

**FORM NO.HCJD/C**  
**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

**JUDICIAL DEPARTMENT**

**F.A.O. No. 90 of 2015.**

**Pakistan Stone Development Company Ltd.**

**Versus**

**Muhammad Yousaf, etc.**

**Date of Hearing: 16.10.2017.**

***Appellant by:*** ***Mr Muhammad Asif Khan,***  
***advocate.***

***Respondents by:*** ***Sardar Haroon Sami, advocate.***

**Athar Minallah, J:** This appeal filed by the Pakistan Stone Development Company Limited (hereinafter referred to as the "***Appellant / Company***"), has arisen from order, dated 27.10.2015, passed by the learned Civil Judge, First Class, Islamabad.

2. The facts, in brief, are that the respondents had filed a suit on 05.06.2015, seeking recovery and a permanent injunction. Pursuant to inviting international tenders for the supply of machinery, the respondents were declared as successful bidders and, therefore, a contract, dated 08.07.2008, was executed with the Appellant/Company. The said contract contains an arbitration clause, whereby the parties have agreed that disputes relating to the interpretation and implementation of the contract shall be referred to a named arbitrator. After receiving summons an appearance was made on behalf of the Appellant / Company before the

learned trial Court on 18.06.2015. On 25.07.2015 the learned counsel for the Appellant / Company filed his power of attorney and the matter was adjourned till 30.07.2015 for filing a written statement. However, instead of filing the written statement, the Appellant / Company filed an application seeking stay of proceedings under section 34 of the Arbitration Act 1940 (hereinafter referred to as the "**Act of 1940**") in pursuance of clause (9) of the contract, dated 08.07.2008. The learned trial Court dismissed the application vide the impugned order dated 27-10-2015.

3. The learned counsel appearing on behalf of the Appellant / Company has contended that; the power of attorney was submitted by the learned counsel on 25.07.2015 and a copy of the plaint was obtained on the said date so as to ascertain the matter which had been agitated by the respondent; on obtaining the copy of the plaint it transpired that the suit was instituted in relation to disputes arising out of the agreement dated 08.07.2008 and, therefore, an application under section 34 of the Act of 1940 was promptly filed; without knowing the matter, the Appellant / Company could not have filed an application; in the facts and circumstances of the instant case it was never the intent of the Appellant / Company to proceed with the suit; the learned trial Court has misinterpreted the judgment of the august Supreme Court rendered in the case titled "*Muhammad Farooq versus Nazir Ahmad and others*" [PD 2006 S.C. 196]. Reliance has been placed on "*Hamad Raza versus Sajid Hussain*" [2014 CLC 1057] and "*Province of Punjab through Secretary to Government of Punjab, Communication and Works Department and 04 others versus Ehsan Fazal & Company, Lahore*" [1986 CLC 2800].

4. The learned counsel appearing on behalf of the respondents, on the other hand, has argued that; it is settled law that even a single adjournment amounts to 'stepping into proceedings' and, therefore, an application under section 34 of the Act of 1940 was rightly dismissed by the learned trial Court; the representative of the Appellant / Company had appeared before the learned trial Court on 18.06.2015 and, thereafter, the power of attorney was filed on 25.07.2015; the adjournments on the said two dates were sufficient to establish the intention of the Appellant / Company to contest the suit. Reliance has been placed on *"Infospan (Pvt) Limited versus Messrs Telecom Foundation"* [2017 CLC 131], *"Muhammad Idris and others versus Tobarak Hossain"* [PLD 1965 Dacca 260], *"Muhammad Farooq versus Nazir Ahmad and others"* [PLD 2006 S.C. 196], *"Board of Intermediate and Secondary Education, Sargodha and another versus Messrs Akhtar Brothers"* [1981 CLC 221], *Abdul Quddoos Dost Muhammad Momin and another versus Abdul Gani Abdul Rahman and another* [AIR 1954 Nagpur 332] and *"Deluxe Film Distributors Ltd. versus Sukumar Kumar"* [AIR 1960 Calcutta 206].

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

6. The plaint was filed by the respondents / plaintiffs on 05.06.2015. Summons were issued by the learned trial Court and pursuant thereto appearance was made on behalf of the Appellant / Company on 18.06.2015. It is the case of the latter that the authorised counsel had submitted his power of attorney on 25.07.2015 and had obtained a copy of the plaint on the same date in order to know the lis

raised by the respondent/plaintiff. It was only after obtaining a copy of the plaint and other documents attached therewith that the Appellant/Company had gained knowledge for the first time regarding the cause of action and the fact that it was related to the contract which contained the arbitration clause. The Appellant / Company, therefore, promptly filed an application under section 34 of the Act of 1940. The learned trial Court dismissed the application in the light of the judgment of the august Supreme Court in the case titled "*Muhammad Farooq versus Nazir Ahmad and others*" [PLD 2006 S.C. 196]. The existence of an arbitration clause in the contract, dated 08.07.2008, executed between the parties is not disputed.

7. Section 34 of the Act of 1940 provides that if any party to an arbitration agreement commences legal proceedings against the other party which is privy thereto, then the latter may apply for staying the proceedings in the suit. Such an application is required to be submitted before filing a written statement or taking any other step in the proceedings. The court in such an eventuality may stay the proceedings if it is satisfied that sufficient reasons do not exist for refusing to refer the matter in accordance with the arbitration agreement and that the applicant was and continues to be ready and willing to do all things necessary for the purposes of proper conduct of the arbitration.

8. A plain reading of section 34 of the Act of 1940 shows that the following conditions are required to be met for staying the proceedings in a suit;

(a) The plaintiff who commences legal proceedings should have been a party to an arbitration agreement and that such an agreement contains an arbitration clause.

(b) The party privy to the agreement is required to make an application before filing a written statement or taking any other step in the proceedings seeking staying of the proceedings.

(c) The Court is satisfied on the basis of the conduct of the applicant that the latter at the time of commencement of the proceedings or at the time of making the application was/is ready and willing to do all things necessary for the proper conduct of the arbitration.

(d) The Court has to be satisfied that on account of the conduct of the applicant there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and thus stay the proceedings.

9. The provisions of section 34 of the Act of 1940 were considered and interpreted by the august Supreme Court in the case titled "*Pakistan International Airlines Corporation versus Messrs Pak Saaf Dry Cleaners*" [PLD 1981 S.C. 553]. After examining the precedent law the august Supreme Court has laid down the test for determining whether an act is tantamount to a step in the proceedings or not. The relevant portion from the judgment is reproduced as follows;-

*"In my opinion, the true tests for determining whether an act is a step in the proceedings is not so much the question as to whether the party sought an adjournment for filing the written statement although of course that would be a satisfactory test in many cases but whether taking into consideration the contents of the application as well as all the surrounding circumstances that led the party to make the application display an unequivocal intention to proceed with the suit, and to give up the right to have the matter disposed of by arbitration. An application of such nature, therefore, should prima facie be construed as a step in the proceedings within the meaning of section 34, and the whole burden should be upon the party to establish why effect should not be given to the prima facie meaning of the application".*

10. The august Supreme Court, on the basis of the facts and circumstances in the above case, had concluded that despite the applications filed by the learned counsel requesting adjournments so as to file a written statement, the conduct was not considered as indicative of acquiescence or display of an intention to submit to the jurisdiction of the court. Whether or not a party seeking a stay of the proceedings under section 34 of the Act of 1940 has taken steps in the proceedings would essentially depend on the facts and circumstances of each particular case. The Court, therefore, has to be satisfied on the basis of the facts and

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circumstances in each case that the conduct of the party seeking a stay of the proceedings displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of through arbitration. It is thus the duty of the court to carefully examine the facts in each case so as to determine whether the conduct of the party seeking the stay amounts to pursuing the suit. The conduct of the party seeking a stay of the proceedings ought to manifestly reflect willingness to participate in the proceedings and thus the factor of acquiescence must not be in doubt. The august Supreme Court in the case titled "*M/S Uzin Export & Import Enterprises for Foreign Trade versus M/S M. Iftikhar & Company Limited*" [1993 SCMR 866] has observed and held as follows;-

*"Whether to grant stay or not is dependent upon satisfaction of the Court and such order is to be passed by the Court only when it is satisfied that all the requirements and preconditions enumerated have been fulfilled. The Court has to satisfy itself that the party applying for stay has not relinquished or abandoned his right of invoking arbitration clause after filing of suit. In coming to such conclusion the facts and circumstances of each particular case are to be examined in the light of pleas and other steps taken by the parties. Facts and circumstances of two cases may not be alike and may differ".*

11. This Court has carefully gone through the judgment of the august Supreme Court reported as "*Muhammad Farooq versus Nazir Ahmad and others*" [PLD 2006 S.C. 196]. The august Supreme Court has reiterated the law enunciated in the earlier judgment reported as

*"Pakistan International Airlines Corporation versus Messrs Pak Saaf Dry Cleaners"* [PLD 1981 S.C. 553]. However, in the facts and circumstances which were being examined in the case of Mohammad farooq supra, the august Supreme Court had concluded that obtaining several adjournments after receiving notice of the plaint had established willingness and acquiescence to participate in the proceedings to contest the suit. The learned counsel appearing on behalf of the Appellant / Company has, therefore, rightly argued that the learned trial court has misconstrued the judgment of the august Supreme Court rendered in *"Muhammad Farooq versus Nazir Ahmad and others"* [PLD 2006 S.C. 196]. There is no force in the argument raised on behalf of the respondents that requesting a single adjournment would tantamount to stepping in the proceedings by the party seeking a stay of the proceedings.

12. For what has been discussed above, the instant appeal is **allowed**. The impugned order is accordingly set aside. The application filed under section 34 of the Act of 1940 shall be deemed to be pending. The learned trial Court, after affording an opportunity of hearing to the parties, shall decide the application having regard to the principles and law highlighted above.

(ATHAR MINALLAH)  
JUDGE

Announced in the open Court on 16-01-2018.

Asad K/\*

App and for reporting  
JUDGE