JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R. No.73 of 2014
JS Global Capital Limited
Versus
Mrs. Raheela Yahya

Dates of Hearing: 18.01.2021 and 27.01.2021.
Petitioner by: Mehr Muhammad Iqbal, Advocate.
Respondent by: Barrister Ahsan Jamal Pirzada.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition the petitioner, JS Global Capital Limited, impugns the order and decree dated 07.12.2013 passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's appeal against the order and decree dated 03.09.2013 passed by the Court of the learned Civil Judge, Islamabad, was dismissed. Vide the said order dated 03.09.2013, the learned Civil Court dismissed the application filed by the petitioner under Section 20 of the Arbitration Act, 1940 **("the 1940 Act")** seeking the reference of the disputes between the petitioner and the respondent, Mrs. Raheela Yahya, to arbitration.

2. The record shows that the petitioner was a member of the Karachi Stock Exchange **("KSE")** and is engaged in the business of brokerage in stocks, shares, securities, etc. The petitioner has been issued a license by the Securities and Exchange Commission of Pakistan **("S.E.C.P.")** to operate as a broker under the Brokers and Agents Registration Rules, 2001.

3. On 21.02.2007, the respondent signed and submitted an account opening form to the petitioner at the latter's office in Islamabad. The said form sets out the terms and conditions of the contractual relationship between the petitioner and the respondent. Clause 27 of the account opening form sets out the dispute resolution mechanism between the said parties. This clause is reproduced herein below:-

> *"27. In the event of any disputes, differences or controversies arising out of the Agreement, including the Interpretation of the terms hereof ("Disputes"), the same shall be referred to the sitting Chairman of the Exchange for the time being in Office as the Sole Arbitrator. Once the Chairman enters upon reference,*

he will continue as the Sole Arbitrator for such Dispute(s), even after the expiry of his term as the Chairman of the Exchange. Provided further, if Mr. Jahangir Siddiqui or any other officer/director of the Broker is the Chairman of the Exchange at the time of such Dispute(s), then the Sole Arbitrator shall be the Vice Chairman of the Exchange for the time being in office, who after entering upon reference will continue as the Sole Arbitrator (for such Dispute(s) even after the expiry of his term). In case of any reason(s), the Stock Exchange and/or the Arbitration Committee thereof is/are unable to arbitrate upon the matter due to any legal infirmity, the matter shall then be referred to arbitration by two Arbitrators, one to be appointed by each party and on the lack of consensus between the two Arbitrators, the matter shall be referred to an Umpire, to be selected by the two Arbitrators before the commencement of the reference in accordance with the Arbitration Act, 1940 or any amendments thereof. The decision of the Arbitration Committee of such Exchange or the Arbitrators or the Umpire, as the case may be, shall be final and binding upon both the parties. The Arbitration shall be held in accordance with Arbitration Act, 1940 as amended from time to time and the venue of Arbitration shall be Karachi."

4. Clause 6(i) of the account opening form provides that in the event the account holder fails to deposit additional cash or securities as margin within one business day of the margin call (in writing), the petitioner shall have absolute discretion to and, without further notice to the account holder, liquidate the account holder's outstanding position, including the securities purchased and carried in such account so that the margin is maintained at the required level. Clause 6(ii) of the said form empowered the petitioner to square off a transaction by selling the account holder's shares in case of non-payment by the account holder within the time stipulated in Clause 7(ii) of the said form. It is an admitted position that the parties had agreed to maintain 20% margin throughout the trading.

5. It is an admitted position that the respondent had purchased shares in listed companies including Javed Omar Vohra Company Ltd. ("J.O.V.C.") through the petitioner. Vide letter dated 15.01.2008, the petitioner requested the respondent to deposit an amount of Rs.398,768/- in order to maintain her outstanding position at margin or make a payment of Rs.879,656/- to take custody of 5,000 shares in J.O.V.C. purchased by the respondent. Having not received any response from the respondent, the petitioner sold 5,500 shares belonging to the respondent in

J.O.V.C. on 21.07.2009 for an amount of Rs.76,662.28. There had been a sharp decline in the stock market during 2008-2009. This sale resulted in liquidating the entire portfolio of the respondent. However, there still remained an outstanding amount of Rs.803,081.26 in the respondent's ledger account.

6. On 06.01.2012, the petitioner filed an application under Section 20 of the 1940 Act before the learned Civil Court at Islamabad seeking the reference of the dispute between the petitioner and the respondent to be referred to arbitration in terms of Clause 27 of the account opening form. The respondent contested the said application by filing a written reply. The position taken by the respondent in her reply was that under Regulations 31 of the General Regulations of the Karachi Stock Exchange (Guarantee) Limited **("the General Regulations of KSE"),** the Arbitrator could not take cognizance of any claim or dispute which was not referred to him within three months from the date it arose.

7. Vide order dated 03.09.2013, the learned Civil Court dismissed the petitioner's application under Section 20 of the 1940 Act primarily on the ground that the petitioner had failed to refer the disputes to the sitting Chairman of KSE, and that the process for the initiation of the arbitration had not been initiated within the stipulated time. It was also held that the parties had agreed for the venue of the arbitration to be Karachi. The petitioner's appeal against the said order dated 03.09.2013 was dismissed by the learned Appellate Court vide order dated 07.12.2013. The learned Appellate Court held that since the venue of arbitration had been agreed to be Karachi, the learned Civil Court at Islamabad did not have the jurisdiction to adjudicate upon the petitioner's application under Section 20 of the 1940 Act, and that the petitioner had failed to initiate the arbitration within a period of one year. The said concurrent orders have been assailed by the petitioner in the instant civil revision petition.

8. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant civil revision petition, submitted that through its application under Section 20 of the 1940 Act, the

petitioner had sought a reference of its disputes with the respondent to arbitration in accordance with Clause 27 of the account opening form; that in view of the arbitration clause set out in Clause 27, the learned Civil Court could have referred the disputes to the sitting Chairman of the Stock Exchange; that the cause of action accrued to the petitioner when the respondent failed to clear her outstanding liabilities; that the cause of action was continuous and recurring; that the limitation period for filing an application under Section 20 of the 1940 Act is three years in terms of Article 181 of the First Schedule to the Limitation Act, 1908; that the application filed by the petitioner before the learned Civil Court was within the limitation period provided by law; and that the mere fact that the parties had agreed for the venue of arbitration to be Karachi did not prevent the learned Civil Court at Islamabad from referring the disputes to arbitration, which would be conducted at Karachi. Learned counsel for the petitioner prayed for the civil revision petition to be allowed and for the concurrent orders passed by the learned Courts below to be set-aside.

9. On the other hand, learned counsel for the respondent submitted that the General Regulations of KSE would override the arbitration clause set out in Clause 27 of the account opening form; that under Clause 26 of the General Regulations of KSE, the dispute between members of the Stock Exchange and their clients is to be referred to arbitration; that the procedure for initiating the arbitration proceedings is set out in the said Regulations; that Clause 31 of the said Regulations provides that the Arbitrator(s) shall not take cognizance of any claim or dispute which is not referred to him/them within three months from the date it arose; that since the application under Section 20 of the 1940 Act was filed with an inordinate delay, the learned Courts below did not commit any illegality in dismissing the said application; that the petitioner did not apply to the Court under Section 37(4) of the 1940 Act for the enlargement of time for filing an application under Section 20 of the said Act; that since the parties had agreed for the venue of arbitration to be Karachi, the learned Civil Court

at Islamabad could not refer the disputes between the petitioner and the respondent to arbitration; and that the dispute between the parties would not have arisen if the petitioner had exercised its right of liquidating the respondent's outstanding liabilities by promptly selling her remaining shareholding in the petitioner's custody. Learned counsel for the respondent prayed for the civil revision petition to be dismissed.

10. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant civil revision petition have been set out in sufficient detail in paragraphs 2 to 7 above and need not be recapitulated.

11. The account opening form provides *inter alia* that *"all transactions of Securities between the parties"* shall be subject to the Articles, Rules and Regulations of the relevant Exchange, revised policies, board directions and new regulations to be framed in pursuance of Section 34 of the Securities and Exchange Ordinance, 1969 **("the 1969 Ordinance")**. The General Regulations of KSE are said to have been made by KSE in exercise of the powers under Section 34(1) of the 1969 Ordinance, which provides that a Stock Exchange may, subject to the previous approval of the S.E.C.P., make Regulations not inconsistent with the Rules to carry out the purposes of the said Ordinance. Section 34(3) of the 1969 Ordinance requires the Regulations to be published in the Official Gazette. Section 34(2) of the said Ordinance provides for *inter alia* the procedure for the settlement of claims or disputes, including arbitration.

12. The General Regulations of KSE, as amended on 26.11.2007, have been brought on record. Regulations 29 to 42 of the said Regulations provide a detailed mechanism for the settlement of disputes between a stockbroker, who is a member of KSE, and its clients through arbitration, and appeals from awards. Regulation 35 of the said Regulations provides that the Sole Arbitrator / Panel of Arbitrators shall not take cognizance of any claim or dispute which is not referred to him / them within three months from the date it arose. It is on the basis of

Regulation 35 that the learned Courts below concurrently dismissed the petitioner's application under Section 20 of the 1940 Act.

13. Annexed to the General Regulations of KSE is the draft of the account opening form. Unlike the account opening form dated 21.02.2007 signed by the petitioner and the respondent, the draft of the account opening form annexed to the said Regulations does not contain an arbitration clause. The General Regulations of KSE prior to their amendment on 26.11.2007 are not on the record. Assuming that the General Regulations of KSE in their un-amended form had also provided for an elaborate mechanism for arbitration which was different to the arbitration clause embodied in the account opening form dated 21.02.2007, the mechanism for arbitration provided in such General Regulations would, at best, have the force of an agreement between the parties. I say so because Section 46 of the 1940 Act provides that *"the provisions of this Act, except sub-section (1) of Section 6 and Sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were in the arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."*

14. By dint of the deeming provision in Section 46 *ibid*, the mechanism for arbitration embodied in the General Regulations of KSE would be treated as an arbitration agreement between the parties. Learned counsel for the petitioner did not dispute the fact that a mechanism for the settlement of disputes between a broker and a client through arbitration had been provided in the un-amended General Regulations of KSE. These Regulations are also said to provide that claims made beyond three months from the date they arose could not be taken cognizance of by the Arbitrator. Admittedly, these Regulations pre-date the agreement between the parties embodied in the account opening form dated 21.02.2007. The provisions of the account opening form do not give an overriding effect to the mechanism for arbitration in the

said Regulations. Reference in the special terms and conditions of the account opening form to the applicability of the Regulations of the relevant Exchange is only with respect to *"transactions of securities between the parties"* and not, in my view, to the mechanism for the settlement of contractual disputes for which Clause 27 of the account opening form provides the avenue. The arbitration clause in Clause 27 of the account opening form provides an altogether different mechanism for initiating arbitration proceedings and does not in any manner bar a claimant from making a claim or raising disputes beyond a period of three months from the date when they arose. By signing the account opening form, the parties thereto agreed to settle their disputes through arbitration in the manner provided in Clause 27 thereof. The execution of the account opening form containing an arbitration clause would have the effect of overriding the mechanism for the settlement of disputes through arbitration set out in the General Regulations of KSE. An arbitration agreement like any other contract, can be amended either expressly or impliedly by the parties. By agreeing to the mechanism for the settlement of disputes in accordance with Clause 27 of the account opening form, the parties thereto impliedly agreed to override the provisions for arbitration in the General Regulations of KSE. Therefore, I am of the view that the arbitration clause embodied in Clause 27 of the account opening form signed by both the petitioner and the respondent would prevail over the General Regulations of KSE, and a claimant would not be debarred from raising a claim simply on the ground that it was raised beyond a period of three months from the date when it arose.

15. Since Clause 27 of the account opening form did not restrict the parties from raising claims beyond three months from the date when the cause for making the claims arose, the application under Section 20 of the 1940 Act could have been filed within a period of three years of the accrual of the cause of action as provided in Article 181 of the First Schedule to the Limitation Act, 1908.

16. Having said that, it is not uncommon for parties to arbitration agreements to agree to a time limit within which a party can make a claim against the other. In this regard paragraph 2-054 of Russell on Arbitration (21st Edition) reads thus:-

> ***"Some arbitration agreements state that arbitrations must be started within a certain time. Some provisions of this kind prevent a claim being brought by arbitration, and others prevent a claim being brought by any means. Each needs to be examined to see which interpretation it should bear. Where there is ambiguity, the courts prefer to treat these provisions as barring the claim by any means. In some circumstances application may be made to the court to extend a time limit."***

17. Notwithstanding what I have held in paragraphs 14 and 15 above, and assuming for the sake of argument only that the provisions for arbitration in the General Regulations of KSE were applicable to the disputes between the parties, I shall now deal with the argument of the learned counsel for the respondent that since the petitioner never applied to the Court under Section 37(4) of the 1940 Act for the enlargement of time for filing an application under Section 20 of the said Act, and that since the application under Section 20 of the said Act was filed beyond the time fixed in the agreement for referring disputes to arbitration, the learned Courts below did not commit any illegality by dismissing the petitioner's application under Section 20 of the said Act. This argument proceeds on the assumption that the arbitration agreement between the parties did provide a time limit within which a claim could have been filed, and I shall deal with this argument assuming that the arbitration agreement between the parties does provide for such time limits. Section 37(4) of the 1940 Act reads thus:-

> ***"(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper."***

18. Although it is for the Court to decide whether an application under Section 20 of the 1940 Act has been filed within the limitation period provided by law, it is for the arbitrator and not the Court to deal with the question whether the claim of a party to the arbitration agreement is barred the law of limitation. Section 37(4) of the said Act does not apply to the time within which an application under Section 20 of the 1940 Act can be moved. The Court cannot refuse to refer matters to arbitration on the ground that because of a clause in the arbitration agreement (placing a time limit within which the party to such an agreement can raise claims against the other) the 'claims' are time-barred, as it is for the arbitrator to decide such questions. This causes me to hold that the learned Courts below erred by not appreciating that it is for the arbitrator and not the Court to decide whether the petitioner's claim against the respondent was barred by a provision in the arbitration agreement imposing time limits within which claims can be made in arbitration.

19. Where a party seeks a reference to arbitration so as to raise a claim beyond the period fixed by the parties, an application under Section 37(4) of the 1940 Act can be made before the Court for the enlargement of time for making such a claim. Such an application can be filed along with an application under Section 8 or 20 of the said Act, as the case may be, or even after the disputes are referred to arbitration or an arbitrator is appointed. Failure to make an application under Section 37(4) of the 1940 Act regarding claims beyond the period fixed by the parties cannot be a ground for rejecting an application under Section 8 or 20 of the 1940 Act. As mentioned above, it will be for the arbitrator to decide whether such claims are to be rejected on the ground that they were not raised or referred to arbitration within the time fixed by the parties. If the Court, while deciding an application under Section 8 or 20 of the 1940 Act, embarks on determining whether the claims that the applicant is seeking to make before the arbitrator would be barred under the law of limitation or under a provision in the arbitration agreement barring the parties to raise

claims beyond the time fixed in such an agreement, it would amount to usurping the jurisdiction of the domestic tribunal.

20. Section 37(1) of the 1940 Act makes all the provisions of the Limitation Act, 1908 applicable to arbitration as they apply to proceedings in the Court. This provision gives authority to an arbitrator to consider and decide questions of limitation raised in arbitration proceedings. It obligates the arbitrator to determine whether a claim before him is within the period of limitation. In the same way, it is for the arbitrator to determine whether the claims made in the arbitration proceedings are barred on the ground that they have not been raised within the time limit fixed by the parties in the arbitration agreement. The limitation period for filing an application under Section 20 of the 1940 Act seeking a reference to arbitration ought not to be confused with the limitation period or the time limit within which a claim could be raised in arbitration proceedings. In the case of J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. (AIR 2008 SC 1363), a notice issued by the appellant invoking the arbitration clause in the agreement was followed by an application under Section 8(2) of the 1940 Act for the appointment of an arbitrator. The said application was allowed and an arbitrator was appointed. The appellant, in its statement of claim, raised claims which were barred by the law of limitation. These claims were allowed by the arbitrator. The arbitrator had proceeded on the assumption that if the application filed by the applicant under Section 8(2) of the 1940 Act for the appointment of an arbitrator was within time, all claims made in the statement of claim filed before the arbitrator were also to be considered to be in time. This stance did not find favour with the Supreme Court of India which held that the arbitrator ought to have rejected the claims which were barred under the law of limitation. Paragraph 18 of the said report is reproduced herein below:-

> ***"18. The learned counsel for the appellant submitted that the limitation would begin to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4.6.1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation***

for a petition under section 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced. Section 37(3) of the Act provides that for the purpose of Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4.6.1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4.6.1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under section 8(2) of the Act. Insofar as a petition under section 8(2), the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Inder Singh Rekhi Vs. Delhi Development Authority (1988) 2 SCC 338), Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta (1993) 4 SCC 338 and Utkal Commercial Corporation Vs. Central Coal Fields (1999) 2 SCC 571 also make this position clear."

(Emphasis added)

21. In the case of Jiwnani Engineering Works Vs. Union of India (AIR 1978 Calcutta 228), Justice Sabya Sachi Mukharji speaking for the Calcutta High Court held that the question whether a claim sought to be referred to arbitration is barred by limitation is not relevant for deciding an application under Section 20 of the 1940 Act since this would be a question for the arbitrator to decide. The relevant portion of the said judgment is reproduced herein below:-

"6. ... It was, then, contended on behalf of the respondent that in any event the claim sought to be referred to arbitration was belated and barred by limitation. There is a good deal of substance in the contention that the claim now sought to be referred to arbitration is barred by limitation. But the Supreme Court has observed in the case of Wazir Chand v. Union of India, AIR 1967 SC 990 that in an application under S. 20 of the Arbitration Act the Court was not concerned with the question whether the claim sought to be referred to arbitration was barred by limitation or not. That was a matter within the jurisdiction of the arbitrators to decide. The same view was reiterated by the Supreme Court in the case of Mohd. Usman v. Union of India, AIR 1969 SC 474. The Supreme Court in its decision in the case of Kerala S. E. Board v. T. P. Kunhaliumma, AIR 1977 SC 282 did not approve of the views of the Supreme Court in the cases mentioned before that application under S. 20 of the Arbitration Act, 1940 would not be governed by the limitation prescribed by the Limitation Act. But the Supreme Court was there dealing with the question whether in any application under any Act other than Civil Procedure Code, Art. 137 of the Limitation Act would be

applicable or not. The Supreme Court was not dealing in the last mentioned case with the question whether the contention that the claim was barred by limitation or not before the arbitrator is a relevant consideration for refusing an application under S. 20 of the Arbitration Act, 1940. In the aforesaid view of the matter it must be held that the question whether a claim is barred by limitation or not before the arbitrator is not a relevant consideration for an order under S. 20 of the Arbitration Act, 1940. This contention urged on behalf of the respondent, therefore, cannot be accepted."

22. Before a reference could be made to arbitration, the Court has to determine whether (i) the petitioner has entered into an arbitration agreement with some other person; (ii) the agreement has been entered into before the institution of any suit with respect to the subject-matter of the agreement or any part of it; (iii) a difference has arisen between the parties to which the agreement applies; and (iv) the Court to which the application is made has jurisdiction in the matter to which the agreement relates. There is no other condition for an application to file in Court for an arbitration agreement. Reference in this regard may be made to the law laid down in the cases of Project Director Balochistan Minor Irrigation & Agricultural Development Project Quetta, Cantt. Vs. Murad Ali and Company (1999 SCMR 121), Catalyst Communication (Pvt.) Ltd. Vs. National Telecommunication Corporation (2017 CLC 466), Rakshani Builders (Pvt.) Ltd. Vs. Capital Development Authority (2015 YLR 2116), Strong Built Enterprises (Pvt.) Limited, Lahore Vs. Fauji Fertilizer Company Limited (1998 MLD 1628) and Manzoor Construction Company Limited Vs. University of Engineering and Technology (1984 CLC 3347).

23. The next question that warrants determination is whether the agreement between the parties for the venue of the arbitration to be Karachi ousts the jurisdiction of the Civil Court at Islamabad to entertain an application under Section 20 of the 1940 Act. Section 20(1) of the 1940 Act provides that *"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 may apply to a Court having jurisdiction in the matter to which the agreement relates,*

that the agreement be filed in the Court." A *"Court"* is defined in Section 2(c) of the 1940 Act to mean *"a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court."*

24. Section 20 of the Civil Procedure Code, 1908 **("C.P.C.")** provides *inter alia* that every suit shall be instituted in a Court within the local limits of whose jurisdiction the defendant resides or where the cause of action, wholly or in part, arises. Assuming that there was no arbitration agreement between the petitioner and the respondent, and if the petitioner was to institute a suit for recovery against the respondent, it could have done so before the learned Civil Court at Islamabad. This is because, it is an admitted position that the respondent resides at Islamabad; the account opening form was signed and executed at Islamabad; and the letter dated 15.01.2008, wherein a demand for payment was made by the petitioner, was sent from the petitioner's office on Fazl-ul-Haq Road at Islamabad and was received by the respondent at Islamabad. Therefore, it is my view that learned Civil Court at Islamabad was competent to decide the petitioner's application under Section 20 of the 1940 Act. In the case of Lilley International (Pvt) Ltd. Vs. National Highway Authority (PLD 2012 Sindh 301), the Hon'ble High Court of Sindh after referring to the definition of the term *"Court"* in Section 2(c) of the 1940 Act held as follows:-

> *"5. When the definition given in section 2(c) is examined, in my view its meaning is at once clear. The court has been defined not in relation to the arbitration proceedings but rather in relation to the court that would have jurisdiction over the subject matter of the arbitral reference had a civil suit been filed instead of the matter being referred to arbitration. In other words, the definition requires the following exercise to be undertaken if the question arises whether a particular court has jurisdiction for purposes of the Arbitration Act. First, the subject matter of the arbitral reference must be identified. Then, that court must be ascertained which would have jurisdiction if the subject matter so identified had been the subject matter of a civil suit. It is only the court so ascertained that is the "court" within the meaning of section 2(c). As is at once obvious from the second step of the exercise, it is entirely irrelevant for this determination as to where the arbitrator resides or works for gain or where the*

arbitration proceedings were held or where the award was made. This is so because the basis on which the determination must be made is in essence hypothetical since it is an ascertainment of where a civil suit could have been brought in respect of the subject matter of the arbitral reference. Obviously, if a civil suit were to be or had been filed, then there would neither be an arbitrator nor any arbitration proceedings nor award. Furthermore, it must also be kept in mind that in civil suits, the jurisdiction of a court is determined not merely on the basis of where the cause of action arose in whole or in part. Jurisdiction also, inter alia, lies with that court where the defendant ordinarily resides or works for gain. In carrying out the exercise noted above, it is also important therefore to keep in mind as to which of the parties in the arbitral reference would be the plaintiff in the putative suit and who would be the defendant."

25. The ratio in the case of Lilley International (Pvt) Ltd. Vs. National Highway Authority (*supra*) was quoted with approval by the Hon'ble Supreme Court in the case of Province of Punjab Vs. Muhammad Tufail & Co. (PLD 2017 SC 53). Furthermore, in the said report, it was held as follows:-

"18. It is settled law that in terms of Section 20, C.P.C. different Courts may assume jurisdiction on the basis of the defendant's place of business or residence and/or where the cause of action wholly or partly arises. Section 2(c) read with Section 31(1) of the Act requires that we suspend the existence of the arbitration agreement to consider which Court(s) may have jurisdiction with respect to the "subject matter of the reference" if a civil suit were to be filed in respect thereof. The subject matter of a reference cannot be limited to the physical construction of the road at Toba Tek Singh as contended by the appellants. The subject matter of the reference is an inclusive term which would cover the physical road constructed at Toba Tek Singh, the contract executed at Toba Tek Singh, the arising of all the disputes regarding the violation and enforcement of the terms and conditions of the contract, and the rights emerging and based thereupon, including payment of/deduction from the final bill of the respondent."

26. Parties, while executing an arbitration agreement, have the freedom to fix the venue for arbitration as well as the Courts which would have jurisdiction in the matter. In the case at hand, the parties have agreed on the venue for arbitration to be Karachi but have not agreed on the Court which would have jurisdiction in the matter. The mere fact that the venue of arbitration was agreed to be Karachi would not denude the Court at Islamabad from deciding an application under Section 20 of the 1940 Act provided it had the jurisdiction in terms of Section 20 C.P.C., over the subject matter of the reference. In holding so, reliance is placed on the following case law:-

(i) In the case of National Highway Authority Vs. Put Sarajevo General Engineering Company (2012 CLD 464), the arbitration agreement between the parties provided for the venue of arbitration to be Islamabad. The question that arose for consideration was whether the Court of Civil Judge at Peshawar had jurisdiction with respect to the arbitration given the fact that works under the contract containing the arbitration clause had to be executed at Peshawar. The Hon'ble Peshawar High Court held that the Court of the Civil Judge, Peshawar had the jurisdiction to adjudicate upon the application for making the award a rule of Court. In the said judgment, it was held as follows:-

> *"The material available on the record would further reveal that the agreement is silent with regard to filing of award in the Court for making the same as rule of Court. It is settled law that the disputes between the parties to the contract agreements are referred to the Courts in whose territorial jurisdiction the agreements are signed. It is also settled proposition of law that where there are many Courts having the jurisdiction to entertain the disputes between the parties under the agreement, then the parties with their mutual consent agree to refer their dispute to any such Court or Courts and such consent agreement between the parties is also not against the provisions of section 23 or section 28 of the Contract Act (IX of 1872). But here in this case there is no such clause of the agreement conferring jurisdiction in any one Court except the one that the arbitration would be held in Islamabad, which too, has been violated by both the parties. So, in the given circumstances, the dispute between the parties could be referred to the Courts having the jurisdiction under general law. No doubt, the Courts at Islamabad have the jurisdiction to entertain any dispute between the parties as agreement between them was executed at Islamabad. Since head-office of respondent is there in Lahore so, a suit regarding any dispute against respondent can be filed at Lahore. The work being done was within the territorial jurisdiction of the Courts at Peshawar and dispute between them also cropped up there. Sub-offices of both the parties are also situated in Peshawar. So, such a dispute between the parties regarding the subject matter situated within the territorial jurisdiction of Courts at Peshawar can well be referred and agitated before the Courts at Peshawar as cause of action wholly or partly, within the meaning of section 20(c) of C.P.C, arose here. Similarly, there is no bar in the agreement that the Courts at Peshawar will have no jurisdiction."*

(ii) In the case of Major General (Retd) Fazle Ghafoor Vs. Total Parco Pakistan Ltd (2009 MLD 1397), the Hon'ble Peshawar

High Court overturned the order passed by the learned Civil Court at Peshawar to return a plaint on the ground that the parties to the dispute had agreed for the venue of arbitration to be Lahore. The operative part of the said judgment is reproduced herein below:-

> ***"6. A perusal of the above quoted clause, would reveal that it simply stipulates about the arbitration, place thereof and the application of the provisions of the Arbitration Act. This clause despite stipulating that arbitration shall be held at Lahore does not stipulate the ouster of jurisdiction of the Civil Court at Peshawar. Even 2(c) of the Act does not come in the way of the Civil Court at Peshawar by any stretch of imagination. What it requires and lays stress on is that the Court must be a Civil Court and it must have jurisdiction to entertain a suit vis-a-vis the dispute referred to arbitration. The Civil Court at Peshawar under no canons of interpretation would be shorn of jurisdiction, when the subject matter of dispute is admittedly situated and cause of action, as per averments in the plaint, has arisen within its territorial jurisdiction. Section 31(2) of the Act, too, would not come in the way of the Civil Court when all the questions enumerated therein can be decided by the said Court."***

(iii) In the case of Special Communication Organization Vs. Ibell (Pvt.) Ltd. (2007 CLC 248), the Hon'ble Lahore High Court made recourse to Section 20 C.P.C. in order to determine the Court which would have the jurisdiction to entertain an application under Section 20 of the 1940 Act. In the said case, an order passed by the Civil Court at Lahore to refer the matter to arbitration under Section 20 of the 1940 Act was set-aside by the Hon'ble Lahore High Court primarily on the ground that since the agreement containing the arbitration clause was executed at Rawalpindi, therefore the jurisdiction vested at the Courts at Rawalpindi. It was also held that the parties to the arbitration agreement had agreed for the venue of arbitration to be Islamabad, and that no cause of action had accrued at Lahore.

(iv) In the case of Ravi Glass Mills Limited Vs. I.C.I. Pakistan Powergen Limited (2004 YLR 2503), the arbitration agreement between the parties provided for the venue to be Karachi. It also provided that *"judgment may be entered upon such award(s) in any competent Court in Karachi."* The arbitration proceedings were conducted and the award was

rendered at Karachi. The application to make the award a rule of Court was submitted to the Court in Lahore. The respondent in the said case had sought the arbitration award to be made a rule of Court, whereas the petitioner had filed objections under Sections 30 and 33 of the 1940 Act contending that the Court at Lahore had no jurisdiction to take cognizance of the matter since the agreement between the parties had provided that the Court at Karachi would have jurisdiction over the matter. The petitioner's contention did not find favour with the learned Civil Court at Lahore as well as the Hon'ble Lahore High Court. In the said judgment, it was *inter alia* held as follows:-

> *"It is also settled principle of law that agreement executed between the parties in violation of the substantive law is void. Under the law no man exclude himself from the protection of Courts by contract as law laid down in Rehmatunnissa Begum and others v. Prince and others (AIR 1917 P.C. 116). It has been held in a number of Judgments of different Courts that where more Courts than one [have] jurisdiction to try a suit there is nothing in violation to public policy in the agreement executed between the parties to the extent that dispute between them would be tried at one place of these. ... It is settled law that where two Courts have jurisdiction to take cognizance of the matter under the ordinary law, an agreement that disputes will be tried by one Court only is valid and does not contrary to section 28 of the Contract Act. It is also equally plain that if Court of one place do not have jurisdiction under the ordinary law, a provision in a contract that such a Court alone shall have jurisdiction is void because jurisdiction cannot be conferred by the consent of parties as law laid down in Messrs Gamman India Ltd. v. Hakam Singh (AIR 1967 AWR 380)"*

27. In the event the disputes between the petitioner and the respondent are referred to arbitration by a Court at Islamabad and the arbitration proceedings take place at Karachi, as agreed by the parties in Clause 27 of the account opening form, then by virtue of Section 31(3) of the 1940 Act, all applications regarding the conduct of the arbitration proceedings or otherwise arising out of such proceedings are to be made to the Court where the award may be filed, and to no other Court. Additionally, in the event the award is rendered at Karachi, then the same will have to be filed before the Court at Islamabad, which had referred the matter to arbitration. This is because Section 31(4) of the 1940

Act, which starts with a non-obstante clause, provides that where in any reference any application under the said Act has been made in a Court competent to entertain it, *"that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court."* The intent behind Section 31 of the 1940 Act is to avoid conflicts between various Courts before the commencement of arbitration; during the pendency of arbitration; and after the completion of arbitration. The necessity of clothing a single Court with such exclusive jurisdiction is to avoid conflict and scramble at any stage.

28. It now needs to be determined whether the application under Section 20 of the 1940 Act was filed within the limitation period provided by law. It is by now well settled that the limitation period for filing an application under Section 20 of the said Act is three years under the residuary Article 181 of the First Schedule to the Limitation Act, 1908 to be computed from the date when the dispute arises between the parties to an arbitration agreement. Reference in this regard may be made to the law laid down in the cases of M. Imam-ud-Din Janjua Vs. The Thai Development Authority through the Chairman, T.D.A., Jauharabad (PLD 1972 SC 123), Muhammad Nazir Vs. The Secretary, Cooperative Department (1989 MLD 1156), Messrs Progressive Engineering Associates Vs. Pakistan Steel Mills Corporation Ltd. (1997 CLC 236), Azad J&K Government Vs. Shaheen Timber Trading Corporation (PLD 1965 (Azad J&K) 9) and Muhammad Abdul Latif Faruqi Vs. Nisar Ahmad (PLD 1959 Karachi 465).

29. The application under Section 20 of the 1940 Act was filed by the petitioner before the learned Civil Court on 06.01.2012. Vide letter dated 15.01.2008, the petitioner requested the respondent to pay Rs.879,656/- for the purchase of 5,000 shares in J.O.V.C. and take custody of the said shares on making such payment, or in the alternative to deposit an amount of Rs.398,768/- to maintain her outstanding position at margin. Having not received any response from the respondent, the

petitioner on 21.07.2009 sold the respondent's 5,500 shares in J.O.V.C. for an amount of Rs.76,662.28. After this sale, an amount of Rs.803,081.26 remained payable by the respondent to the petitioner. In the application under Section 20 of the 1940 Act, the petitioner has claimed Rs.803,081.26 along with interest in addition to late payment surcharge. The dispute arose when the petitioner liquidated the 5,500 shares of the respondent in J.O.V.C. on 21.07.2009, which left an amount of Rs.803,081.26 payable by the respondent to the petitioner. This is when the cause of action accrued to the petitioner to raise a claim for the said amount against the respondent. The non-payment of the said amount was a dispute which warranted reference to arbitration in terms of Clause 27 of the account opening form. Since the application under Section 20 of the 1940 Act was filed by the petitioner on 06.01.2012 (i.e. within three years of 21.07.2009), I am of the view that the said application was filed within the limitation period prescribed by law.

30. In view of the above, the instant civil revision petition is allowed; the concurrent orders passed by the learned Courts below are set-aside; the petitioner's application under Section 20 of the 1940 Act is allowed; and the matter in dispute between the parties is referred to arbitration by the Chairman of the successor body of the KSE. In the event the Chairman of the successor body KSE refuses to enter upon reference, then the mechanism for the appointment of the Arbitral Tribunal prescribed in Clause 27 shall ensue. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 26.04.2021.

(JUDGE)

*Ahtesham**

APPROVED FOR REPORTING