JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.59/2013
Infospan (Private) Limited
Versus.
M/s. Telecom Foundation and another.

Date of Hearing:	14.04.2016
Appellant by:	Mr. Sultan Mazhar Sher, Advocate,
Respondent No.1 by:	Syed Ishtiaq Haider, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 39 of the Arbitration Act, 1940 ("the 1940 Act"), the appellant, Infospan (Private) Limited, impugns the order dated 05.06.2013, passed by the Court of learned Civil Judge 1st Class (West), Islamabad, whereby the appellant's application under Section 34 of the 1940 Act, praying for the civil suit instituted by respondent No.1 to be stayed, was dismissed.

2. The facts essential for the disposal of this appeal are that the appellant and respondent No.1 entered into lease agreements dated 12.09.2005 and 13.03.2007 whereunder the former leased, the 4th and 5th Floors and a part of the ground floor of Telecom Foundation Complex, Plot No.7, Mauve Area, G-9/4, Islamabad ("the rented premises"). These lease agreements contained arbitration clauses providing for disputes and differences arising from and related to the lease agreements to be resolved through arbitration in accordance with the provisions of the 1940 Act. The arbitration clause in the said agreements is reproduced herein below:-

> ***16. DISPUTE RESOLUTION:***
>
> ***"Except as otherwise may have been provided in this Lease, any dispute, controversy or claim arising out of the or in connection with this Lease or the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Arbitration Act, 1940, as amended from time to time. The parties shall appoint sole arbitrator with mutual consent whose decision shall be final and binding on both the parties. The arbitration shall be held in Islamabad, Pakistan. The arbitration proceedings shall be conducted in English and the award shall be rendered, in English language."***

3. Apparently, respondent No.1 had instituted eviction proceedings against the appellant before the Court of the learned Rent Controller, Islamabad. These proceedings culminated in an eviction order being passed against the appellant under Section 17 (9) of the Islamabad Rent Restriction Ordinance, 2001 ("IRRO"). The appellant's appeal against the eviction order was also dismissed. Thereafter, the appellant vacated the rented premises. On 25.04.2012, respondent No.1 instituted a suit for recovery of Rs.21,329,108/- against the appellant as outstanding rent etc., before the Court of learned Civil Judge, Islamabad. After summons were issued, a representative of the appellant tendered appearance before the learned Civil Court on 17.07.2012. The matter was adjourned to 10.09.2012 for the filing of the written statement. Thereafter, the matter was adjourned on five occasions, but the appellant did not file a written statement. On 10.01.2013, the learned Civil Court give the appellant a last and final opportunity to file the written statement. As the appellant did not file a written statement, the learned Civil Court, on 23.01.2013, passed the following order:-

> *"Written statement has not been submitted by the defendant before the court inspite of availing number of opportunities. Statutory period for the submission of written statement has also been exhausted. Accordingly, right of defendant to submit written statement is struck of. Now to come up for exparte evidence of plaintiff for 16.02.2013."*

4. About nine months after the institution of the suit, the appellant filed an application under Section 34 of the 1940 Act, praying for the said suit to be stayed and matters in dispute between the parties to be referred to arbitration. Vide Order dated 05.06.2013, the learned Civil Court, dismissed the said application and adjourned the matter for respondent No.1's *ex parte* evidence. It is the said order dated 05.06.2013, which has been impugned by the appellant in the instant appeal.

5. On 11.10.2013, this Court admitted the appeal to regular hearing and passed a *status quo* order. I am told that since then no progress has been made in the proceedings before the learned Civil Court.

6. Learned counsel for the appellant submitted that the *vakalatnama* / power of attorney was filed on the same day on which the application under Section 34 of the 1940 Act was filed by the appellant; that on no occasion did the appellant seek an adjournment to file a written statement; that the adjournments requiring the appellant to file a written statement were granted in routine; that at no stage was there a direction given to the appellant to file a written statement; that the appellant had not filed a written statement because it wanted the matters in dispute between the parties to be referred to arbitration; that the appellant had not taken any step in the proceedings, and was, therefore, entitled to apply for the proceedings in the suit to be stayed; and that the order dated 05.06.2013 was against the law and liable to be set aside. In making his submissions, the learned counsel for the appellant placed reliance on the law laid own in the cases of Muhammad Farooq Vs. Nazir Ahmad (PLD 2006 SC 196), Ghulam Mohiuddin Paracha and another Vs. Ahmed Naseer Khawaja and another (1996 CLC 405), and M/s. Uzin Export & Import Enterprises for Foreign Trade Vs. M/s. M. Iftikhar & Company Limited (1993 SCMR 866).

7. On the other hand learned counsel for respondent No.1 defended the impugned order by drawing the attention of the Court to the orders dated 17.07.2012, 10.09.2012, 03.10.2012, 16.10.2012, 27.11.2012, 10.01.2013 and 23.01.2013, passed by the learned Civil Court to demonstrate that the appellant had been granted ample opportunities by the learned Civil Court to decide either to file an application under Section 34 of the 1940 Act or a written statement; that the appellant's right to file a written statement had already been struck off when the appellant filed an application under Section 34 of the 1940 Act; that since the appellant's right to file a written statement had been struck off, an application under Section 34 of the 1940 Act was not maintainable. In support of his submissions, the learned counsel for respondent No.1 placed reliance on case of Pakistan International Airlines Corporation Vs. Messrs Pak Saaf Dry Cleaners (PLD 1981 SC 553).

8. I have heard the arguments of the learned counsel for the contesting parties and perused the record with their able assistance.

9. The question that falls for consideration in this case is whether the six adjournments granted by the learned Civil Court to the appellant for filing a written statement, coupled with the appellant's silence regarding its intention to seek stay of the proceedings on all these dates until its right to file a written statement was struck off amounts to a 'step in the proceedings' disentitling it to any relief under Section 34 of the 1940 Act.

10. Before going into the merits of the case, it is pertinent to reproduce herein below, Section 34 of the 1940 Act:-

> ***"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 in 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."***

11. Section 34 of the 1940 Act contemplates an application which makes out that a dispute had arisen before the institution of the suit or before the filing of an application; that such a dispute was the subject matter of the suit; and that the dispute was covered by the arbitration clause in the contract. Section 34 creates an exception to the general law relating to procedure, in that it empowers the court which has jurisdiction to decide a dispute to refuse to do so where an arbitration agreement is in existence. By now, Section 34 has been subjected to copious judicial interpretation.

12. Section 34 vests the court with the power to refuse its aid to a person who appeals to it in breach of an agreement to decide the matter by arbitration. Under this section the court has the

power to exercise its discretion to make an order for stay provided that:

(i) There is a valid submission;
(ii) The proceedings in the court have been commenced by a party to the submission or a person claiming through and under him against another party to the submission or a person claiming through or under him;
(iii) The proceedings are in respect of a matter agreed to be referred;
(iv) The application is made by a party to the proceedings;
(v) The application is made before filing a written statement and taking any other 'step in the proceedings'; and
(vi) The party applying for stay was and is ready and willing to do all things necessary to the proper conduct of the arbitration.

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.

14. In the instant case vide order dated 23.01.2013, the learned Civil Court had struck off the appellant's right to file a written statement, and the matter was adjourned for respondent No.1's *ex parte* evidence. This Court asked the learned counsel for the appellant as to whether the appellant had applied to have the order dated 32-01-2013 set aside, and, if not, the reasons for not doing so. The learned counsel for the appellant submitted that the filing of such an application would have been a 'step in the proceedings' disentitling the appellant from relief under Section 34 of the 1940 Act. This explanation, I am afraid, is not tenable.

15. In the case of Charan Das And Sons Vs. Harbhajan Singh-Hardit Singh, (AIR 1952 Punjab 109), *ex parte* proceedings were ordered to be taken against the defendants in a suit for recovery

of money. The defendants' application for setting aside the *ex parte* proceedings was successful. Thereafter, the defendants filed an application under Section 34 of the 1940 Act pleading that the contract on which the plaintiffs had sued the defendants contained an arbitration clause and that the matter should be referred to arbitrators and the proceedings should be stayed. The court on this held that there was an arbitration clause and accepted the contention of the defendants and stayed the proceedings. The appellate court accepted the appeal and set aside the order of the trial Judge. The contention that found favour with the appellate court was that under Section 34 of the 1940 Act, the defendants should have filed their application for stay before they took any other proceedings and that the fact that they filed an application for setting aside the *ex parte* order precluded them from filing the application for stay. The Punjab High Court set aside the appellate order and restored that of the trial Court. At paragraph 3 of the report, it was held as follows:-

> ***"3. I have heard learned counsel for the parties. The way in which I look at the matter is this. When proceedings are ordered to be taken ex parte before a Court the party against whom proceedings have been ordered to be ex parte has no right to come to the Court or take any other application to the Court except the application that the ex parte order be set aside. It is only when the ex parte order is set aside that he can take any other proceedings in the Court. If that order setting aside the ex parte proceedings stands, no other proceedings can be taken in the suit before the Court. Mr. Gurdev Singh, learned counsel for the respondent, in this case, urged that under Section 34 the application for stay could be made before any other proceedings were taken in the Court. The section no doubt says so, but the Section refers to normal proceedings which are taken before a Court. A case normally proceeds before a Court when defendant is served with a notice by the Court of a suit having been brought against him and he is asked to put in whatever defence he would care to put in. Section 34 refers to those normal proceedings, and when the section says that the party may, at any time before filing a written statement or taking any other steps in the proceedings apply to the judicial authority before which the proceedings are pending to stay the proceedings, it refers to the normal manner in which these proceedings are not normally pending, but when ex parte proceedings have been taken and the person against whom ex parte proceedings are taken comes up before the Court the first thing that he must do is to convince the Court that the ex parte order was not rightly made. Unless he convinces the Court he has no right to make any other application before the Court. Therefore the first act which the defendants had to do, was to***

> ***have the ex parte order set aside. The Court accepted the contention of the defendants and set aside the ex parte proceedings. If after setting aside the ex parte proceedings the defendants had taken any other step in the suit except the step of asking the Court to stay the proceedings because of arbitration clause in the contract, then no doubt they would be debarred under the provisions of Section 34 from urging for the stay of proceedings. But this is what did not happen in the case. The ex parte order, as I have said before, was set aside on the 6th June 1949 and a date was fixed for further proceedings in the suit. On that date the present application for stay of proceedings under Section 34 of the Arbitration Act was put in. In my opinion, there has been nothing done by the defendants in contravention of the provisions of Section 34, and in my view the learned Additional District Judge was wrong in setting aside the order of the learned trial Judge."***

16. Now, by analogy, the appellant ought to have applied for the order dated 23.01.2013 to be set aside, especially in view of the fact that the learned Civil Court had fixed the matter for the *ex parte* evidence of respondent No.1. The filing of such an application could not have been considered to be a 'step in the proceedings'. Had the appellant made such an application, and the order dated 23.01.2013 had been set aside, the appellant would not have been precluded to file an application under Section 34 of the 1940 Act. But the appellant did not do so and the said order dated 23.01.2013 held the filed, when the appellant on 16.02.2013 filed the application under Section 34 of the 1940 Act. Therefore, I am of the view that the appellant could not have sought stay of the proceedings without having the said order dated 23.01.2013 set aside.

17. Even otherwise, the case was adjourned on six occasions for the filing of a written statement. The learned counsel for the appellant submitted that on 10.09.2012, the law officer of the appellant had tendered appearance in the court. Earlier on 07.07.2012, as per the order sheet, the presence of the appellant's representative is marked. The matter had been adjourned on six occasions, stretched over a period of six months, until the appellant's right to file a written statement was struck off. The appellant, as prudent commercial person of business, ought to have known the consequences of not expressing its intention, at the earliest, of seeking to have the proceedings in the suit

stayed by filing an application under Section 34 of the 1940 Act. One or two adjournments would have been alright, but six adjournments to file a written statement is too much of an overstretch. This conduct on the part of the appellant, in my view, manifestly displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration.

18. The learned counsel for the appellant is correct in his submission that on no occasion did the learned counsel for the appellant expressly seek an adjournment for the filing of a written statement. This, by itself, would not, in my opinion, be enough for the suit to be stayed. Parties are presumed to be aware of the contents of the order sheet maintained by the learned Civil Court. Even though the appellant may have engaged the services of a legal counsel at a later stage, the appellant's in-house law officer had appeared earlier, and the appellant opted not to take a position for months – a position that would indicate the appellant's intention to seek to have the proceedings in the suit stayed due to the arbitration clause in the agreements between the parties.

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.

21. In the case of Government of Baluchistan and 4 others Vs. Mor Qadir Bakhsh & Sons (PLD 1978 Quetta 204), it has been held as follows:-

> ***"It is always a question of facts whether a particular act of the defendant amounts to a step to the proceedings. No hard and fast rule can be made in this behalf but the following circumstances are relevant facts to determine the conduct of the B defendant in this behalf;***
>
> ***(a) A party has before him information enabling him to elect between trial before a Court of law and trial between an arbitrator.***
>
> ***(b) The defendant has full knowledge about the claim of the defendant, set out in the plaint and this knowledge can be deduced from the fact that defendant has received the copy of the plaint. After having fully conversant with the facts of the plaintiff's case, if the defendant did sot exercise his right of arbitration at the earliest and going on attending the Court though no progress has been made in the case and the case is being adjourned either at the instance of the parties or by the Court.***
>
> ***(c) The delay caused due to the lethargic attitude of the defendant or his negligence are some of the facts showing that the defendant does not want to get rid of the arbitration clause."***

22. In the case of Muhammad Farooq Vs. Nazir Ahmad (PLD 2006 SC 196), it has been held at paragraph 11 of the report as follows:-

> ***"Provision of section 34 of the Arbitration Act would indicate that the party has to promptly act raising the plea of referring the hatter to the arbitrator at the very first opportunity and delay on any pretext in raising the plea would estop the party from raising the said plea of staying all proceedings."***

23. In the case of Pakistan International Airlines Corporation Vs. M/s. Pakistan Saaf Day Cleaners (PLD 1981 SC 553), the Hon'ble Supreme Court of Pakistan, referring to Section 34 of the 1940 Act, held at page 554 of the report, 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 proceeding. 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."

24. In the case of Badshah Meah Sowdagar Vs. Nurul Haq and others (PLD 1967 Dacca 250), the Division Bench of the Hon'ble Dacca High Court, at page 253 of the judgment authored by Hon'ble Mr. Justice S. M. Murshed (as he then was), held as follows:-

"On a construction of the requirement of section 34 of the Arbitration Act, it must be held that whether an applicant under section 34, as quoted above, has taken any "step in the proceedings" as mentioned above, would depend upon a consideration of the facts of each particular case. The primary duty of a Court is to look into the facts of the case fairly and squarely and then to decide whether the conduct of the applicant is such as would amount to a participation in the suit itself or an indication of acquiescence in its proceedings. If so, an application under section 34 would be barred for the simple reason that a party is not allowed to ask for staying the proceedings when he has clearly and willingly participated in them in a manner which can be construed acquiescence therein. If he intends to enforce an arbitration clause, he must do it at the earliest possible moment. If his conduct is such as would indicate that he has acquiesced in the suit, he is shut out from claiming the benefit of section 34 of the said Act." **(Emphasis added)**

25. In the case of M/s. Multix International Corporation Vs. Karachi Metropolitan Corporation (2014 MLD 1482) one of the reasons by the defendant's application under Section 34 of the 1940 Act was dismissed was because it was filed at a belated stage. In the case of Hamad Raza Vs. Sajid Hussain (2014 CLC 1057), it has been held by the Hon'ble Lahore High Court that if a party intended to enforce an arbitration clause it must do so at the earliest possible moment prior to filing a written statement or taking any steps in the proceedings. In the case of M/s. Sprint Energy (Pvt.) Limited Vs. Ahsaan Ullah and 2 others (2013 CLC 799) it has been held by the Hon'ble Lahore High Court that the intention of the statute was that a defendant who wants to take advantage of an arbitration clause *"must without any ado and before submitting to the jurisdiction of the Court inform the Court in unequivocal terms that he is going to insist upon the implementation of the arbitration clause."* **In the case of Utility**

Stores Corporation of Pakistan Vs. UNI-CARE International Cosmetics (2014 CLC 238), the Division Bench of the Hon'ble Lahore High Court has observed that an application under Section 34 of the 1940 Act should be filed promptly.

26. As mentioned above, the case was adjourned on six occasions for the filing of a written statement after the appellant tendered appearance. After the appellant tenders appearance and obtains a copy of the suit, he is presumed to be aware of its contents. If subsequent to that he lets the case be adjourned for the filing of a written statement without expressing his intention of filing an application under Section 34 of the 1940 Act, he can said to have taken a step in the proceedings. In the present case, the appellant was silent before the Court on six occasions spread over a period of six months. On all these occasions, the case was adjourned for the filing of a written statement. On 10.01.2013, the Court gave the appellant a last and final opportunity to file a written statement. And on 23.01.2013, the appellant's right to file a written statement was struck off and the matter was adjourned for the respondent No.1's *ex parte* evidence. In these circumstances, I feel that the learned Civil Court was correct in dismissing the appellant's application under Section 34 of the 1940 Act.

27. For the foregoing reasons, the instant appeal, being devoid of merits, is dismissed.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

(JUDGE)

Qamar Khan*