

**JUDGMENT SHEET.**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD.**

**F.A.O. No. 79 of 2018**

Sports Star International (Pvt) Limited (SSI)

**Versus**

M/s Shalimar Recording & Broadcasting Company Limited (SRBC)

Appellant By : Mr. Hasan Rashid Qamar, Advocate

Respondent By : M/s Muhammad Amin Farooqi and Noman  
Amin Farooqi, Advocates

Date of hearing : 12.07.2018

**AAMER FAROOQ, J. -** This appeal is directed against order dated 30.06.2018, whereby application under section 20 of the Arbitration Act, 1940, filed by the appellant, was dismissed.

2. The facts, leading to the filing of the instant appeal are that the parties entered into agreement on 02.05.2005, whereby the appellant was granted by the respondent right to use Air Time with respect to TV Channel owned and managed by the latter. The terms and conditions of the parties were settled in writing. The agreement provided that appellant shall pay sum of Rs. 251 Million in twelve (12) equal monthly installments for the first year and thereafter with an yearly increase as provided in the agreement. It was also agreed between the parties that the appellant shall indemnify the respondent from any claim from the Excise and Taxation Department, Sales Tax Department, Income Tax Department, Central Board of Revenue and/or other Executive Departments if the claim relates to the liability of the appellant under any law. The agreement also contained the arbitration clause (Article 21) under which the parties agreed to resolve their dispute arising out

of the agreement amicably and in case of failure to do so, the matter was to be referred to the arbitration by two arbitrators, one to be appointed by each party to the agreement. In case of difference of opinion, the dispute was to be referred to the Umpire and the proceedings were to be conducted in accordance with the Arbitration Act, 1940.

3. The agreement was renewed time and again and lastly was done on 07.09.2017 by virtue of which certain modifications were made in the original agreement and the same was validated till 31.08.2018. During the subsistence of the agreement, an issue cropped up regarding payment of Federal Excise Duty by the Federal Board of Revenue on the basis that agreement is in the nature of franchise, therefore, Federal Excise Duty is to be paid on franchise fee/ consideration. As a result of dispute, demand was created and asked to be paid which liability was denied by both the appellant and the respondent. The matter regarding payment of the referred duty is apparently pending before this Court by way of a Tax Reference. The respondent on the basis that sum of the demand created was deducted from its account or liability is still subsisting required the appellant to pay the Federal Tax Duty and/or to provide Bank Guarantee with respect thereto in light of the original agreement, whereby the appellant was to be indemnified by the respondents and/or liability to pay taxes was that of the appellant. Moreover, apparently, the appellant also did not adhere to the schedule of the payment as agreed between the parties hence the respondent served seven days termination notice whereafter the agreement was terminated. The appellant filed an application under section 20 of the Arbitration Act, 1940, which was resisted by the respondent. The referred application was dismissed by the Trial Court vide the impugned order.

4. Learned counsel for the appellant, *inter alia*, contended that since there is a dispute between the parties, therefore, arbitration agreement had to be

registered and the matter was to be referred to the arbitration; that the appellant acknowledges the liability to pay the outstanding dues, however, since in the past as well the payment was made by the appellant to respondent after the scheduled date, it was accepted by the latter. Hence, it was contended even now, the agreement could not be terminated due to late payment. Reliance was placed on case reported as **Mashreq Bank versus Messrs Nazir Cotton Mills and others (2004 CLD 542)**. It was also contended that the payment of Federal Excise Duty has not yet matured and the matter is still pending in the court of Competent Jurisdiction. It was also contended that in the past as well the respondent had written to the appellant that the liability is still to be determined and then in such case, question of indemnity and payment of tax does not arise.

5. Learned counsel further contended that even where main agreement stands terminated, arbitration agreement operates independently and the matter can be referred to the arbitration. Reliance was placed on cases reported as **Pakistan Real Estate Investment and Management Company (Pvt) Ltd. Versus Sohail A. Khan, Associates and another (PLD 2018 Islamabad 115)**, **Messrs Sadat Business Group Ltd. Versus Federation of Pakistan through Secretary and another (2013 CLD 1451)**, **Messrs Crescent Steel and Allied Products Limited Versus Messrs Sui Northern Gas Pipeline Limited and another (2013 MLD 1499)**.

6. Learned counsel for the respondent, *inter alia*, contended that conditions for meeting or complying with section 20 of the Arbitration Act, 1940, have not been fulfilled, therefore, application was rightly dismissed; that no dispute arises between the parties requiring the matter to be referred to arbitration; that the appellant did not adhere to the payment schedule as provided in the agreement and addendums hence the arrangement between the parties was rightly terminated; that liability to pay the Federal Excise Duty still existed and in view of the terms of the

agreement, demand was made that the appellant indemnify the respondent which they failed to do so. Reliance was placed on cases reported as **Federation of Pakistan Versus Messrs James Construction Company (Pvt) Ltd. (PLD 2018 Islamabad 1)**, **Pak. U.K. Association (Pvt.) Ltd. Versus The Hashemite Kingdom of Jordan (2017 CLC 599)**, **Al-Mukhlis (Pvt.) Ltd. Company Versus Messrs Telecom Foundation and another (2017 YLR 1674)** as well as **Capita Insurance Services Limited Versus Wood ( 2017 SCMR 1116)**.

7. Arguments advanced by the learned counsels for the parties have been heard and record examined with their able assistance.

8. The issue, raised in the instant appeal, is regarding contractual dispute (which is denied by the respondent) and /or interpretation of the terms of the Agreement. As mentioned above, the parties entered into agreement on 02.05.2005, whereby the appellant acquired to use Air Time in respect to the TV Channel owned and managed by the respondent. The consideration was to be paid by the appellant for using the Air Time to the respondent in terms of the agreement. All taxes and such like payments were the obligation of the appellant and in case of any dispute between the parties, the matter was to be referred to the arbitration. For sake of brevity terms of the agreement which are relevant for the purposes of the present controversy i.e. Article 12.1 and 21 are reproduced hereinbelow:

*"Article 12.1. SSI hereby indemnifies SRBC from any/ all claims etc., from the Excise and Taxation Department, Sales Tax Department, Income Tax Department, Central Board of Revenue and/or any other Government department (Federal/ Provincial, Local etc.), and/or any other Third Party if the claim relates to the liability of SSI under any law in respect of the programmes telecast/Air Time utilized under this Agreement."*

*"Article 21. In the event of any dispute between SRBC and SSI arising out of the Agreement or any matter related thereto or connected therewith, the Parties shall endeavor to settle the same in an amicable manner. Should the Parties fail to arrive at an amicable settlement, they shall refer the matter to arbitration by*

*two Arbitrators, one to be appointed by each Party to the Agreement. In case of difference of opinion between the Arbitrators, the dispute shall be referred to an Empire who would be appointed by the said two Arbitrators, as the case may be, and the same shall be final and binding upon the parties. Arbitration proceedings shall be held at Islamabad, Pakistan in accordance with the Arbitration Act, 1940; or any amendment or enactment thereof. Arbitration as aforesaid shall be condition precedent to any other action under the law.”*

The bare perusal of the above Articles shows that the appellant is required to indemnify the respondent in respect of any liability arising out of the payment of the taxes and/or Government Duty and in case of any dispute between the parties arising out of the agreement, or any matter relate thereto or connected therewith, is to be referred to the arbitration to be resolved by the arbitrators appointed by each of the party. Admittedly, the appellant did not pay its dues/ payments i.e. consideration amount under the agreement as per schedule agreed between the parties. In this regard, the agreement was renewed time and again and last addendum was made on 07.09.2017. The validity of the agreement was extended for one year and consideration for using the Air Time was increased by 5% with credit line facility of 90-days. It was provided in clause 2 of the addendum that in case of failure on part of the appellant to pay Air Time rental within 15 days after the lapse of 90 days credit line, the respondent may terminate the addendum subject to 07 days notice in writing. Admittedly, the appellant did not adhere to this payment schedule and consequently the notice was served by the respondent on the appellant, requiring to clear the dues within 7 days failing which the agreement was to be terminated and in fact it was done so.

9. The appellant's version is that in the past as well payment was made after expiry of the schedule period and it was accepted and where such is the case, it was vehemently argued, that amounts to waiver and condonation of the delay. Reliance was placed on **Mashreq Bank versus Messrs Nazir Cotton Mills and**

**others (2004 CLD 542)**. The Hon'ble Lahore High Court in the said judgment observed as follows:

*"10. An installment decree, containing a penalty clause, and giving option to the decree-holder to invoke the same in case of default. is doubtless for the benefit of the decree holder, and he can take out execution of the decree for the full amount if there is a default in the payment of any installment. But, if he elects not to refuse a delayed payment, and receives without objection, it would constitute waiver of his right. The dictionary meaning of the word "waiver" is "to abandon, relinquish, desert, to relinquish (a right, claim or contention) either by express declaration or by some intentional act which by law is equivalent to this." In Law Terms and Phrases "waiver" is inter alia described to mean "forsaking the assertion of a right act at the proper time"; "an intentional relinquishment of a right a man is entitled to." "an intentional relinquishment of a known right"; "it may consist either of a positive act of relinquishment or of conduct such as would warrant an inference of A relinquishment of the right". Thus the word "waiver" means to forego, to waive a claim or right, or not to put forward the same. In Norton v. Wood (1829) IR&M 178 where the obligee under a bond bound himself not to call in the principal for a specified period, if interest were regularly paid. On two occasions interest was paid after the due date. The question whether payment of interest tendered after it was due and accepted by the creditor was or was not a regular payment was answered in the following terms:-*

*"I think, if money is tendered after the period when it became due, and the person, to whom it has been paid does not see fit to refuse it, it is a waiver of the objection; it must be taken as a regular payment if the person receives it the day after without making any objection."*

The learned counsel for the respondents, however, provided that since there was credit line period for 90 days and if the payment was not tendered after 15 days of the same, the same amounts to default which could lead to termination of the agreement. However, neither side produced documents to the effect whether in the past payment was tendered after the expiry of payment schedule and was accepted by the respondent. The very fact that the appellant avers that in past as well payment schedule was not adhered and the same was tendered after the expiry of the date but was accepted by the respondent. The respondent has taken up the

stance that payment schedule was not adhered to leads to the dispute between the parties for the purposes of arbitration clause provided in the agreement.

10. Moreover, Article 12.1 of the agreement does provide that the appellant shall indemnify the respondents in respect of any liability arising out with respect to payment of taxes or any other departmental authority. The stance of the appellant that since the matter is pending before this Court and liability has not yet matured, therefore, question of indemnity is premature. This again is a dispute between the parties arising out with respect to the agreement.

11. Section 20 of the Arbitration Act, 1940, provides for filing of the agreement in the Court. The referred section reads as follows:

**"20. Application to file in Court arbitration agreement.\_\_\_\_**

*(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court.*

*(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.*

*(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.*

*(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.*

*(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."*

The examination of sub-section 1 of section 20 shows that where any arbitration agreement has been entered between the parties and where difference has been arisen, any party to the agreement may apply to the Court having jurisdiction in the matter with agreement to be filed in the Court. Moreover, where no sufficient cause is shown, the Court has to Order that the agreement be filed and the reference be made to the arbitrator. The fact that main agreement in which there was the arbitration agreement stands terminated does not affect the arbitration agreement and the matter can still be referred to the arbitrator(s). Reliance is placed on **Messrs Sadat Business Group Ltd. Versus Federation of Pakistan through Secretary and another (2013 CLD 1451)**. In the referred judgment, the Hon'ble Sindh High Court referring case law on the subject and discussing the same, concluded as follows:-

*"18. As a result of above discussion, I feel no hesitation in my mind that despite cancellation/termination of contract the provision of arbitration survives and agreement for arbitration contained in the contract is a separable part of contract, therefore, it would be fair and square to appoint arbitrator in this case. Consequently, Justice (Retired) Mr. Ali Aslam Jafferi is appointed Arbitrator to resolve and arbitrate the dispute between the plaintiff and defendant No.2. The suit is disposed of accordingly."*

Since appeal is the continuation of the original proceedings, therefore, this Court sitting as the appellate forum can pass any order which the Trial Court was competent to do so. Reliance is placed on case reported as **Pakistan Real Estate Investment and Management Company (Pvt) Ltd. Versus Sohail A. Khan, Associates and another (PLD 2018 Islamabad 115)**. In so far the interpretation of the agreement is concerned, learned counsel for the respondent relied on a decision by the Supreme Court of United Kingdom reported as **Capita**



**Insurance Services Limited Versus Wood ( 2017 SCMR 1116)**. Some of the observations made in the referred judgment are pertinent and reproduced below:-

*"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."*

*"13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."*

In view of the foregoing, as observed above, there does exist a dispute between the parties within the meaning of clause 21 i.e. the arbitration clause between the parties and despite termination of agreement by the respondent, arbitration agreement / clause survives and the matter can be referred to the arbitrator(s).

12. For abovementioned reasons, the instant appeal is **allowed** and the impugned order dated 30.06.2018 is **set-aside**; consequently, application under section 20, filed by the appellant, is accepted as prayed 1<sup>st</sup> paragraph of the prayer clause. The parties shall nominate their arbitrators as provided in the agreement and the appellant shall make the reference to them which is to be proceeded with and decided in accordance with the Arbitration Act, 1940. In case of failure on part of the parties to make nomination of the arbitrators, the law shall take its course.

**(AAMER FAROOQ)**  
**JUDGE**

Announced in open Court this\_\_\_\_\_ day of July, 2018.

**JUDGE**

Approved For Reporting.

M.Shah/.