

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. No.39 of 2016

Al-Mukhlis (Pvt.) Limited Company

Versus

M/s Telecom Foundation and another

Date of Hearing: 06.12.2016

Appellant by: Malik Taj Mohammad Khan, 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, Al-Mukhlis (Pvt.) Limited, impugns the order dated 22.02.2016, passed by the Court of the learned Civil Judge, Islamabad, dismissing the appellant’s application under Section 20 of the 1940 Act, praying for the contractual disputes between the appellant and the respondent (M/s Telecom Foundation) to be referred to arbitration.

2. This case has a long chequered history. The record shows that on 05.08.1992, an agreement was executed between the appellant and the respondent for “laying, jointing, erection/fitting of DPs, etc. of Secondary Cable Network against BLT Project, Islamabad Zone”. Clause-16 of the agreement is reproduced herein below:-

“16) In case of any dispute between the contractor and the Telecom Foundation, the decision of the concerned General Manager, Telecom Foundation will be final”

3. It is not disputed that the said clause was amended by adding the following clause thereto:-

“However in case any unresolved dispute, the same shall be resolved under the Arbitration Act 1940 of Pakistan. The venue for arbitration shall be Islamabad.”

4. The appellant claims to have executed and completed the works under the said agreement, whereafter the appellant submitted a bill amounting to Rs.33,69,351.81 to the respondent. As the respondent did not pay the said amount to the appellant, the appellant on 10.11.1996, filed an application under Section 8 of the 1940 Act, praying for the appointment of an arbitrator for the adjudication of the appellant’s claim against the respondent.

Along with the said application, the appellant also filed an application under Section 5 of the 1940 Act, praying for the removal of the General Manager ("G.M") as the person designated in the agreement to resolve the disputes between the appellant and the respondent.

5. The respondent opposed the said application by filing written replies thereto. The position taken by the respondent was that the appellant was not able to perform its obligations under the agreement dated 05.08.1992. It was also pleaded that after the completion of the works, the appellant's pending bills were cleared on 27.02.1995 by making a final payment of Rs.128,351/-; that on 26.03.1995, the appellant submitted a bill claiming an amount of Rs.33,69,352/-; that vide letter dated 25.04.1996, the respondent informed the appellant that after the joint measurement of the additional quantity of work carried out by the appellant, an amount of Rs.33,000/- was found to be due to the appellant. Furthermore, the respondent has pleaded that the appellant, vide letter dated 24.06.1996, asked the respondent to concur on the appointment of an arbitrator named therein. After the respondent informed the appellant that under Clause-16 of the agreement, the disputes between the parties, in the first instance, had to be referred to the G.M., Telecom Foundation, the appellant referred the matter to the G.M., Telecom Foundation. When the G.M., Telecom Foundation asked the appellant to submit its claim along with supporting documents, the appellant filed the applications under Sections 5 and 8 of the 1940 Act.

6. Vide order dated 27.02.1997, the learned Civil Court dismissed the appellant's applications under Sections 5 and 8 of the 1940 Act. The said order dated 27.02.1997, was impugned by the appellant in Civil Revision Petition No.204/1997 before the Hon'ble Lahore High Court, Rawalpindi Bench. Vide order dated 03.12.2002, the said petition was disposed of in the following terms:-

"After arguing this case at some length learned counsel for the petitioner states that he will not be pressing this case but shall commence appropriate proceedings under Section 20 of the

Arbitration Act, wherein all the questions including interpretation of Clause-16 shall be thrashed out.

2. C.R accordingly disposed of with the observation that if such an application is filed, learned Trial Court shall decide the same independently being not influenced by observations made in this order or in the impugned order.”

7. Six months after the disposal of Civil Revision Petition No.204/1997, the appellant, on 03.06.2003, filed an application under Section 20 of the 1940 Act, before the learned Civil Court, praying for a direction to the respondent to file the arbitration agreement in the Court. Furthermore, the appellant also prayed for the appointment of an independent arbitrator. Three months after filing the said application, the appellant also filed an application under Sections 5 and 14 of the Limitation Act, 1908, praying for condonation of delay in filing of the application under Section 20 of the 1940 Act. The time consumed by the appellant in agitating its grievances before the learned Civil Court and the Hon'ble Lahore High Court in Civil Revision Petition No.204/1997, was sought to be excluded from the limitation period for filing an application under Section 20 of the 1940 Act.

8. The respondent contested the application under Section 20 of the 1940 Act by filing a written reply. In the said reply, the position taken by the respondent was that the arbitration clause in the agreement dated 05.08.1992, clearly provided that the contractual disputes between the appellant and the respondent were to be referred, in the first instance, to the G.M., Telecom Foundation, and that if after such a reference, the disputes remained unresolved, they were to be resolved under the provisions of the 1940 Act. Furthermore, it was pleaded that the appellant's failure to refer the disputes in the first instance to the G.M., Telecom Foundation, extinguished its right to have the contractual disputes resolved through arbitration under the provisions of the 1940 Act.

9. Vide order dated 28.02.2014, the learned Civil Court accepted the appellant's application under Section 20 of the 1940 Act, and directed the parties to propose the names of arbitrators. The appellant's application for condonation of delay in filing the application under Section 20 of the 1940 Act, also appears to have been allowed.

10. The respondent challenged the said order dated 28.02.2014, in an appeal under Section 39 of the 1940 Act, before the Court of the learned District Judge, Islamabad. Vide judgment dated 03.12.2014, the learned Appellate Court, allowed the respondent's appeal, and remanded the matter to the learned Civil Court for a decision afresh after framing an issue regarding limitation, and affording an opportunity to the parties to lead evidence regarding the same.

11. In the post-remand proceedings, the learned Civil Court framed an additional issue on whether the appellant was entitled to condonation of delay in filing the application under Section 20 of the 1940 Act. The learned Civil Court recorded the evidence of the parties' witnesses on the said issue. Vide order dated 22.02.2016, the learned Civil Court dismissed the appellant's application under Section 20 of the 1940 Act on the ground that the same was barred by limitation. The said order dated 22.02.2016, has been impugned by the appellant in the instant appeal.

12. Learned counsel for the appellant, after narrating the facts leading to the passing of the impugned order dated 22.02.2016, whereby the appellant's application under Section 20 of the 1940 Act, was dismissed, submitted that the period between 10.11.1996 and 03.06.2003 should have been excluded from the limitation period for filing an application under Section 20 of the 1940 Act; that between 10.11.1996 and 03.06.2003, the appellant had been agitating its case before the learned Civil Court in the applications under Sections 5 and 8 of the 1940 Act, and the Hon'ble High Court in Civil Revision Petition No.204/1997; that these proceedings had been instituted by the appellant under a *bonafide* mistake as to the jurisdiction of the learned Courts to adjudicate upon the same; that the learned Civil Court, vide its earlier order dated 28.02.2014, had correctly allowed the appellant's application under Section 20 of the 1940 Act; that since the Hon'ble High Court in its order dated 03.12.2002 had allowed the appellant to file a fresh application, the learned Civil Court should not have dismissed the appellant's application under Section 20 of the 1940 Act on the ground of limitation; that

the delay in filing the application under Section 20 of the 1940 Act was not deliberate, and there was sufficient cause for condoning the delay in filing of the said application; that the learned Appellate Court should have itself framed and decided the issue of limitation, instead of remanding the matter to the learned Civil Court; that since the issue of limitation had earlier been decided by the learned Civil Court in its order dated 28.02.2014, there was no occasion for the learned Appellate Court to have remanded the matter to the learned Civil Court with the direction to the learned Civil Court to decide the issue of limitation. Learned counsel for the appellant prayed for the impugned order dated 22.02.2016, to be set-aside and for the matter in dispute between the parties to be referred to arbitration. In making his submissions, the learned counsel for the appellant placed reliance on the law laid down in the cases of Province of Baluchistan Vs. Mirza Abdul Hayee (1991 SCMR 1313), and Sherin Vs. Fazal Muhammad (1995 SCMR 584).

13. On the other hand, learned counsel for the respondent submitted that the appellant could not seek a reference to arbitration without satisfying the precondition of first having the disputes resolved by referring them to the G.M., Telecom Foundation; that since the G.M., Telecom Foundation had not, at any material stage, given a decision regarding the appellant's claims, the appellant's application under Section 20 of the 1940 Act, was premature and not maintainable; that in the year 1996, the appellant, instead of filing applications under Sections 5 and 8 of the 1940 Act, could have filed an application under Section 20 of the 1940 Act, if the disputes between the parties remained unresolved after the decision of the G.M., Telecom Foundation; that Civil Revision Petition No.204/1997 remained pending before the Hon'ble High Court for more than four years; that the order dated 03.12.2002, passed by the Hon'ble High Court could not be interpreted as enlarging the limitation period within which the appellant could file an application under Section 20 of the 1940 Act; that limitation was a substantive matter which could only be considered by the Court before which the time barred application had been filed; that even after the said order dated

03.12.2002, the appellant did not file the application under Section 20 of the 1940 Act until 03.06.2003; that delay of each and every day in filing the application under Section 20 of the 1940 Act had to be explained by the appellant; that the cause of action had accrued to the appellant in the year 1996, whereas the application under Section 20 of the 1940 Act was filed on 03.06.2003 i.e. with a delay of several years beyond the limitation period for filing an application under Section 20 of the 1940 Act; and that under Article 181 of the Limitation Act, 1908, limitation period for filing of an application under Section 20 of the 1940 Act is three years from the date of the accrual of the cause of action.

14. The learned counsel for the respondent prayed for the appeal to be dismissed. In making his submissions, the learned counsel for the respondent placed reliance on the law laid down in the cases of Oil and Gas Development Company Ltd. Vs. Agha Muhammad and Brothers (2015 MLD 1821), M. Imam-ud-Din Janjua Vs. the Thal Development Authority through the Chairman, T.D.A., Jauharabad (PLD 1972 SC 123), and Dar Okaz Printing and Publishing Limited Liability Company Vs. Printing Corporation of Pakistan Private Limited (PLD 2003 SC 808).

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

16. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 02 to 11 above, and the they need not be recapitulated.

17. As mentioned above, the sole ground taken by the appellant in its application under Sections 5 and 14 of the Limitation Act, 1908, for condonation of delay in filing the application under Section 20 of the 1940 Act was that the appellant had been agitating its claim by filing representations before the respondent as well as before the learned Civil Court and the Honourable Lahore High Court in C.R. No.204/1997. The learned counsel for the appellant in his arguments submitted that the period consumed while the matter was pending before the learned Civil Court and the Hon'ble High Court should have been

excluded from the limitation period in filing the application under Section 20 of the 1940 Act.

18. It was not disputed that as per the agreement dated 05.08.1992 between the appellant and the respondent, the disputes between the said parties were to be resolved, in the first instance, by the decision of the G.M., Telecom Foundation. However, if despite the decision of the G.M., Telecom Foundation, the disputes between the said parties persisted, the same were to be resolved in accordance with the provisions of the 1940 Act. Perusal of the appellant's application dated 10.11.1996, under Section 5 of the 1940 Act shows that the appellant had referred the disputes to the G.M., Telecom Foundation, who in turn had asked the appellant for its claims. The appellant sought the removal of the G.M., Telecom Foundation, under Section 5 of the 1940 Act, as he was said to be *"bent upon going ahead with self assumed role of arbitrator, for which, no authority vested in him"*. The appellant had also filed an application under Section 8 of the 1940 Act for the appointment of an arbitrator. These applications were contested by the respondent. The learned Civil Court vide its order dated 27.02.1997, dismissed the appellant's said application by holding that the ground on which an arbitrator can be removed under Section 11 of the 1940 Act, had not been taken by the appellant in its application.

19. Now, at that stage the option available to the appellant was to submit its claim before the G.M., Telecom Foundation in accordance with the dispute resolution mechanism enshrined in the agreement, and if the decision of the G.M., Telecom Foundation, was not in the appellant's favour, it could have initiated arbitration proceedings, with the intervention of the Court by filing an application under Section 20 of the 1940 Act, or by initiating arbitration without the intervention of the Court. Instead of doing so, the appellant challenged the order dated 27.02.1997, passed by the learned Civil Court before the Honourable Lahore High Court in C.R. No.204/1997, which remained pending for years until its disposal on 03.12.2002. Perusal of the order dated 03.12.2002, shows that the appellant

after arguing its case at some length decided not to press the petition so that it could commence proceedings under Section 20 of the 1940 Act. The appellant with its own free will decided not to press the C.R. No.204/1997 against the order dated 27.02.1997 passed by the learned Civil Court. The Hon'ble High Court in its order dated 03.12.2002 observed that if such an application is filed, the learned Trial Court shall decide the same independently and uninfluenced by the observations made by the said order. This order cannot, by any stretch of imagination, be construed or interpreted as excluding the period during which the appellant was agitating the matter before the learned Civil Court and the Hon'ble High Court from the limitation period for filing an application under Section 20 of the 1940 Act. The appellant took six months after the passing of the said order dated 03.12.2002 to file the application under Section 20 of the 1940 Act.

20. The cause of action to initiate proceedings in accordance with the dispute resolution mechanism enshrined in Clause-16 of the agreement dated 05.08.1992 accrued to the appellant during the year 1996 (i.e. either on 25.04.1996 when the respondent turned down the appellant's claim for the payment Rs.33,69,351.81, or on 24.06.1996 when the appellant served a notice on the respondent seeking the appointment of an arbitrator). It is by now well settled that the limitation period for filing an application under Section 20 of the 1940 Act, is three years from the date of the accrual of the cause of action, in terms of Article 181 of the First Schedule of the Limitation Act, 1908. At this stage, reference to the following case law would be apposite:-

- (i) In the case of M. Imam-ud-Din Janjua Vs. The Thal Development Authority through the Chairman. T.D.A. Jauharabad (PLD 1972 SC 123), it has been held as follows:-

“Having examined these decisions with care, we, too, have come to the conclusion that, after the incorporation of Articles 158 and 178 in the First Schedule to the Limitation Act, which make specific provision for applications under the Arbitration Act, 1940, it is no longer possible to say that the Article contained in the

Third Division of the First Schedule to the Limitation Act apply only to applications under the Code of Civil Procedure, because, all the other Articles contained in this Division apply to such applications. With the incorporation of Articles 158 and 178, that reason no longer holds good, and therefore, the scope of Article 181, which is in the nature of a residuary Article, must necessarily be extended to all kinds of applications for which no specific period of limitation has been provided for either in the First Schedule to the Limitation Act or in any other Statute. To hold otherwise would lead to the anomalous result that for applications which have not been expressly provided for in the Third Division of the First Schedule to the Limitation Act there will be no period of Limitation at all. This could not have been the intention of the Legislature.”

- (ii) In the case of Progressive Engineering Associates Vs. Pakistan Steel Mills Corporation Ltd. (1997 CLC 236), it has been held as follows:-

“7. No time limit is provided in the Arbitration Act, 1940 for filing of different applications or references nor any provision is available in the Limitation Act, 1908 for such purpose. In such circumstances, Article 181 would apply as held in the case of Muhammad Abdul Latif Faruqi v. Nisar Ahmad and another PLD 1959 Karachi 465. For further reference see the case of Messrs Islamic Estates and Builders Ltd. v. Mirza Saeeduddin and another 1986 CLC 369 wherein a Division Bench of this Court comprising of Mr. Tanzeelur Rehman and Mr. K.A. Ghani, JJ. (as they then were) held that residuary Article of the Limitation Act i.e. Article 181 would attract for the purpose of filing an application under section 20 of the Arbitration Act, 1940. In the case of Tufail Muhammad v. Water and Power Development Authority 1985 MLD 1449 a learned Single Judge of Lahore High Court Mr. Muhammad Afzal Lone, J. (as he then was) has followed the rule laid down by this Court in the case of Karachi Shipyard and Engineering Works Ltd. v. Muhammad Aslam Khan PLD 1979 Karachi 635 and held that the period of limitation for application under section 20 of the Arbitration Act is three years as envisaged in Article 181 of Limitation Act. ...”

- (iii) Recently, this Court in the case of Oil and Gas Development Company Ltd. Vs. Agha Muhammad and Brothers (2015 MLD 1821), held that the period of limitation for filing an application under Section 20 of the Act of 1940 is to be reckoned in accordance with the provisions of Article 181 of the Limitation Act, 1908. Furthermore, at paragraph 9 of the report, it was held as follows:-

“9. The question of limitation is, therefore, to be decided by the Court before granting the application under section 20 of the Act of 1940. Leaving the question to be

determined by the Arbitrator is neither envisaged under section 20 of the Act of 1940, nor can the Court delegate its power under section 20 to the Arbitrator. This determination is essentially to be made by the Court, and that too before granting the application. In case the Court comes to the conclusion that the application under Section 20 of the Act of 1940 is barred by time qua the period prescribed under Article 181 of the Limitation Act, 1908, then such an application cannot be granted, nor can the matter be referred to the Arbitrator.”

21. The same view as above, has also been taken in the cases of Muhammad Nazir Vs. Secretary, Cooperative Department (1989 MLD 1156), Mirza Saeed-ud-Din Vs. Islamic Estates & Builders Limited (1992 CLC 477), Government of Pakistan Vs. Messrs Shafsal Enterprises, Government Contractors (2002 YLR 2528), Messrs ACSYS Limited Vs. Associated Press of Pakistan Corporation (2004 CLC 1262), and Abdul Rauf Muhammad Hanif (Pvt.) Ltd. Vs. WAPDA (PLD 2007 Lahore 335).

22. The appellant filed the application under Section 20 of the 1940 Act on 03.06.2003 (i.e. seven years after the accrual of the cause of action). The appellant's case was not that of condoning or excluding the period for which it had agitated the matter before a 'wrong forum'. The learned Civil Court was the correct forum for filing an application for seeking the removal of an arbitrator or the appointment of a new arbitrator. After the dismissal of the appellant's applications by the learned Civil Court, the appellant consciously abandoned its case before the High Court and decided to file a fresh application under Section 20 of the 1940 Act. The simple fact the Hon'ble High Court observed that the appellant wanted to file an application under Section 20 of the 1940 Act, cannot wipe out the time consumed in the proceedings before the learned Civil Court and before the Hon'ble High Court from the limitation period for filing an application under Section 20 of the 1940 Act. As mentioned above, the earlier proceedings before the learned Civil Court and the Hon'ble High Court had remained pending for several years. Therefore, the appellant cannot be said to have prosecuted its remedy with due diligence or in good faith. In the case of Khushi Muhammad Vs. Fazal Bibi (PLD 2016 SC 872), it has been held that hurdles of limitation could not be crossed under the guise of

any hardships or imagined inherent discretionary jurisdiction of the Court. Furthermore, it was held that unexplained delay or laches on the part of those who were expected to be aware and conscious of the legal position and who had facility for proper legal assistance could hardly be encouraged or countenanced.

23. In the earlier proceedings before the learned Civil Court, the appellant had sought the revocation of the authority of the G.M., Telecom Foundation, to decide the disputes between the appellant and the respondent. The learned Civil Court had dismissed the appellant's said application. Even now the appellant cannot seek the appointment of an arbitrator without satisfying the precondition of referring the disputes to the G.M., Telecom Foundation as envisaged by Clause-16 of the agreement dated 05.08.1992.

24. It is well settled that the non-fulfillment of the conditions precedent to the operation of an arbitration clause step in to prevent its operation. The arbitration clause in the case at hand in effect provides that a dispute between the parties had to be referred, in the first instance, to the G.M., Telecom Foundation, who was supposed to give his decision on the disputes, and that if after the decision of the G.M., Telecom Foundation, the disputes persisted, they were to be resolved under the provisions of the 1940 Act. In other words, the disputes between the appellant and the respondent could be referred to arbitration only after the decision of the G.M., Telecom Foundation. Thus, the right of an aggrieved party to refer contractual disputes to arbitration was pre-conditioned with a reference of such disputes to the G.M., Telecom Foundation. An application under Section 20 of the 1940 Act, without the fulfillment of the precondition of a reference of the disputes for the decision of the G.M., Telecom Foundation in terms of Clause-16 of the agreement, was liable to be dismissed as premature. Reference in this regard may be made to the law laid down in the following cases:-

- (i) Board of Intermediate and Secondary Education Vs. Fine Start & Company (1993 SCMR 530);

- (ii) Karachi Dock Labour Board Vs. Quality Builders Ltd. (PLS 2016 SC 121);
- (iii) Hanover Contractors Vs. Pakistan Defence Officers Housing Society (2002 CLC 1880);
- (iv) Sanad Associates Vs. General Manager Telephone & Telegraph (1989 CLC 386);
- (v) Ayaz Builders Vs. Board of Trustees of the Karachi Port Trust and another (2008 CLC 726) and;
- (vi) WAPDA Vs. S. H. Haq Noor & Co. (2008 MLD 1606).

25. As regards the case law relied upon by the learned counsel for the appellant, in the case of Sherin Vs. Fazal Muhammad (supra), it is, *inter-alia*, held that the filing of an appeal in a wrong court on account of mistaken advice tendered by the counsel canvassed on behalf of the appellants for condonation of delay by itself would not attract Section 5 of the Limitation Act, but when the litigant and the counsel have acted with due care and caution and their conduct does not smack of negligence, the institution of the appeal in the wrong forum may constitute a sufficient cause within the meaning of Section 5 of the Limitation Act for condonation of delay. In the case of Province of Balochistan Vs. Mirza Abdul Hayee (supra), the subject matter of a reference was completed in 1965, while a reference to arbitration was sought in 1979. Since the matters in dispute between the parties to the said case had remained under active consideration of the government functionaries, which had showed that in the intervening period, there had been no rejection of the claim, the reference to arbitration was held not to be barred by time. In the case at hand, there is no issue of the appellant having approached a wrong forum in the past. Furthermore, the appellant's pleadings show that the appellant's claim was turned down by the respondent in the year 1996, when the cause of action for instituting arbitration proceedings, had accrued. Therefore, the case law relied upon by the learned counsel for the appellant do not come to its aid.

26. On the basis of the above discussion, I am of the view that the learned Civil Court was correct in not condoning the delay in filing the application under Section 20 of the 1940 Act, which was

barred by many years. For the foregoing reasons, I do not find any merit in the appeal, which is dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

Sultan*

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