FORM NO.HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JUDICIAL DEPARTMENT

C.R. No. 38 of 2011

B.C. International Pvt. Ltd.

Versus

Tashfeen Qayyum, etc.

Date of Hearing: 29-01-2015.

Petitioner by: ***Mr Mehmood A. Sheikh, advocate.***

Respondents by:- ***Syed Hamid Ali Shah and Syed Ishfaq Hussain Naqvi, advocates for the respondent No.5.***

Mr Sara Rehman, advocate for the respondent No.1.

Mr Muhammad Afzal Siddiqui and Mr Hamid Ahmad, advocates for the respondent No.3.

Mr Muzaffar Ahmed Mirza, Director Law & Mr Ibrar Saeed, Deputy Director Law for SECP.

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Athar Minallah, J: Through this consolidated judgment the instant Civil Revision along with Civil Revision No.37 of 2011 shall be decided.

2. The petitioner is a juridical person incorporated under the applicable laws of the British Virgin Islands, United Kingdom, having its branch office in Sharjah, United Arab Emirates. The respondents No.1 and 2 had filed a suit for declaration and perpetual injunction in the Court of the Senior Civil Judge, Islamabad. The prayer sought in the suit was as follows:

"It is humbly prayed that the Plaintiff's suit may kindly be decreed in their favour as against the Defendants to the following effect:

(a) A Decree in favour of Plaintiff No.2 and against the Defendants declaring that Plaintiff No.2 is contractually and legally entitled to appoint the Chief Executive Officer of Defendant No.1/ETS as per the Joint Venture Agreement among Plaintiff No.2 and Defendants No.5 and 6 dated 16-07-2008.

(b) A decree in favour of Plaintiff No.1 and against the Defendants declaring that Plaintiff No.1 is entitled to remain and continue as the Chief Executive Officer and director of Defendant No.1/ETS as per the Joint Venture Agreement among Plaintiff No.2 and Defendants No.5 and 6 dated 16-07-2008.

(c) A decree in favour of the Plaintiffs and against the Defendants declaring that the purported resolution dated 16-01-2011 passed by Defendants No.3 & 4 and the notice dated 24-01-2011 issued by the then Company Secretary of Defendant No.1/ETS for holding extraordinary general meeting on 29-01-2011 are illegal, without lawful authority and wholly inoperative upon the legal and contractual rights of the Plaintiffs.

(d) A decree in favour of the Plaintiffs and against the Defendants perpetually restraining the Defendants from removing Plaintiff No.1 as Chief Executive Officer and director Defendant No.1/ETS and from interfering in the exercise of Plaintiff No.1's rights, duties and powers as such in violation of the Joint Venture Agreement among

Plaintiff No.2 and Defendants No.5 & 6 dated 16-07-2008.

(e) A decree in favour of the Plaintiffs and against the Defendants perpetually mandating the Defendants to strictly adhere to and abide by the terms and conditions of the Joint Venture Agreement among Plaintiff No.2 and Defendants No.5 & 6 dated 16-07-2008.

(f) Costs of litigation may also be awarded to the Plaintiffs throughout.

(g) Any further better relief which this Hon'ble Court deems fit and appropriate, in the circumstances, may also be granted.

3. From the averments made in the plaint, it is obvious that the dispute between the parties relates to a Joint Venture Agreement (hereinafter referred to as the "JVA") entered into between the respondent No.2, 6 and the petitioner. The petitioner had executed the JVA on behalf of the respondent No.2. In a nut shell, the dispute essentially relates to the interpretation of Clause-12 of the JVA, particularly as to whether the position of the Chief Executive Officer shall rest with the respondent No.1. The respondents No.1 & 2 interpret clause-12 of the JVA as giving an exclusive right to the respondent No.2 to appoint the Chief Executive Officer. Moreover, they further rely on clause-6 of the JVA in support of the contention that the said clause provides that the Chief Executive Officer of respondent No.3 shall also be the respondent No.1, namely Mr Tashfeen Qayyum. Likewise, rights have been asserted under clause-13 of the JVA. The grievance of respondents No.1 & 2, leading to filing of the suit, had arisen on account of a resolution passed by the Board of Directors of the respondent No.1, whereby it was resolved and decided to remove the respondent No.1 from

the position of Chief Executive Officer and Director of respondent No.3. This special resolution was passed in the extraordinary meeting of the respondent No.3. Pursuant thereto a notice dated 24-01-2011 was issued, which was received by the respondent No.1 via email. The disputes, therefore, undoubtedly emerge from the JVA and the interpretation of its various clauses. The prayer sought in the suit further affirms that the entire matter is in respect of the JVA.

4. The JVA contains an arbitration clause, which is reproduced as follows:

> *"That all the differences or disputes among the Parties shall be resolved through mutual negotiations, failing which these shall be resolved through Arbitration in accordance with the rules of International Chamber of Commerce applicable at the time of Arbitration Notice. The arbitration shall be held in England. The award rendered by the Arbitrator(s) shall be final and binding on the Parties".*

5. In the above back ground, the petitioner filed an application dated 03-02-2011, under Section 34 of the Arbitration Act 1940, praying for the stay of the proceedings. A reply was duly filed by the respondents No.1 & 2, and a preliminary objection regarding the competence of the person who had filed the said application on behalf of the company was raised. The learned Trial Court vide order dated 12-02-2011 dismissed the application on the ground that the person who had filed the application was not authorized in this regard and, consequently, the learned Court held that the application was not maintainable. The learned Trial Court simultaneously observed that a fresh application under Section 34 of the Arbitration Act 1940 could be filed by an authorized person, if it was so

desired. The respondents No.1 & 2 preferred an appeal under Section 39(1)(v) of the Arbitration Act 1940. The grievance of the respondents was that the learned Trial Court could not have observed that the company was entitled to file a fresh application under Section 34 of the Arbitration Act 1940.

6. The petitioner filed a fresh application under Section 34 of the Arbitration Act 1940, and the same was accepted by the learned Trial Court, and consequently the proceedings were stayed vide order dated 09-03-2011, with the observation that the parties may resolve their disputes pursuant to clause-14 of the JVA through Arbitration. The respondents No.1 & 2 preferred an appeal assailing the order dated 09-03-2011. The appeal was decided by the learned Additional District Judge, Islamabad vide order dated 07-04-2011 (hereinafter referred to as the "impugned order"). The learned Additional District Judge allowed the appeal, mainly on two grounds. Firstly, that the dismissal of the first application under Section 34 of the Arbitration Act 1940 had created a bar for filing of the second application and, secondly, the acts and conduct of the present petitioners, i.e. the defendants No.5 & 6, in the suit, disentitle them, rather prevented them from seeking the resolution of the disputes through Arbitration. Hence this revision petition by the petitioner.

7. The learned counsel for the petitioner has contended that the appeal filed by the respondents No.1 & 2, assailing the order dated 12-02-2011, was incompetent, as the right of appeal against the said order is not provided under Section 39(1)(v) of the Arbitration Act 1940; the order for dismissal of the first application cannot be construed as a bar for filing of a second application; the matter was not decided or adjudicated on merits and, therefore, the question of resjudicata does not arise; the learned ADJ, while exercising jurisdiction, has erred and,

thereby, committed illegality and material irregularity, as the grounds on which the appeal was allowed are not tenable in law; the learned Appellate Court has decided the matter and virtually held the arbitration clause as having become frustrated and, therefore, the same is without lawful authority and jurisdiction; the learned Trial Court had correctly stayed the proceedings, pursuant to Clause-14 of the JVA, which provides for resolution of disputes through international arbitration; the learned Appellate Court has passed the order as a result of misreading and non-reading of the order passed by the Trial Court, and pleadings of the parties; the learned Appellate Court has misinterpreted the clauses of the JVA and has not taken the relevant matters into consideration; the extraordinary meeting, wherein the resolution was passed to remove the respondent No.1, was in accordance with law; there is no bar on filing a second application under Section 34 of the Arbitration Act 1940; the order passed by the learned Appellate Court tantamounts to interfering with the internal management of the company; the provision of the Company Ordinance 1984 is to prevail and, therefore, no interference is warranted, as the special resolution was passed in accordance with law; there were serious allegations against the respondent No.1 and, therefore, his removal had become necessary; the decision taken for the removal of Mr Tashfeen Qayyum as Chief Executive Officer was in the best interest of the juridical person, and in line with the doctrine of corporate democracy; in any case, the matter raised by the respondents No.1 & 2 through filing the suit was within the exclusive jurisdiction of a Company Court under the Companies Ordinance 1984; the proper forum for resolving the disputes is through Arbitration, as provided in Clause-14 of the JVA; the order passed by the learned Trial Court, by accepting the application under Section 34 of the Arbitration Act 1940, does not suffer from any legal infirmity. The learned counsel has placed reliance on *PLD 1969 Lahore 615 (Syed Amir Hussain Shah Versus Progressive Papers Ltd and*

others), 2004 CLD 640 (Shahamatullah Qureshi Versus Hi-Tech Construction Pvt. Ltd), PLD 1978 Lahore 1098 (Sh. Muhammad Salim Versus Lahore Race Club and 4 others), AIR 1953 Madras 467 (Ananthalakshmi Ammal and another Versus The Indian Trades and Investments Ltd and another), PLD 2002 SC 452 (Town Committee, Gakhar Mandi Versus Authority under the Payment of Wages Act Gujranwala and 57 others), 1987 CLC 726 (Haji Abdul Jabbar and others Versus Haryana Asbestos Cement Industries) and 2003 SCMR 132 (United Liner Agencies of Pakistan Pvt. Ltd, Karachi and 4 others Versus Miss Mahenau Agha and 8 others).

8. The learned counsel for the respondents No.1 & 2 contended that; there is no legal infirmity in the impugned order and the learned Appellate Court has rightly exercised its jurisdiction, and no illegality or material irregularity has been raised as a ground; the second application filed under Section 34 of the Arbitration Act 1940 was not competent, as the first application had been dismissed; the JVA was executed in Kuwait, the entire evidence is in Pakistan, the companies are incorporated and based in Pakistan and, therefore, the Court at Islamabad is the appropriate forum; the petitioner has not made out a case so as to invoke the jurisdiction of the forum provided under Clause-14 of the JVA; the petitioner cannot invoke Clause-14 of the JVA, as the pre-requisites have not been complied with; under Clause-14 of the JVA, the matter could only be referred to Arbitration, if resolution through mutual negotiations had failed; the petitioner shall suffer irreparable loss and no one can be left without a remedy; the respondent No.1, through the suit, is protecting his status. The learned counsel has relied on *PLD 1983 Karachi 613 (Muhammad Hanif Versus Eckhard & Co. Marine GMBH and 2 others), PLD 1976 Karachi 1060 (Gulf Iran Co. and another Versus Pakistan Refinery Ltd and others), PLD 1958 Lahore 208 (Novelty Cinema,*

Layallpur Versus Firdaus Fils and another), 1987 MLD 2832 (Messrs Cosmopolitan Development Company Versus Messrs SO DI.ME.-S.P.A. and another) and NLR 1997 Civil 100 (Ch. Muhammad Shafi Versus Iqbal Hussain).

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

10. The questions which need consideration by this Court are; whether the impugned order suffers from any illegality or material irregularity, committed while exercising jurisdiction by the learned Appellate Court; whether dismissal of the first application under Section 34 of the Arbitration Act 1940 created a bar for filing a second application, particularly when the earlier application was admittedly not filed by an authorized person.

11. Section 34 of the Arbitration Act 1940 provides for stay of legal proceedings where there is an arbitration agreement. The ingredients or pre-requisites required to be satisfied for staying the legal proceedings are as follows:

(i) The legal proceedings should have been initiated / commenced by a party to an arbitration agreement against any other party to the agreement;

(ii) That the legal proceedings should be stayed in respect of any matter agreed to be referred;

(iii) Any party to such legal proceedings may, at any time before filing a written statement or taking

any other steps in the proceedings apply with the judicial authority before which the proceedings are pending to stay the proceedings.

(iv) The Court or authority, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the Arbitration Agreement stay the proceedings, provided the applicant at the time when the proceedings were commenced, and remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

12. From the above essential ingredients and pre-requisites of Section 34 of the Arbitration Act 1940 it is obvious that where there is an arbitration agreement, and the proceedings before a Court have been initiated by a party to the agreement against any other party thereto, then the latter may enforce the arbitration agreement by seeking a stay of the proceedings. Two fundamental factors have to be satisfied, firstly, that the written statement has not been filed and, secondly, that no steps in the proceedings have been taken by the applicant. Except for these two conditions, no limitation has been provided for filing such an application. It is also noted that no time is prescribed for filing an application. Thus, it is obvious that where a Court is satisfied that the ingredients of Section 34 have been fulfilled, than the proceedings are to be stayed, so as to give effect to the Arbitration Agreement.

13. Next, if the party filing an application under section 34 of the Arbitration Act 1940 is a juridical person, then it is mandatory that the application has been validly filed by a person authorized in this regard. Order XXIX of the Civil Procedure Code 1908 relates to suits by or against

corporations, and rule 1 thereof prescribes the manner for the pleadings to be verified and signed. It does not authorize the institution of the litigation, but enables pleadings to be signed and verified in a validly instituted suit. As far as valid institution of suit on behalf of an incorporated company is concerned, the law is well settled. In the judgment titled Khan Iftikhar Hussain Khan Mamdot versus Ghulam Nabi Corporation Ltd PLD 1971 SC 550 the august Supreme Court cited with approval H.M Ebrahim Sait versus South India Industries Ltd AIR 1938 Mad 962 and held that for a suit to be validly instituted, it must have been so instituted by a person authorized in this behalf, through a resolution passed in a meeting of the Board of Directors, convened after due notice has been given to all the Directors. Following the law laid down by the Supreme Court, a Division Bench of the Lahore High Court in Government of Pakistan versus Premier Sugar Mills and others, PLD 1991 Lahore 381 has held as follows;

> "It is well settled that when a company institutes a suit, it has to establish that the suit has been competently and authorizedly instituted on its behalf. The rigor of this principle is to the extent that even a person incharge of the affairs of the company unless specifically authorized in this behalf is not considered competent to initiate proceedings on behalf of the corporate entity"

14. The above law has been consistently followed and reference in this regard may be made to Dr. S.M. Rab versus National Refinery Ltd PLD 2005 Karachi 478. It is also pertinent to discuss whether the defect in a suit of having been incompetently instituted is curable? The Sind High Court in two cases i.e. Abdul Rahim versus United Bank Ltd of Pakistan

PLD 1997 Karachi 62 and Qamar Construction (Pvt) Ltd Versus Saleemullah and others CLD 2008 239 has held that the defect remains incurable, even by a subsequent ratification.

15. As a corollary to the above discussed law, a suit or legal proceedings invalidly or incompetently instituted in the name of an incorporated company, a juridical person, cannot be treated as legal proceedings by that company. It may be added that since these are not valid legal proceedings instituted by the company, therefore, even a subsequent ratification would not cure the defect by making the proceedings valid and competent. The wisdom behind the principle that the defect is incurable seems to be the intention to protect the juridical person on the one hand, and on the other to safeguard any attempt to circumvent the period of limitation. It may be possible that the defect is pointed out before the expiry of the period of limitation, thus enabling the juridical person to cure the defect by withdrawing the suit and filing it afresh, or filing it after the dismissal on the ground of it being invalid or incompetent. This course can obviously not be resorted to after the limitation period has lapsed. However, if no limitation is prescribed, then the company will be entitled to institute legal proceedings even if the earlier suit or application has been dismissed on the sole ground that its institution was not valid or competent.

16. In the instant case, however, no limitation is provided for filing an application under Section 34 of the Arbitration Act 1940. The only conditions are that a written statement has not been filed, and steps have not been taken by the applicant in the proceedings. Likewise, if an application has been dismissed on the ground that it was not maintainable, as it had not been filed by a person authorized by a juridical

person, or in the manner provided in its Articles of Association, then it would not create a bar to filing another application, provided the aforesaid conditions do not create a bar. Resjudicata is a doctrine intended to provide finality to judicial orders. However, the doctrine is attracted, or becomes applicable, when legal rights and obligations have been determined and decided through a binding final judgment. The entire matter, the legal rights and obligations of the parties, ought to have been determined and decided, including the questions of law, as well as the findings of facts. The doctrine, therefore, initially rests on the promise that the matters have been determined and adjudicated on merits. Reliance is placed on *PLD 2005 S.C. 605 (Facto Belarus Tractor Ltd. Versus GOP through Finance economic Affairs and others) and AIR 1960 S.C. 941 (Satyadhyan Ghosal and others Versus Smt. Deorajin and another).*

17. This Court is not impressed with the argument advanced by the learned counsel for the respondents that a second application was not competent after the dismissal of the first application. This is also a contradiction of the admitted position that the first application was not competently or validly instituted by the petitioner company. The language of the arbitration clause is wide enough to bring within its ambit the disputes raised in the plaint and the prayer sought.

18. It is noted, and as held by the august Supreme Court in *PLD 2003 S.C. 808* (Dar Okaz Printing and Publishing Ltd Liability Company Versus Printing Corporation of Pakistan Pvt. Ltd.) that "no likelihood of failure of justice exists if arbitration is allowed to proceed; rather, it is always in the interest of justice and furtherance of the arbitration agreement that disputes are resolved through arbitration, and it would not be within the province of the Courts to enter upon such disputes" that the parties out of free will and voluntarily had agreed to be resolved through

arbitration. In the case of a foreign arbitration clause, the august Supreme Court in *PLD 1993 S.C. 42 (Messrs Eckhardt & Co, Marine GmbH Versus Muhammad Hanif)*, has observed that while dealing with an application under Section 34 of the Arbitration Act 1940, particularly when there is a foreign arbitration clause, the Court's approach should be dynamic, and it should bear in mind that unless there were some compelling reasons, such an arbitration clause should be honoured. It has further been observed that the rule that the Court should not lightly release the parties from their bargain that follows from the sanctity which the Court attaches to contracts, must be applied with more vigor to a contract containing a foreign arbitration clause.

19. In the light of the above discussion, the principles and law, an examination of the impugned order reveals that the learned Appellate Court failed to appreciate the law in its correct perspective. The provisions of Section 34 of the Arbitration Act 1940 have been misinterpreted, by concluding that the dismissal of the first application created a bar for filing a second application. It is no one's case that the essential conditions of non filing of the written statement, or that the applicant had taken steps in the proceedings, are attracted or would come into play. The learned Appellate Court appears to have treated the dismissal of the first application as creating a bar on the touchstone of the doctrine of resjudicata. Admittedly, the first order dated 12-02-2011, was passed solely on the ground that the application was filed by a person not authorized by the company, a juridical person i.e. the petitioner. Moreover, the learned Appellate Court went to the extent of deciding the merits of the disputes between the parties by observing that as the respondent No.1 was removed from the office of the Chief Executive Officer, the petitioner himself negated the arbitration clause. It was not appropriate, in the circumstances, that the conduct of the petitioner

should have been discussed, nor could this have been determined, as this is the core dispute which the parties have agreed to resolve pursuant to the insertion of the arbitration clause. The learned Appellate Court virtually decided the dispute relating to the removal of the respondent No. 1 as the Chief Executive Officer, and thus erred by committing a material irregularity. The prayer, as reproduced above, and the averments in the plaint, unequivocally reveals the nature of the dispute raised by the respondents No.1 & 2, by instituting the suit related to and having essentially arisen from and out of the JVA. The learned Appellate Court, therefore, passed the impugned order, and in doing so exercised the jurisdiction vested in it illegally and with material irregularity. The learned Trial Court, on the other hand, properly exercised its jurisdiction in accordance with the law, and no legal infirmity has been pointed out so as to require interference with the order dated 09-03-2011. The said order is in accordance with law and is just and proper.

20. For what has been stated above, both the revision petitions are ***accepted*** and the impugned order dated 07-04-2011 is set aside. The order dated 09-03-2011 shall, therefore, be deemed as ***restored***.

(Athar Minallah)
Judge

Announced in the open Court on _____.

Judge.

Approved for reporting.

*Asad K/**

29-01-2015.

Vide my detailed judgment of even date in connected Civil Revision No.38 of 2011 titled as "B.C. International Pvt. Ltd. Versus Tashfeen Qayyum, etc", the instant Civil Revision is also accepted accordingly.

(Athar Minallah)
Judge

Announced in the open Court on _____.

Judge.