

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

F.A.O. No.29 of 2016
BNP (Pvt.) Limited
Versus
Colliers International Pakistan (Pvt.) Limited

Date of Hearing:	<u>20.06.2016</u>
Appellant by:	Mr. Ali Nawaz Kharal, Advocate,
Respondent by:	Ch. Hassan Murtaza, and Barrister Sheryar Swati, Advocates

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 39 of the Arbitration Act, 1940 ("the 1940 Act") the appellant, M/s BNP (Pvt.) Limited, impugns the Order dated 13.02.2016, passed by the Court of learned Civil Judge, Islamabad, whereby the respondent's application under Section 34 of the 1940 Act, was allowed and the proceedings in the suit for recovery of damages instituted by the appellant, were stayed.

2. The appellant is engaged in the business of developing a five star hotel and a residential apartment building in Islamabad. During 2011, the appellant wanted to engage the services of a party for marketing, selling and leasing apartments in the buildings to be developed by the appellant. Consequently, on 01.06.2011, the appellant and the respondent (M/s Colliers International Pakistan (Pvt.) Limited) entered into an agency agreement, whereby the respondent was appointed as the appellant's exclusive agent to market, sell and lease the apartments, as directed by the appellant from time to time. This agreement was valid until all the apartments/premises were leased or sold or until 31.12.2013, whichever was earlier. Clause 11 of the said agreement, which is reproduced herein below, provides a mechanism for the resolution of the contractual disputes between the said parties:-

"11. DISPUTES

In the event of any dispute or claim arising out of or relating to this agreement or any breach hereof, the parties shall use their best effort to settle such dispute or claim. To this effect,

a party wishing to settle a dispute or claim shall provide a written notice of the dispute or claim to the other party together with reasonable particulars thereof and the parties shall consult and negotiate with each other, in good faith and understanding of their mutual interests, and shall attempt to reach a just and equitable solution satisfactory to both parties within thirty (30) days from the date of the aforesaid notice. In the event that the parties fails to arrive at an amicable settlement within the aforesaid period the issue shall then, within fifteen (15) days of the expiry of the aforesaid period of thirty (30) days, be referred to the Chief Executive Officers of Colliers and BNP (Pvt.) Ltd who shall render their decision within seven (7) days of the dispute being referred to them. If the parties fail to reach an amicable settlement pursuant to this Clause 12, then upon written notice by either party to the other, the dispute or claim shall be settled by arbitration in accordance with the provisions of the Arbitration Act, 1940 (X of 1940) based upon the following:

The arbitration tribunal shall consist of two (2) arbitrators. Each party shall appoint one arbitrator;

The arbitrators shall be instructed that time is of the essence in proceeding with their determination of any dispute or claim and, in any event, the arbitration award must be rendered within the period stipulated under the laws of Pakistan;

The arbitration shall take place in English at Islamabad, or such venue as is mutually agreed by the Parties; The choice of law shall be the laws of Pakistan.

The arbitration award shall be given in English and in writing and shall be final and binding on the Parties, not subject to any appeal, and shall deal with the question of costs of arbitration and all matters related thereto; and Judgment upon the award rendered may be entered in any court having jurisdiction, or, application may be made to such court for a judicial recognition of the award or any order of enforcement thereof, as the case may be."

3. After disputes and differences developed between the appellant and the respondent, the appellant on 09.03.2015, instituted a suit for recovery of Rs.9,682,000/- along with interest and recovery of damages to the tune of Rs.40,000,000/- against the respondent before the Court of learned Civil Judge, Islamabad.

4. On 28.09.2015, a representative of the respondent tendered appearance before the learned civil court, and the matter was adjourned to 27.10.2015 for the filing of *Wakalatnama* (power of attorney) and written statement. On 27.10.2015, the respondent filed an application under Section 34 of the 1940 Act, in which the following relief was prayed for:-

"In view of above facts and circumstances, it is most humbly prayed that this learned Court may graciously be pleased to stay the proceedings in the present suit and the Plaintiff be directed to invoke clause 11 of the agreement for appointment of arbitrator as agreed between the parties so as to resolve the matter as per procedure provided in the agreement between the parties."

5. The appellant contested this application by filing a reply thereto. In the said reply, the appellant took a preliminary objection to the effect that since the agreement between the parties does not subsist, the arbitration clause in the agreement could not be invoked. Vide order dated 13.02.2016, the learned civil court allowed the said application under Section 34 of the 1940 Act and stayed the proceedings in the suit instituted by the appellant. Furthermore, the learned civil court directed the appellant to invoke Clause 11 of the agreement for the resolution of the disputes. The appellant, in the instant appeal, has impugned the said order dated 13.02.2016.

6. Learned counsel for the appellant submitted that as the term of the agreement between the parties had expired on 31.12.2013, the arbitration clause in the agreement could not be invoked for the resolution of contractual disputes between the parties; that two employees of the respondent were involved in fraudulent activities which had caused losses to the appellant; that since allegation of forgery had been made by the appellant, the disputes between the parties could not be referred to arbitration; that since overlapping issues of law and fact were involved in the matter, arbitration was not the proper mode for the resolution of disputes; that the respondent had taken 'a step in the proceedings' by appearing before the learned civil court on 28.09.2015 and seeking an adjournment for filing a written statement; that under Section 34 of the 1940 Act, the court has discretion whether or not to stay the proceedings in the suit; that the respondent's application under Section 34 of the 1940 Act was silent as to the disputes which were sought to be referred to arbitration; and that the law requires for such disputes to be set out with specificity in an

application under Section 34 of the 1940 Act. The appellant, however, admitted that the agreement contained an arbitration clause, and that the disputes between the parties arise from and are related to the terms of the said agreement. In making his submissions, the learned counsel placed reliance on the cases of The HUB POWER COMPANY LIMITED (HUBCO) Vs. PAKISTAN WAPDA through Chairman (PLD 2000 SC 841), Government of N.-W.F.P. Vs. The Devlikund Forest and Multipurposes Cooperative Society Limited through Managing Director (1994 SCMR 1829), M/s Uzin Export & Import Enterprises for Foreign Trade Vs. Messrs M. Iftikhar & Company Limited (1993 SCMR 866), Eckhardt & Company Vs. Muhammad Hanif (PLD 1993 SC 42), Uzin Export Import Foreign Trade Co. Vs. Macdonald Layton & Co. Ltd. Karachi (1996 SCMR 690), Island Textile Mills Ltd. Vs. V/O TECHNOEXPORT & another (1986 SCMR 463), Haji Soomar Haji Hajjan Vs. Muhammad Amin Muhammad Bashir Ltd. (1981 SCMR 129), Muhammad Yousuf Burney Vs. S. Muhammad Ali (1983 CLC 1498), Syed Arshad Ali Vs. Sarwat Ali Abbasi (1988 CLC 1350), Farid Virani and another Vs. Feroz Virani (PLD 2013 Sindh 386), Trading Corporation of Pakistan (Pvt) Ltd. Karachi Vs. Messrs Abdullah Sugar Mills Limited (Depalpur) (PLD 2013 Sindh 254), and Nelofar Saqib Vs. Saiban Builders & Developers (2011 CLC 157).

7. On the other hand, learned counsel for the respondent drew the attention of the Court to paragraphs 10 to 16 of the suit to demonstrate that the dispute raised by the appellant relates to and arises from the provisions of the agreement dated 01.06.2011. He further submitted that the appellant, in its suit, had placed reliance on only six documents, none of which contain any allegation of fraud/forgery against the respondent; that the appellant, in its reply to the respondent's application under Section 34 of the 1940 Act, did not plead or allege the commission of fraud by the respondent; that the respondent did not apply for an adjournment to file a written statement and did not take 'a step in the proceedings'; that an application

under Section 34 of the 1940 Act was filed at an early stage of the suit; and that in the application under Section 34 of the 1940 Act, it has been clearly mentioned that the dispute raised by the appellant in its suit is liable to be resolved through arbitration as contemplated by the provisions of the agreement dated 01.06.2011.

8. He further submitted that there was no dispute as to the execution of the agreement dated 01.06.2011 between the parties; that the term *'arising out of or relating to this agreement'* is a term of wide import and encompasses all disputes and differences, which, but for the said agreement, would not have arisen between the parties; and that the applicant is ready and willing to do everything necessary for proper conduct of arbitration proceedings. In conclusion, he submitted that the learned civil court correctly exercised its jurisdiction by allowing the respondent's application under Section 34 of the 1940 Act and staying the proceedings in the suit. In making his submissions, the learned counsel for the respondent placed reliance on the cases of Dar Okaz Printing and Publishing Vs. Printing Corporation of Pakistan (PLD 2003 SC 808), Yusuf Muhammad Siddiq Vs. Muhammad Rafique (PLD 2015 Sindh 319), Serulean (Pvt.) Ltd Karachi Vs. Bhoja Airlines (Pvt.) Ltd (2001 YLR 3150), Hamad Raza Vs. Sajid Hussain (2014 CLC 1057), Province of Punjab Vs. Ehsan Fazal & Company, Lahore (1986 CLC 2800), Island Textile Limited Vs. V/O TECHNOEXPERT (1979 CLC 307), Haji Soomar Haji Hajaan Vs. Muhammad Amin Muhammad Bashir Limited (1981 SCMR 129), Syed Ghaus Mohyuddin Vs. National Refinery Limited (PLD 1968 Karachi 652), Government of Sindh Vs. Tousif Ali Khan (2003 CLC 180), Syed Mudassar Shah Vs. Managing Director N.-W.F.P. Forest Development Corporation (1999 MLD 736), Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak (AIR 1962 SC 406), and Swiss Timing Limited Vs. Commonwealth Games 2010 Organising Committee (2014 (6) SCC 677).

9. I have heard the arguments of the learned counsel for the parties and perused the record with their able assistance. The facts have been set out with sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

Section 34 of the 1940 Act is reproduced herein below:-

"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 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."

10. Section 34 of the 1940 Act has been enacted to make arbitration agreements effective and prevent a party from going to the Court contrary to his own agreement. Where parties have agreed to refer disputes to arbitration, the Court should as far as possible, give an opportunity for resolution of disputes through arbitration rather than by judicial adjudication. The power conferred upon the Court to grant stay under Section 34 of the 1940 Act is entirely a matter of discretion of the Court. But the Courts should see that the parties are held to their bargain and promote the sanctity of contracts. Stay of proceedings in a suit is a more expedient and proper course to follow where there is an arbitration clause in a contract. The moment an application under Section 34 of the 1940 Act is filed in a pending suit, further progress thereof is automatically arrested and the trial Court's power to act under the Code of Civil Procedure, 1908, is suspended till decision is rendered on the application.

11. The arbitration clause in the agreement dated 01.06.2011, requires the parties to first refer the matters in dispute to the Chief Executive Officers of the appellant and the respondent, before the disputes could be taken to arbitration.

The contention of the learned counsel for the appellant that on account of such a pre-condition, the respondent could not file an application under Section 34 of the 1940 Act, is not tenable. Under Section 34 of the 1940 Act, a Court has the discretion whether or not to stay the proceedings in the suit on account of the existence of an arbitration agreement between the contesting parties to the suit. The Court, on such an application, cannot refer the disputes, which are the subject matter of the suit, to arbitration. At best a court can stay the proceedings leaving the parties to institute arbitration proceedings in accordance with the dispute resolution mechanism enshrined in the contract. Reference in this regard may be made to the case of Messrs S. M. Qasim & Co. Vs. Messrs Ch. Azimuddin (PLD 1962 Lahore 95), where it has been held as follows:-

“Section 34 of the Arbitration Act merely provides that where any party to an arbitration agreement commences any legal proceedings against any other party to the agreement, such party may apply to the judicial authority before which the proceedings are pending to stay the proceedings, and if the judicial authority is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, then such authority may make an order staying the proceedings. It does not provide that the Court shall then proceed to enforce the arbitration clause in the agreement. It appears to me that the intention of the legislature is that in a case of this nature the parties should be left to pursue their own course to enforce the arbitration agreement in accordance with its terms. The parties can refer their dispute to an arbitrator in terms of the agreement without the intervention of the Court, or any of them may apply under section 20 of the Arbitration Act to a Court having jurisdiction in the matter to which the agreement relates that the agreement be filed in Court, and then the Court shall have to follow the procedure laid down in that section.”

12. In view of the above, the contention of the learned counsel for the appellant that the pre-condition for a reference to arbitration had not been satisfied is spurned as pre-mature at this stage of the case. Once the Court stays the proceedings in the suit, the parties are left whether to institute arbitration proceedings with the intervention of the Court (under Section 20 of the 1940 Act), or without the intervention of the Court (under Chapter II of the 1940 Act). However, where the parties

to the suit, who are also parties to an arbitration agreement executed prior to the institution of the suit, jointly apply for the matters in dispute between such parties to be referred to arbitration, the Court may treat such an application as an application under Section 20 of the 1940 Act, and refer the disputes to arbitration.

13. I shall now deal with the contention of the learned counsel for the appellant that as the case was adjourned on 28.09.2015 for the filing of written statement, the respondent had taken 'a step in the proceedings. The record shows that on 28.09.2015, a representative of the respondent tendered appearance before the learned civil court. The matter was adjourned to 27.10.2015 for the filing of *wakalatnama* (power of attorney) and a written statement. The respondent had not applied to the Court for an adjournment so as to enable it to file a written statement. On 28.09.2015, the respondent was not represented by a lawyer, and was therefore not expected to know the intricacies of the law. On the very next date of hearing (i.e. 27.10.2015), the respondent filed an application under Section 34 of the 1940 Act. An adjournment granted in routine by the learned civil court is not inductive of the respondent's conduct to abdicate his claim to have the disputes raised in the suit decided in accordance with the arbitration clause in the agreement. Reference to case law at this stage would be apposite:-

- i) In the case of Pakistan International Airlines Corporation Vs. M/s Pak Saaf Dry Cleaners (PLD 1981 SC 553), the Hon'ble Supreme Court, after making reference to Section 34 of the 1940 Act held as follows:-

"The Legislature has, of course, clearly implied in the language used in the section that the arbitration clause should be respected, but has also made it abundantly clear that the party seeking to avail of the provision of stay under this section must clarify his position at the earliest possible opportunity, so as to leave no manner of doubt that he wishes to have resort to arbitration proceedings. If he hesitates in this regard, or allows the suit to proceed in any manner, that conduct would indicate that he has abdicated his claim to have the dispute decided under the arbitration clause, and to

have thereby forfeited his right to claim stay of the proceedings in the Court." (Emphasis added)

- ii) In the case of Province of Punjab Vs. Ehsan Fazal & Company, Lahore (1986 CLC 2800), it was held as follows:-

"6. As noticed earlier no request was made by the District Attorney for adjournment for filing written statement on behalf of the appellants. There is also no application filed by the District Attorney in the Court seeking adjournment to file written statement. The case was adjourned by the Court in routine for filing written statement by the defendants. On the next date of hearing the appellants filed application under section 34 of the Arbitration Act. In the circumstances it cannot be said that the appellants had waived their right to invoke the arbitration clause of the agreement or they had taken any step in the proceedings before moving the Court under section 34 of the Arbitration Act for staying proceedings in the suit."

- iii) In the case of M/s Associates Construction Limited Vs. WAPDA (1989 MLD 206), the plaintiff resisting an application for the stay of the suit under Section 34 of the 1940 Act, had contended that since the matter had been adjourned for the filing of a written statement prior to the filing of the application under Section 34 of the 1940 Act, the defendant had taken 'a step in the proceedings' disentitling it to seek a stay of the proceedings in the suit. The Hon'ble Lahore High Court held that as the defendant had not made any request or filed an application for an adjournment to file a written statement, and the adjournment order had been passed by the Court in routine, inference could not be drawn against the defendant. The Hon'ble High Court upheld the order passed by the learned civil court allowing the defendant's application under Section 34 of the 1940 Act and staying the proceedings in the suit.
- iv) In the judgment dated 22.04.2016, passed in F.A.O. No.59 of 2013 titled "Infospan (Private) Limited Vs. M/s Telecom Foundation & another" I have had the occasion to hold as follows:-

"13. If a defendant files a written statement or takes 'a step in the proceedings' he is not entitled thereafter to

seek a stay of the suit. The term, 'step in the proceedings' has been judicially interpreted to mean such a step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Where the counsel appearing for the party to the suit had sought adjournments specifically for the filing of a written statement and had obtained time on more than one occasion for such a purpose, subsequent application for stay of suit has been held to be not maintainable. The party, in such a case is said to have evinced an intention to have the matter adjudicated by the Court.

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19. *It is my view that a distinction need not be made between a situation where an adjournment is sought on behalf of the defendant to file a written statement, and a situation where a Court adjourns the matter for the filing of a written statement in the presence of the counsel or a representative of the defendant albeit without an application for an adjournment. Both the situations stand on the same footing and entail the same legal consequences. When a case is adjourned on six occasions in the presence of a defendant or its counsel for the filing of a written statement, the defendant cannot assert that such adjournments are no consequence to the defendant simply because he had not applied for an adjournment for the filing of written statement.*

20. *Once the defendant has gone through the suit, he must, at the earliest make up his mind whether or not to submit to the jurisdiction of the Court. He must not dilly-dally but take a position at the first available opportunity. Even if the matter has been adjourned by the Court in routine for the filing of a written statement, the defendant, if he wants to opt for the dispute resolution mechanism contained in the contract, take corrective steps and inform the Court, without any delay, about his intention to seek stay of the suit. There is nothing stopping a defendant from seeking an adjournment for the filing of an application under Section 34 of the 1940 Act."*

14. In the case at hand, a single adjournment granted by the Court in routine, requiring the defendant to file a power of attorney and a written statement cannot be termed as 'a step in the proceedings'. The date on which this order was passed was the first date on which the representative of the defendant had tendered appearance in the Court. The conduct of the defendant, in order to be termed as 'a step in the proceedings' must be such as would manifestly display an unequivocal

intention to proceed with the suit and give up the right to have the matter disposed of by arbitration. In the case of Rachappa Guruadappa Bijapur Vs. Gurusiddappa Nuraniappa and others (AIR 1989 SC 635), it was held that where a counsel appearing for a party to the suit had sought adjournments specifically for the filing of written statement and had obtained time on more than one occasion for such a purpose subsequent application for stay of the suit would not be maintainable because the applicant had, by seeking such adjournments, evinced an intention to have the matter adjudicated by the Court. Consequently, I am unable to agree with the learned counsel for the appellant that the adjournment granted by the Court on 28.09.2015 to the respondent/defendant to file a power of attorney and a written statement amounted to 'a step in the proceedings' disentitling it from seeking a stay of the suit on the basis of an arbitration clause in the agreement.

15. As regards the reliance placed by the learned counsel for the appellant on the case of Syed Arshad Ali Vs. Sarwat Ali Abbasi (1988 CLC 1350) in support of his contention that the respondent's application under Section 34 of the 1940 Act, was liable to be dismissed because it did not state or specify the disputes which could be referred to arbitration, the Hon'ble Sindh High Court in the case of Mst. Surriya Rehman Vs. Siemens Pakistan Engineering Company Limited (PLD 2011 Karachi 571) has taken a different view. In the said judgment, it has been, *inter-alia*, held as follows:-

“While it would be desirable for a defendant moving an application under section 34 to specify with some exactitude the dispute that ought to be referred to arbitration, a failure to do so should not be regarded as fatal. The reason for this, in my respectful view, is twofold. Firstly, it is well settled that if parties have chosen to refer their disputes to a domestic forum of their own choice, that choice should be honored to the maximum extent possible, and the parties should be directed to have the dispute resolved by that forum (i.e., by arbitration). To simply dismiss an application for stay of suit on a rather technical ground may result in the court being forced to proceed with 'a dispute that ought to have been arbitrated. Secondly, even if the court is put to some inconveniency as a result of the defendant's failure to specify the dispute that ought to have been referred to arbitration, that inconvenience does not create an insurmountable

burden. The reason is that the plaintiff must, after all, disclose a cause of action, and the defendant's objection that the matter be referred to arbitration can only be in respect of the cause of action disclosed in the plaintiff, either in whole or in part. It is normally not difficult to extract the cause of action from the contents of the plaintiff and thus, in effect, to identify the dispute that ought to be referred to arbitration. It is also to be noted that section 34 does not, as such, require that the defendant must specify the dispute in his application. It follows therefore that in my respectful view, the failure to exactly identify the dispute in the application under section 34 ought not to be regarded as fatal."

16. As I find myself in respectful agreement with the law laid down by the Hon'ble High Court of Sindh in the case of Mst. Surriya Rehman Vs. Siemens Pakistan Engineering Company Limited (PLD 2011 Karachi 571), I cannot bring myself to agree with the learned counsel for the appellant that the respondent's omission to set out the disputes which were liable to be referred to arbitration in its application under Section 34 of the 1940 Act, rendered the same incompetent. It is neither a statutory nor a mandatory requirement of law that the application under Section 34 of the 1940 Act must catalogue the disputes arising between the parties. Mere non-statement of disputes in so many words would not render the application bad *ipso facto*. The Court can, by perusing the arbitration clause and the claim raised in the suit, determine whether the claim brought in the suit, sought to be stayed, comes within the submission to arbitration.

17. The contention of the learned counsel for the appellant that since the agency agreement dated 01.06.2011 had a validity period until 31.12.2013, and since the civil suit had been instituted by the appellant on 27.09.2015 (i.e. after the expiration of the validity period of the agreement), the proceedings in the suit ought not to have been stayed by the learned civil court, does not take account of the fact that the payments which the appellant was seeking to recover from the respondent was alleged to have been made either during the validity period of the said agreement or thereafter, on the basis of the said agreement. Any dispute between the appellant and the respondent, which does not arise from or is not related to

the terms of the agreement, cannot be referred to arbitration. The suit instituted by the appellant raises a purely contractual dispute. The claims made by the appellant in the said suit are not *de hors* the agreement. It has consistently been held that arbitration clause in a contract is to be regarded as a thing apart from the main conditions of the contract. The main contract deals with the performance of mutual obligations and how they are to be performed, whereas the arbitration clause deals only with the procedure for determining the liabilities created by the contract. The arbitration clause itself creates no liability, and is severable from the main contract. The arbitration clause in the contract continues to exist even after the termination of the contract. If the main contract is repudiated or frustrated or cancelled or expired, the arbitration clause survives. Mere repudiation, frustration, cancellation or expiration of the contract would not give rise to putting an end to the arbitration clause. Law to this effect has been laid down in the cases of Heyman and another Vs. Darwins Ltd. [1942] 1 All ER 337, Firm Karam Narain Daulat Ram and another Vs. Messrs Volkart Bros. and another (AIR 1946 Lahore 116), Radhakishin C. Chawla Vs. General Construction Co. (AIR 1947 Sindh 57), Hoosen Brothers Ltd Vs. Pakistan Textile Mills Ltd (PLD 1954 Sind 1), Raja Muhammad Sarwar Khan Vs. The Federation of Pakistan (PLD 1958 Karachi 224), The Pan Islamic Steamship Co. Ltd. Vs. Messrs General Imports And Exports Ltd. (PLD 1959 Karachi 750), Hyderabad Municipal Corporation Vs. Messrs Columbia Enterprises (1990 Karachi CLC 47), Lahore Stock Exchange Limited Vs. Fredrick J. Whyte Group (Pakistan) Ltd. and others (PLD 1990 SC 48), Bharat Petroleum Corpn. Ltd. Vs. Great Eastern Shipping Co. Ltd. (AIR 2008 SC 357), and Pakistan Mobile Communication Vs. Naimatullah Achakzai (2012 CLC 12).

18. As regards the contention of the learned counsel for the appellant that since fraud was alleged by the appellant against the respondent in the suit, the learned civil court ought to have dismissed the application under Section 34 of the 1940 Act, I

am of the view that mere allegation of fraud/forgery in a civil suit against the defendant cannot, by itself, be a ground for refusing a stay the proceedings in the suit, otherwise there will be tendency to allege fraud in any case in which a party to an arbitration agreement/clause wishes to avoid arbitration. It has become commonplace for litigants to make bald allegations of fraud/forgeries in order to avoid arbitration.

19. Unless a *prima-facie* case of fraud in procuring the contract, which contains the arbitration clause, is clearly made out from the documents on the record, the proceedings in the suit should not be stayed. The Court must ascertain whether there are any criminal proceedings pending against the defendant, and whether such criminal proceedings are so inextricably intertwined with the contractual disputes, which the defendant seeks to resolve through arbitration, that the arbitration proceedings would be hampered and obstructed by such criminal proceedings or whether the institution of or progress in the arbitration proceedings would be dependent on the outcome of the criminal proceedings. If the Court on the examination of the record of the criminal proceedings concludes that the arbitration proceedings and the criminal proceedings cannot proceed simultaneously, it can, in exercise of discretion, stay the proceedings in the suit. A wrong alleged against a defendant can be alleged to be a criminal as well as a civil wrong. The mere fact that a defendant is held, after an adjudicatory process, to have committed a civil wrong does not *ipso facto* make him criminally liable or vice versa. Therefore, mere pendency of criminal proceedings against a defendant by itself cannot, in my view, be a ground on which the proceedings in a suit can be stayed under Section 34 of the 1940 Act. It is by now well settled that civil and criminal proceedings can proceed against the same person simultaneously with varying results. In the case at hand, the appellant has not even filed any criminal complaint against the respondent or its employees with respect to the forgery alleged by it. The appellant's reply to the respondent's application under Section 34 of the 1940

Act contains no pleading as regards allegations of fraud/forgery.

20. In the civil suit instituted by the appellant, it was pleaded that the respondent (as an agent) was entitled to a selling fee of 2.0% of the gross sale price of premises/apartments in the appellant's project. In the event of overseas sales, the respondent was entitled to an additional selling fee of 2.0% of the gross sale price. The respondent was also entitled to an additional fee of 2% of the gross sale price or any figure agreed with the appellant in writing, in case of any sale introduced by a third party or by any property agent. The respondent was to keep the appellant fully informed and was to provide satisfactory evidence of the clients with whom the respondent was dealing. The appellant's case is that the approvals for additional disbursements made by the appellant to the respondent in accordance with the provisions of the agreement dated 01.06.2011 were based on misrepresentations, and forged/fake evidence given by the respondent's employees and representatives. In my view, such an allegation would not render the arbitration agreement between the parties inoperative. This dispute, which is purely contractual in nature, ought to be resolved in accordance with the dispute resolution mechanism as enshrined in the agreement.

21. The appellant's reliance on the majority view in the case of Hub Power Company Limited Vs. Pakistan WAPDA (PLD 2000 SC 841) ("HUBCO's case"), is also misplaced. In the said case, a distinction was drawn between a dispute raised under a valid agreement and a dispute raised under an agreement which had *prima-facie* been obtained through fraud or bribery. The Hon'ble Supreme Court took into consideration the material brought on record in support of the allegations of fraud. This material included the allegations of corruption set out in the First Information Reports (FIRs) lodged by Water & Power Development Authority with particularity against high officials in a Ministry of Water & Power, Government of Pakistan. The Hon'ble Supreme Court, after examining such

material, held that *"[t]hese circumstances prima facie do establish the case of misuse of power by public functionary for extraneous considerations requiring detailed examination and decision by a Court of law after a full fledged trial."*

Furthermore, it was held as follows:-

"The allegations of corruption in support of which the above-mentioned circumstances to provide prima facie basis for further probe into matter judicially and, if proved, would render these documents as void, therefore, we are of the considered view that according to the public policy such matters, which require finding about alleged criminality, are not referable to Arbitration."

22. In the case of Government of Sindh Vs. Tousif Ali Khan (2003 CLC 180), the Hon'ble High Court of Sindh distinguished HUBCO's case by holding as follows:-

"Appointment of an arbitrator was declined in the case of the Hub Power Company Ltd. Vs. Pakistan WAPDA through Chairman and others PLD 2000 SC 841 where, in addition to pending criminal prosecution proceedings before the Court, the supplementary agreement was alleged to have been obtained through fraud and sufficient material was placed on record providing prima facie evidence in support of the allegations details whereof are set forth at pages 866 and 867 of the said report. No such material has been brought on record to substantiate the allegations of fraud in the instant case in support of prima facie case of fraud."

From the documents placed on record, although a show-cause notice has been issued but no finding of guilt against any officer, any prosecution nor even an F.I.R. is available on record. The allegation of fraud has not been substantiated in the present case. Merely by an allegation of fraud by the appellant at his stage, the respondent cannot be deprived to have the dispute resolved through arbitration."

23. In HUBCO's case, the Hon'ble Supreme Court had explicitly held that *"mere allegations were not sufficient in order to come to the conclusion whether the dispute between the parties is arbitrable or not."* In the case at hand, the allegation of forgery in paragraph 12 of the plaint is a bare allegation and nothing more. The petitioner did not place any material on record in support of such an allegation. Such an allegation has to be proved through an adjudicatory process in accordance with clause 11 of the agreement. There is no material brought on record by the appellant which would cause the Court to come to a *prima facie* view that the agreement

dated 01.06.2011 was obtained by exercise of fraud. Therefore, I am of the view that the appellant could not resist an application under Section 34 of the 1940 Act by alleging forgery or fraud against the respondent.

24. Reference to case law on the subject would be appropriate. In the cases of Aswan Tentage and Convas Mills Ltd Lahore Vs. MA Razzaq & Company (1993 MLD 243), and Lahore Stock Exchange Limited Vs. Fredrick J. Whyte Group (Pakistan) Ltd. and others (PLD 1990 SC 48) it has been held that the question whether the consent of a party to an arbitration agreement had been procured through fraud, is to be referred to arbitration. Furthermore, in the case of Government of Sindh Vs. Tousif Ali Khan (2003 CLC 180), it has been held that merely by alleging fraud, a defendant cannot be deprived from having dispute resolved through arbitration. In the cases of Syed Ghaus Mohyuddin Vs. National Refinery Limited (PLD 1968 Karachi 652), and Island Textile Limited Vs. V/O TECHNOEXPERT (1979 CLC 307), the Hon'ble High Court of Sindh has held that there was no legal prohibition or embargo to the effect that any arbitrable tribunal cannot try the question of fraud and/or misrepresentation. In the case of Syed Mudassar Shah Vs. Managing Director N.-W.F.P. Forest Development Corporation (1999 MLD 736), the Hon'ble Peshawar High Court held as follows:-

"17. The insertion of Section 34 in the Arbitration Act has got its own object and its effect should not be nullified by the arguments that once fraud is alleged in the plaint then the civil Court should not stay the proceedings i.e., should not invoke the provisions of Section 34 is misconceived. All statutes and enactments are to be given such interpretation so to make them operative and not to bye-pass them by advancing mere technical objections."

25. Furthermore, in the case of Haji Soomar Haji Hajaan Vs. Muhammad Amin Muhammad Bashir Limited (1981 SCMR 129), the Hon'ble Supreme Court held as follows:-

"....We feel that wherever the parties to an Agreement expressly chose, through an arbitration clause, a forum other than a Court of law, for the settlement of their dispute, neither of them should normally be allowed to avoid that forum. The sole purpose of the Arbitration Act is to curtail litigation in Courts and to promote the settlement of the dispute amicably"

through persons in whom both the parties repose their trust. Therefore the course that the Courts should generally follow is to encourage the settlement of disputes by this method wherever the parties have themselves agreed to do so. That this was also the intention of the Legislature is evident from the manner in which Section 34 of the Arbitration Act is worded. To allow one side to evade and wriggle out from the agreement merely by making allegations of fraud, even though the same may not ultimately be proved or even pressed, would amount to giving a handle to that party to circumvent the arbitration clause. The apprehension was also expressed by the Chancery Division in Russell's case in the following words:

"....if the mere making of a charge of fraud would entitle the person making it to call upon the Court, in the exercise of its discretion, to refuse to refer to arbitration, there would be a very easy way of getting rid of all these clauses of arbitration. I am satisfied that the mere making of a charge will not do that, even in a case where the Court ought to exercise its discretion by refusing to refer the case to arbitration...."

9. *The present case is a lamentable example of such evasion on the part of the appellant, who filed a civil suit in disregard of their agreement, as far back as June, 1969, and notwithstanding the fact that they got an adverse verdict from the High Court, they persisted in filing appeal after appeal with the result that neither side has been able to get the dispute settled till today.*

10. *In view of the above discussion, the appeal is dismissed with costs."*

26. I find the case law relied upon by the learned counsel for the appellant to be distinguishable and not applicable to the facts and circumstances of the case.

27. In the case of Nelofar Saqib Vs. Saiban Builders and Developers 2011 CLC 157. The Hon'ble High Court of Sindh dismissed the application under Section 34 of the 1940 Act, because the allegations of fraud leveled by one party against the other appeared to the Hon'ble High Court to be substantial, weighty and bonafide. In the case of Uzin Export Import Foreign Trade Co. Vs. Macdonald Layton & Co. Ltd. Karachi (1996 SCMR 690), the application under Section 34 of the 1940 Act was dismissed, because the arbitration clause contemplated arbitration in a foreign country, which was not considered expedient because the entire evidence with respect to the dispute was available in Pakistan. In the case of M/s Uzin Export & Import Enterprises for Foreign Trade Vs. Messrs M. Iftikhar & Company Limited (1993 SCMR 866), it was

held that stay should have been granted under Section 34 of the 1940 Act to allow the parties to have their disputes raised in the counter claim to be decided by arbitration. Although, the venue for arbitration was agreed by the parties to be at Paris, the Hon'ble Supreme Court stayed the proceedings in the suit and left the parties to resolve their disputes through arbitration proceedings at Karachi.

28. The learned civil court in the impugned order dated 13.02.2016 has not just stayed the proceedings in the civil suit, but has also directed the appellant to invoke the arbitration clause in the agreement for the resolution of the dispute. This direction, the learned civil court could not give, and goes against the law laid down by the Hon'ble Lahore High Court in the case of Messrs S. M. Qasim & Co. Vs. Messrs Ch. Azimuddin (PLD 1962 Lahore 95).

29. In view of the above, the impugned order dated 13.02.2016, is set aside only to the extent of the direction given by the learned civil court to the appellant to invoke the arbitration clause in the agreement dated 01.06.2011.

30. For the foregoing reasons, the instant appeal is partly allowed.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

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