

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
(JUDICIAL DEPARTMENT)

F. A. O. No.102/2013

Infospan (Private) Limited

Versus

M/s Shaheen Foundation & another

Appellant by : Mr Sultan Mazhar Sher, Advocate.

Respondents by : Syed Ishtiaq Haider, Advocate.

Date of Hearing : 10-01-2018

ATHAR MINALLAH, J.- Through this appeal M/s Infospan (Pvt) Ltd (*hereinafter referred to as the 'appellant Company'*) has assailed the order, dated 25-10-2013, passed by the learned Additional District Judge (West), Islamabad.

2. The facts, in brief, are that the appellant Company had executed a Memorandum of Understanding, dated 16-09-2005, followed by contract, dated 08-11-2005 (*hereinafter referred to as the 'Agreement'*) with M/s Shaheen Foundation (*hereinafter referred to as the 'Foundation'*). The purpose and object of the Agreement were described therein and clause II(1) explicitly referred to

payments which were agreed to be paid to the appellant Company by the Foundation. Clause III of the Agreement prescribes the mechanism for resolving disputes and is thus an arbitration clause, which is reproduced as follows.-

"III. ARBITRATION AND GOVERNING LAW:

- 1. In case of any dispute arising between the parties hereto in connection with this Agreement, its conclusion, its performance or its implementation the parties shall endeavor or to settle such dispute in an amicable manner.*
- 2. If the dispute cannot be settled amicably the dispute shall be finally decided by arbitration under Pakistan arbitration laws. One arbitrator shall be appointed by each party hereto and in case of any disagreement between the arbitrators an umpire shall be appointed by the two arbitrators so appointed. The arbitrators shall decide the dispute in accordance with the Agreement.*
- 3. Any arbitration award made in such arbitration proceedings shall be final and binding on the parties hereto and shall be enforceable and valid in any court having jurisdiction.*
- 4. During the course of arbitration the parties hereto shall continue to execute their respective obligations under the Agreement.*
- 5. The Agreement shall be governed by and interpreted in accordance with the laws of Pakistan."*

3. The Foundation had earlier filed a suit on 07-04-2010 seeking a declaration, rendition of accounts and permanent injunction. An application under Section 34 of the Arbitration Act

1940 (*hereinafter referred to as the 'Act of 1940'*) was filed by the appellant Company and the same was accepted by the learned Civil Judge 1<sup>st</sup> Class, Islamabad vide order dated 19-10-2010. Pursuant to the arbitration clause incorporated in the Agreement, proceedings in the said suit were stayed and two arbitrators were duly appointed. It is an admitted position that arbitration proceedings are pending before the two appointed arbitrators. In the aforementioned suit which was stayed by the learned trial Court under section 34 of the Act of 1940, the Foundation has expressly referred to the dispute regarding an amount of Rs.5,944,436/- and US \$ 200,000/- described in paragraphs 14 and 15 respectively of the plaint. The affidavit filed before the arbitrators also explicitly refers to the said two amounts. The Foundation filed another suit on 14-02-2012 under Order XXXVII of the Code of Civil Procedure, 1908 (*hereinafter referred to as the 'C.P.C.'*) for recovery of the aforementioned two amounts i.e. Rs.5,944,436/- and US \$ 200,000/-. The appellant Company filed an application under Section 34 of the Act of 1940 for staying the proceedings and the same was dismissed by the learned trial Court vide the impugned order, dated 25-10-2013.

4. The learned counsel for the appellant has contended that; the impugned order is based on misinterpretation of Order XXXVII of the C.P.C. and section 34 of the Act of 1940; Order XXXVII of the C.P.C. merely prescribes a special procedure and does not exclude filing of an application under the provisions of the Act of 1940; the

legislature, in its wisdom, has used two distinct expressions i.e. 'appearance' and 'leave to defend'; the learned trial Court has erred in assuming that both the said expressions are the same; the learned trial Court has also not taken into consideration the earlier suit filed by the Foundation, which was stayed, and wherein the same disputes were raised; the disputes between the parties relate to the rendition of accounts in respect of the Agreement and, therefore, the second suit was not competent; the learned trial Court did not consider that the dispute raised through the subsequent suit was an integral part of the disputes which had been referred to the arbitrators vide order dated 19-10-2010; the entire matter relating to the rendition of accounts in the context of the Agreement has already been referred to the arbitrators in the light of the arbitration clause and, therefore, refusing to stay the proceedings in the subsequent suit has led to an anomalous situation; the learned trial Court also failed to appreciate that the Foundation was estopped from filing a fresh suit, since the same dispute is pending before two arbitrators; the only contractual relationship between the parties stems from the Agreement and a plain reading of the plaint makes it obvious that the cause of action and dispute relating to recovery is pending before the arbitrators; reliance has been placed on the case of '*Sqn. Ldr. Khurram Zaman v. Mrs Afia Zafar and others*' [2008 CLD 662].

5. The learned counsel for the Foundation, on the other hand, has argued that; the appellant Company did not have a locus

standi to file the application under section 34 of the Act of 1940 unless leave was granted to defend the suit; the provisions of Order XXXVII of C.P.C. are mandatory; the appellant Company was required to have simultaneously filed both the applications i.e. one under section 34 of the Act of 1940 and the other under Rules 2 and 3 of Order XXXVII of the C.P.C.; the disputes raised in the subsequent suit had no nexus with the Agreement; the learned trial Court was justified in dismissing the application as the prayer sought in the plaint was based on an instrument covered under Order XXXVII of the C.P.C.; reliance has been placed on the case of '*Mst. Suriya Waseem Usmani and 9 others v. L & M International (Pvt.) Ltd. and another*' [2002 CLD 624], '*Messrs Pioneer Cables Limited v. Messrs Saadi Cement Limited*' [1999 CLC 184], '*Cotton Export Corporation of Pakistan (Pvt.) Ltd. v. M/s Asif Cotton Ginners and 5 others*' [1995 CLC 1024].

6. The learned counsels have been heard and the record perused with their able assistance.

7. The Agreement between the Foundation and the appellant Company is admitted. Clause II(1) of the Agreement describes the contractual arrangement and obligations of the Foundation towards the appellant Company. It is also admitted that in paragraphs 14 and 15 of the plaint in the earlier suit the same amount, regarding which the subsequent suit was filed, was explicitly mentioned. The earlier

suit was stayed under section 34 of the Act of 1940 and the disputes were referred to the learned arbitrators. The affidavit filed by an authorized representative of the Foundation before the learned arbitrators also clearly refers to the said two figures. The application filed on behalf of the appellant Company in the matter relating to the instant appeal was dismissed through the impugned order on two grounds. Firstly, that Order XXXVII provides a special procedure and that the application under section 34 of the Act of 1940 could only have been filed and thus entertained after the appellant Company had been granted "leave to appear and defend". The failure to file an application for the grant of leave was, therefore, declared as fatal. The second ground was to the effect that, according to the stance taken by the Foundation/plaintiff, the amount sought to be recovered had been paid as a loan and was, therefore, to be treated as an independent cause of action. The questions, therefore, which are required to be answered by this Court in the instant appeal are (i) whether an application under section 34 of the Act of 1940 is not competent unless leave is granted under Order XXXVII of the C.P.C. (ii) whether the learned trial Court had properly appreciated the record while dismissing the application and, (iii) whether the provisions of section 34 of the Act of 1940 are attracted when resort is made by the other party to the summary procedure prescribed under Order XXXVII of the C.P.C. In case the answer to the last question is in the affirmative than at what stage is such an application required to be filed or entertained by the learned trial

Court. In order to appreciate these questions it would be beneficial to examine the relevant provisions of the C.P.C. and the Act of 1940.

8. Section 9 of the C.P.C. provides that, subject to the provisions *ibid*, Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. An ordinary suit is governed under and proceedings are conducted in accordance with the procedure prescribed under the CPC. However, Order XXXVII of the C.P.C prescribes a special procedure relating to the specified nature of documents. They are described under sub rule (1) of Rule 2 i.e. bills of exchange, hundies or promissory notes. The plaintiff has an option to either invoke the special summary procedure prescribed under Order XXXVII or file a suit in the ordinary manner. If a plaint has been presented then the Court issues summons in the prescribed form or in such other form as may be prescribed from time to time. Sub rule (2) of Rule 2 provides that the defendant, after having been served with summons, shall not appear or defend the suit unless he obtains leave from a Judge, as provided under Order XXXVII, so as to appear and defend. In case of default to obtain such leave or of appearance and defense pursuant thereto, the allegations in the plaint are deemed to have been admitted. Sub rule (1) of Rule 3 provides that the Court shall, upon application by the defendant, grant leave to appear and defend the suit upon an affidavit which discloses such facts which makes it ~~incumbent~~ upon the holder to prove consideration, or other facts as

the Court may deem sufficient to support the application. Sub rule (2) of Rule 3 further provides that the defendant may be given unconditional or subject to such terms as to payment into Court giving security, framing and recording of issues otherwise as the Court thinks fit. Sub rule (3) of Rule 3 provides that section 5 of the Limitation Act 1908 is attracted to applications under sub rule (1).

9. A combined reading of the above provisions clearly shows that the special summary procedure prescribed under Order XXXVII of the C.P.C. covers suits which are in respect of bills of exchange, hundies or promissory notes. Sub rule (2) of Rule 2 refers to two expressions i.e 'appear' and 'defend'. In the first part the word 'or' has been used between the said two expressions. A defendant, therefore, can neither appear nor defend unless leave has been granted by the learned Court. When sub rule (2) of Rule 2 is read with sub rule (1) and (2) of Rule 3, it becomes obvious that an independent application and, pursuant thereto, grant to appear and defend is not contemplated. Rule 3 explicitly covers a situation where a defendant intends not only to appear but also to defend on merits. A defendant is also bound by the prescribed limitation to file an application for seeking leave to appear and defend. Order XXXVII also does not bar a defendant from filing an application for the purposes of staying the proceedings under section 34 of the Act of 1940. The provisions of Order XXXVII neither override nor expressly exclude the application of the Act of 1940.



10. Before proceeding further, it would be beneficial to examine the relevant provisions of the Act of 1940. 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 case of 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 the things necessary for the purpose of proper conduct of the arbitration.

11. 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.

12. 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".*

13. 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

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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 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”.*

14. As already noted above, the provisions of Order XXXVII of the C.P.C. provides for a special procedure in case of the classes of suit specified therein. If the dispute is covered under an arbitration clause incorporated in the agreement then the provisions of the Act of 1940 will be attracted and thus, in such an eventuality, the defendant would be entitled to file an application for staying the proceedings under section 34 of the Act of 1940, provided the conditions mentioned therein are satisfied. The essential conditions required to be met are the existence of an arbitration agreement and filing of an application before taking any other step in the proceedings. The conduct of the defendant, therefore, would become pivotal. It is settled law that the crucial test for determining whether an act is a step in the proceedings is the display of an unequivocal intention not to proceed with the suit and to refer the dispute for arbitration. The Court, therefore, has to be satisfied that the conduct of the party seeking stay of the proceedings does not reflect an intent to waive the right to resolve the dispute through arbitration. There is no force in the argument raised by the learned counsel for the Foundation that unless leave to appear and defend the suit has been granted by the Court in a suit filed under Order XXXVII of the C.P.C. application under section 34 of the Act of 1940 cannot be

entertained. Seeking and arguing an application for leave to defend under Rule 3 would definitely tantamount to taking a step in the proceedings and thus negating the legislative intent postulated under section 34 of the Act of 1940. In order to demonstrate an unequivocal intention not to waive the right to refer the matter for arbitration, the filing of an application under section 34 of the Act of 1940 at the first instance would be crucial. It may well be filed independently and the same would also tantamount to seeking leave of the Court to appear without defending the suit.

15. I have carefully gone through the judgments of the learned Sindh High Court cited at the Bar i.e 1999 CLC 1841 and 2002 CLD 624 by the learned counsel for the Foundation. Firstly, the judgments are distinguishable on the basis of the facts and circumstances in the instant case and, secondly, with great reverence I have not been able to persuade myself that a promissory note or a bill of exchange given pursuant to and the parties bound by an agreement/contract containing an arbitration clause would give rise to an independent cause of action. If this was so then the procedural provisions of Order XXXVII of the CPC would prevail by excluding the Act of 1940. If such an exclusion was intended by the legislature then it would have used express language in this regard. The Act of 1940 is not only procedural but provides for substitutive provisions as well. It was enacted later in time and, therefore, it has to be reconciled harmoniously with the summary procedure prescribed under Order

XXXVII of the CPC. The facts and circumstances in the instant case highlight an anomalous situation. The same matter was earlier referred to be resolved through arbitration and the proceedings are pending before the arbitrators. After consenting to arbitration the suit was filed by the Foundation under Order XXXVII, having the effect of frustrating the said proceedings. In the earlier suit the Foundation had exercised its option to file an ordinary suit instead of invoking the special procedure contemplated under Order XXXVII of C.P.C.

16. In the instant case, the proceedings in the earlier suit which was filed by the Foundation on 07-04-2010 were stayed by the learned trial Court after acceptance of the application under section 34 of the Act of 1940 vide order dated 19-10-2010. Both the parties submitted before the two arbitrators to whom the disputes were referred. The disputes relate to, inter alia, rendition of accounts which stem from the Agreement. In paragraphs 14 and 15 of the earlier plaint the amounts sought to be recovered have been specifically mentioned. When the entire matter relating to the rendition of accounts in respect of the Agreement has already been referred to two arbitrators and the order, dated 19-10-2010, has attained finality having been accepted by both the parties, then it would also give rise to the question whether it would be equitable to proceed with the suit merely because it has been filed under Order XXXVII of CPC.

17. In my humble opinion the provisions of the Act of 1940, particularly section 34 *ibid*, are not excluded under Order XXXVII of

the CPC. However, a defendant, in order to show an unambiguous intent not to waive the right to resolve the dispute in the manner described in the arbitration agreement, would be required to file an application under section 34 of the Act of 1940 along with an application seeking leave to appear and defend. There is no bar under Order XXXVII of the CPC to allow appearance for the purposes of deciding a prayer sought under section 34 of the Act of 1940 while keeping the application pending to the extent of granting leave to defend. In the event that the application under section 34 of the Act of 1940 succeeds then the prayer to the extent of granting leave to defend would not be required to be adjudicated.

18. For what has been discussed above, the instant appeal is allowed. Consequently the matter is remanded to the learned trial for deciding the application under section 34 of the Act of 1940 afresh. The appellant Company shall also be at liberty to file an application for leave to appear and defend along with an application seeking condoning of the delay.

(ATHAR MINALLAH)  
JUDGE

Announced in the open Court on 13-04-2018.

JUDGE.

Approved for reporting.