and *in pari materia* with section 210 of the repealed Companies Ordinance, 1984. The differences in drafting are immaterial in the present context. Both the sections use the words *acting under the company's express or implied authority* while referring to a person signing on behalf of a company. *National Engineering Services Pakistan (Private) Limited*

versus Steel Mill Corporation, 2003 YLR 1696, is a case on all fours. His Lordship Mushir Alam J. (sitting as an Hon'ble Judge of the Sindh High Court), while rejecting the plea of Steel Mill that its officials were not duly authorized to enter into the subject contract, upheld the doctrines of "ostensible authority" and "indoor management" and interpreted section 210 of the Companies Ordinance, 1984 as having the object of protection of third parties. Relying on several precedents, his Lordship held as follows:

> "Third party dealing with a corporate entity is justified to assume that all the matters of internal affairs have been duly complied with and persons who have proximate relationship with the corporate entity are either authorized under the Charter of the company or have been delegated such authority thereunder."

He observed further as follows:

> "If a corporate body is allowed to disown the act of omission and commission of persons who represent the company then no sanctity could be attached to any transaction that may be entered into by such corporate body running its day to day affairs through its directors and managers."

As Steel Mill (not unlike Samsons) raised the issue of lack of authority at a much belated stage when litigation had started, His Lordship observed as follows:

> "Such assertion for the first time was urged in the objections to the reference, such silence on the part of Objector in terms of section 197 of the Contract Act amounts to implied rectification[4] of contract (one may see Sanaullah v. Muhammad Rafiq 2003 CLC 138)."

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[4] typo; read ratification

iii) Section 201 of the Companies Act 2017 is an enabling provision. Contrary to the learned counsel's submissions, it does not proscribe contracts without the authority of a board resolution and does not displace the doctrine of ratification under section 197 of the Contract Act as applied in the *National Engineering Services* case cited above. Sub-clause (b) of sub-section (1) of section 201 envisages contracts entered into in writing by a person acting under a company's implied authority, and sub-section (2) makes such contracts binding on a company. Learned counsel admitted that Hashim Khan, the executant for the "Client" in the Agreement, was Samsons' employee at the time of its execution. The counsel purported to argue that Samsons made the payments to 'regularize' the Agreement made by Hashim Khan without authority under a board resolution of Samsons. The concept of regularization is alien to the formation of a contract; the relevant concept being "ratification". So even if it is assumed that Hashim Khan was not duly authorized under a board resolution on the date on which the Agreement was signed, there is ample evidence to establish ratification of the Agreement by Samsons.

(iv) Learned counsel also referred to section 208(4) of the Companies Act, 2017. Section 208 pertains to related-party transactions, and its sub-section (4) reads as follows:

> (4) Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the board or approval by a special resolution in the general meeting under sub-section (1) and *if it is not ratified by the board* or, as the case may be, by the shareholders at a meeting within ninety days from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the board and

> if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.
> (Emphasis supplied)

I fail to see how section 208(4) furthers Samsons' case. Section 208 as a whole pertains to related party transactions, and sub-section (4) cannot be read in isolation. Further, the Agreement was ratified by conduct, as already discussed above.

III) Expiry of the term of the Agreement

The learned counsel referred to clause 1.1 of the Agreement stipulating the contract term of one year, that is, up to 30.04.2019. He argued that the Agreement stood expired, and so did the arbitration clause therein. This plea was taken for the first time before this Court in oral argument and does not appear in the memo of appeal nor in the Order VII Rule 11 application before the learned ADJ. I can reject it on that basis alone. But I will deal with it. Even assuming that the Agreement did expire on 30.04.2019, it appears on the record that Panther continued to perform the works and Samsons continued to make payments under the same agreement after 30.04.2019 (cheques dated 23.08.2019 and 21.02.2020), which conduct is not explicable by any explanation other than that the parties *by their conduct* treated the Agreement as valid and subsisting as, even at the time of the settlement negotiations as late as February 2021, there is no correspondence on record to demonstrate that Samsons served Panther any notice of termination of the Agreement by expiry. Even if it had done so, the law is settled that the arbitration clause is separable from the main contract and survives the termination (and, by analogy, the expiry) of an agreement – see *2014 CLD 337* and *2013 CLD 1451*.

IV) Ouster of jurisdiction of the civil Court in favour of the Company Bench of the High Court

i) Learned counsel also argued relying on section 5 of the Companies Act, 2017 that, the company jurisdiction being a special jurisdiction, a dispute between two companies ought to have been brought before the High Court (Company Bench) and could not have been brought before the civil Court under the Arbitration Act. This plea is yet another one revealing purposeful ignorance of established principles. I take it that the learned counsel had in mind sub-sections (1) and (2) of section 5 when raising this plea. The said subsections read as follows:

> 5. Jurisdiction of the Court and creation of Benches.
>
> (1) The Court having jurisdiction *under this Act* shall be the High Court having jurisdiction in the place at which the registered office of the company is situate.
>
> (2) Notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 (Act V of 1908) or any other court shall have jurisdiction to entertain any suit or proceeding *in respect of any matter which the Court is empowered to determine by or under this Act.*
>
> (Emphasis supplied)

ii) The proverbial 'plain reading' of these statutory provisions confers jurisdiction on the High Court in respect of matters arising under the Companies Act, 2017 and which the High Court is by or under the Companies Act empowered to determine. Contrary to the contention of the learned counsel, section 278 of the Companies Act, 2017, in plain terms envisages referral to arbitration by companies under the Arbitration Act, 1940, and subsection (3) stipulates that *"The provisions of the Arbitration*

Act, 1940 (X of 1940), shall apply to all arbitrations between companies and persons in pursuance of this Act." I therefore find this plea of Samsons to be not only devoid of merit, but plainly a frivolous and vexatious one, for it cannot be assumed without an abundant dose of incredulity that the learned counsel took the pain to identify provisions of the Companies Act that could (in his estimation) support his case but missed out on other provisions of the same statute that clearly contradicted a self-serving selection of the statutory provisions.

Decision

12 Concluding, I find as follows:

i) A Constitutional petition under Article 199 will lie where a revision lay before the promulgation of the Code of Civil Procedure (Amendment) Act, 2020 (Act No.VII of 2020), and the Court, in applying the tests of *required by law to be done (or not done)* or *want of lawful authority* under Article 199 (1)(a) will be guided by the principles laid down in the jurisprudence developed in the exercise of its revisional jurisdiction.

ii) Order VII Rule 11 CPC has no place in proceedings under section 20 of the Arbitration Act, 1940. The statutory test of 'sufficient cause' stipulated in section 20 is to be employed instead. Applications under Order VII Rule 11 CPC coming before the Court in proceedings under section 20 of the Arbitration Act are to be treated as applications contesting sufficient cause and the Court's reasoning and order should centre around the test of sufficient cause. The civil Court should order or refuse, as the case may be, the filing of the arbitration agreement under the same order by which it disposes of the application contesting sufficient cause, so that it becomes an appealable order under section 39(1)(iv) of the Arbitration Act.

iii) A plea of *non est factum*, that is, denial of the existence of an agreement altogether, is rebuttable by attendant circumstances, including performance by the party denying the agreement where such performance is not inconsistent with the tenor and substance of the alleged agreement.

iv) A contract made on behalf of a company without the authority of a board resolution can be ratified by the company, including by its conduct.

v) Section 201 of the Companies Act, 2017, does not displace the common law doctrines of 'ostensible authority' and 'indoor management' intended for the protection of third parties entering into an agreement with a company in good-faith without notice of lack of authority of the executant on behalf of a company.

vi) An arbitration agreement made by a company with reference to and governed by the Arbitration Act, 1940, remains subject to the said Act and is not brought within the company jurisdiction of the High Court under the Companies Act, 2017, for the sole reason of the parties to the arbitration agreement or any one of them being a company.

13 Applying the above principles, I do not find any material irregularity in the impugned judgment nor do I find any want of or improper exercise of the jurisdiction vested in the learned Additional District and Sessions Judge and I find that he did what was required by law to be done within the jurisdiction vested under section 20 of the Arbitration Act, 1940. Resultantly, this petition is dismissed *in-limine* with costs per the succeeding paragraphs.

Order on Costs

14 I have no hesitation in stating that I have struggled without success against imposing costs on Samsons. I have reviewed precedent, and find that the Courts do impose costs where they find the pleas taken to have been outright false or frivolous. His Lordship Justice Mansoor Ali Shah (when at the Lahore High Court) while imposing costs in *Mian Shabir Asmail versus Chief Minister of Punjab and others, PLD 2017 Lahore 597*, observed as follows:

> "The petitioner … has … burdened the Court and drawn upon its time and resources, besides, eating into the time allocated for other cases."

15 In the case *Malik Sajjad versus Shafqat Zaman and 2 others, 2019 CLC 284*, my learned senior brother judge, Justice Miangul Hassan Aurangzeb, while imposing costs observed as follows:

> "Additionally, for protracting the execution proceedings by taking objections which had been decided in the earlier round of litigation, this Court in its discretion imposes an amount of Rs.1,00,000/- as costs in terms of section 35(1)(iii) C.P.C. on the petitioner."

16 Section 35 of the CPC, as amended by the Costs of Litigation Act, 2017, envisages in sub-clause (iii) of sub-section (1) *costs other than those mentioned in clause (i)* and makes it discretionary for the Court to award such costs. The costs under sub-clause (i) are costs of litigation incurred by the parties for which bills of costs are to be filed by the parties with the Court. It follows that, per sub-clause (iii), costs other than the parties' costs may be awarded by the Court in its discretion, for otherwise sub-clause (iii) would be otiose. This the Court can do where it finds it called for in the particular circumstances of a case. I find this one to be such a case. The national justice delivery system, funded by taxpayer's money, with resources stretched to their limits, is not meant to be a playfield for litigants to raise knowingly and wilfully all manner of false or frivolous pleas squeezing out the time and resources available to the Courts to deal with genuine pleas that, though they might not be endorsed by the Court in the end, do raise a triable issue of fact or law raised in good faith. For such triable pleas, only the costs under sub-clause (i) may be awarded. For pleas that are false, frivolous or vexatious to the knowledge of a party or its counsel, costs under sub-clause (iii) are justified.

17 I find that the plea of denial of the Agreement in toto was made by Samsons knowing well that it was false. I impose costs of Rs.100,000/-.

18 I find the plea of the Agreement being invalid for the absence of a board resolution by Samsons to be frivolous, Samsons knowing full well that the Agreement was signed by its employee and Samsons having ratified the Agreement by conduct. Samsons will pay Rs. 25,000/- costs on account of this frivolous plea.

19 I find the plea of expiry of the Agreement to be frivolous, with Samsons continuing to perform the Agreement beyond its expiry. Samsons will pay Rs. 25,000/- costs on account of this frivolous plea.

20 I find the plea of the jurisdiction resting with the Company Bench of the High Court to be vexatious, as counsel failed (by design or inadvertence, I cannot say with certainty, but if latter, is not expected of experienced counsel) to advert to section 278 of the Companies Act, 2017 titled "*Power for companies to refer matters to arbitration*" and could not have been missed by one reading even only the table of contents of the said Act. This plea is legal, and responsibility for this plea falls on the counsel alone, for which he is fastened with costs of Rs.10,000/-.

21 The costs shall be deposited in the Government account out of which disbursements are made to State counsel. The learned Deputy Registrar (Judicial) will identify the relevant account and will inform Samsons and its learned counsel accordingly.

22 The deposit slips for these costs shall be placed on record within one month from today. In case the deposit slips are not placed on record within one month from today, office shall put up the file on the administrative side for further necessary action.

23 I add that these costs are by no means representative of the actual costs, let us say per hour, of the two Courts which, if it were computed taking into account direct and indirect costs of running the two Courts, would yield a much higher sum. Litigants raising false, frivolous and vexatious pleas will continue to extract a reverse subsidy from the justice delivery system until such costs are computed, if and when they are.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

Rana.M.Ift

"Approved for reporting."