

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.113/2018
Excel Techno Solutions FZE, UAE and another
Versus
M/s Oil & Gas Development Company Limited and another

Date of Hearing: 14.09.2018.
Petitioners by: Mr. Rahil Sikandar Khawaja, Advocate.
Respondents by: Barrister Sara Seerat for respondent No.1.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioners impugn the order and decree dated 02.04.2018 passed by the Court of the learned Civil Judge (West), Islamabad, whereby respondent No.1's application under Order VII, Rule 11, of the Code of Civil Procedure, 1908 ("C.P.C.") was allowed and the petitioners' applications under Sections 8 and 41 of the Arbitration Act, 1940 ("the 1940 Act") were dismissed.

2. The facts essential for the disposal of the instant petition are that on 28.01.2014, a contract for the "*supply of lighting material for gas plant facility project*" was entered into between M/s Excel Techno Solutions FZE having its offices at RAK Business Centre No.4, Ras Al-Khaimah, United Arab Emirates ("petitioner No.1") and the Oil and Gas Development Company Limited ("the respondent"). Pursuant to the terms and conditions of the said contract, performance guarantee for an amount of Rs.4,338,000/- was furnished on petitioner No.1's instructions by Summit Bank Limited. It is an admitted position that the said contract provides for disputes between the said parties to be settled through arbitration by two arbitrators in accordance with the provisions of the 1940 Act.

3. After disputes and differences arising from and related to the terms of the said contract developed between the said parties, the petitioners instituted arbitration proceedings without the intervention of the Court. During the pendency of the said arbitration proceedings, petitioner No.1, on 06.06.2016, filed an application under Section 41 of the 1940 Act before the learned Civil Court

praying for the grant of an injunctive order to restrain the respondent from encashing the performance guarantee. Vide ad-interim order dated 08.06.2016, the learned Civil Court restrained the respondent from encashing the performance guarantee.

4. The respondent, on 22.06.2016, filed an application under Order VII, Rule 11, C.P.C. praying for the rejection of petitioner No.1's application under section 41 of the 1940 Act. The primary ground taken by the respondent in the said application was that since petitioner No.1 had neither filed a resolution of its Board of Directors nor its Memorandum and Articles of Association showing that Muhammad Nadeem Younus (petitioner No.2) had been authorized to file the application under section 41 of the 1940 Act before the learned Civil Court, the said application was liable to be rejected.

5. Thereafter, on 24.01.2017, the petitioners filed an application under Order I, Rule 10 read with Order VI, Rule 17, C.P.C., praying for petitioner No.2's impleadment as a party (co-petitioner) in the said application under Section 41 of the 1940 Act. The respondent contested the said application by filing a detailed reply. Apparently, the petitioners had also filed an application under section 8 of the 1940 Act regarding the appointment of Arbitrators.

6. Vide order and decree dated 02.04.2018, the learned Civil Court allowed the respondent's application under Order VII, Rule 11, C.P.C. and dismissed all the applications filed by the petitioner(s) as not maintainable. The said order has been impugned by the petitioners in the instant civil revision petition.

7. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant petition, submitted that petitioner No.1 is an establishment licenced in the Free Trade Zone in Ras Al-Khaimah and solely owned by petitioner No.2; that the applications before the learned Civil Court were filed by petitioner No.2 in his capacity as the sole proprietor and owner of petitioner No.1; that petitioner No.1 does not have any Memorandum and Articles of Association and there was no need for any board resolution

authorizing petitioner No.2 to file the application under section 41 of the 1940 Act; that while allowing the respondent's application under Order VII, Rule 11, C.P.C., the learned Civil Court left the petitioners' application under Order I, Rule 10 read with Order VI, Rule 17, C.P.C., undecided; that the share certificate dated 23.07.2009, issued by the RAK Free Trade Zone Authority, is not a share certificate of any company; that the said share certificate has not been issued by petitioner No.1 in petitioner No.2's favour; that the mere fact that the said share certificate was issued to petitioner No.2 does not mean that petitioner No.1 is a company having a Memorandum and Articles of Association; that in the United Arab Emirates ("U.A.E."), there is no requirement for there to be Memorandum and Articles of Association for entities owned by single person; and that the learned Civil Court erred by not appreciating that the respondent had subjected the petitioners to grave injustice by attempting to encash the performance guarantee without any finding through an adjudicatory process as to whether petitioner No.1 had committed breach of contract causing loss to the respondent. Learned counsel for the petitioners prayed for the revision petition to be allowed in terms of the relief sought therein.

8. On the other hand, learned counsel for the respondent took an objection to the maintainability of this petition on the ground that the impugned order dated 02.04.2018 having been passed under Order VII, Rule 11, C.P.C. was appealable, and therefore the instant revision petition was not competent. She further submitted that the said order does not suffer from any legal infirmity; that petitioner No.1, in its application under section 41 of the 1940 Act, had described itself as a "*company*", that the petitioners had filed a share certificate of petitioner No.1 showing that petitioner No.2 was a shareholder having one registered share in petitioner No.1; that it is well settled that any person who signs and files a plaint or an application on behalf of a company has to be specifically authorized to do so through a resolution of the Board of Directors of such company or by its Memorandum and Articles of Association; and that since petitioner No.1 had neither filed such a board resolution nor

the Memorandum and Articles of Association of petitioner No.1 with its applications, the same were correctly rejected by the learned Civil Court. Learned counsel for the respondent prayed for the civil revision petition to be dismissed.

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

10. The facts leading to the filing of the instant revision petition have been set out in sufficient detail in paragraphs 2 to 6 above and need not be recapitulated.

11. I propose, in the first instance, to decide the preliminary objection raised by the learned counsel for the respondent to the maintainability of the instant petition. Learned counsel for the respondent had submitted that since the learned Civil Court, vide the impugned order dated 02.04.2018, had allowed the respondent's application under Order VII, Rule 11, C.P.C., and had also passed a decree, the petitioners could only have filed an appeal against the said order and decree, and therefore, the instant revision petition was not maintainable.

12. Now section 96(1) C.P.C. provides *inter-alia* that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court. By virtue of the Law Reforms Ordinance, 1972, the definition of the term "*decree*" appearing in section 2(2) C.P.C. was amended, and by fiction of law, the rejection of a plaint was declared to be a decree. Therefore, since an order rejecting a plaint is deemed to be a decree, the same is appealable under the provisions of the C.P.C. However, in the case at hand, the application under Order VII, Rule 11, C.P.C. had not been filed by the respondent in any pending suit. The said application was filed for the rejection of petitioner No.1's application under section 41 of the 1940 Act which is admittedly not a suit.

13. The jurisdiction of the learned Civil Court had been invoked by petitioner No.1 by filing an application under section 41 of the 1940 Act, which reads as follows:-

“41. Procedure and powers of Court. Subject to the provisions of this Act and of rules made thereunder—

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings, before the Court, to all appeals, under this Act, and

(b) the Court shall have, for the purpose of and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of; and in relation to, any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making order with respect to any of such matters.”

Paragraph 4 of the Second Schedule to the 1940 Act reads as follows:-

“4. Interim injunction or the appointment of a receiver.”

14. In proceedings under the provisions of the 1940 Act before the learned Civil Court, the only powers that the said Court can exercise are the ones specifically conferred on it by the provisions of the 1940 Act. For instance, even though Order XXXIX, Rules 1 and 2, C.P.C., empowers a Court to pass an order of temporary injunction, where a Court, in proceedings under the provisions of the 1940 Act, passes an order of temporary injunction, it does so under Section 41(b) read with the Second Schedule to the 1940 Act. Even where in proceedings under the 1940 Act, an application for an injunction is filed under Order XXXIX, Rules 1 and 2, C.P.C., the injunctive order must be deemed to have been passed under section 41(b) read with the Second Schedule to the 1940 Act. Similarly, an application under Order VII, Rule 11, C.P.C for the rejection of an application filed under the provisions of the 1940 Act, is entertainable due to provisions of the C.P.C. having been made applicable to the proceedings under the 1940 Act by virtue of section 41(a) of the 1940 Act.

15. The order for the rejection of the petitioners’ application under section 41 of the 1940 Act was undoubtedly passed by the learned Civil Court in pending proceedings under the 1940 Act (i.e., application under section 41 of the 1940 Act). The power to reject the petitioners’ said application was exercised by the learned Civil Court only because the provisions of the C.P.C. (including Order VII,

Rule 11, C.P.C.) had been specifically made applicable to the proceedings before the Court under the 1940 Act by section 41(a) of the said Act. Although the said application was rejected by the learned Civil Court in exercise of its powers conferred under Order VII, Rule 11, C.P.C., it was done only since this provision had been made specifically applicable by virtue of section 41(a) of the 1940 Act. Since the provisions of the C.P.C., including Order VII, Rule 11, C.P.C., have been made applicable to the proceedings under the 1940 Act by section 41(a) thereof, I am of the view that the impugned order dated 02.04.2018, whereby the petitioner's application under section 41 of the 1940 Act was rejected, was an order passed under the provisions of the 1940 Act and not under the C.P.C.

16. It is not disputed that an order to reject an application filed under the provisions of the 1940 Act is not appealable under section 39 of the 1940 Act which runs thus:-

“Appealable orders. (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order:

- (i) superseding an arbitration;*
- (ii) on an award stated in the form of a special case;*
- (iii) modifying or correcting an award;*
- (iv) filing or refusing to file an arbitration agreement;*
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;*
- (vi) setting aside or refusing to set aside an award;*

Provided that the provisions of this Section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.”

17. The language of the section is plain and unambiguous. By Section 39(1), the right to appeal is conferred against the specified orders and against no other orders; and from an appellate order passed under Section 39(1), no second appeal except an appeal to Supreme Court lies. In order that an appeal may lie against an order, it must be shown to be one included in any of the clauses (i) to (vi) of Section 39(1). Since an appeal is a creature of statute, the right of appeal cannot be extended by implication. The legislature has plainly

expressed itself that the right of appeal against orders passed under the 1940 Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away.

18. It has consistently been held that section 39 of the 1940 Act is confined only to the orders which were made under express provisions of the said Act and did not extend to those orders which are made under the provisions of the C.P.C. The provisions of the C.P.C. do not apply to the proceedings under the 1940 Act by their own force but have been made applicable by virtue of section 41(a) of the 1940 Act. In the case of Union of India Vs. N.K Pvt. Ltd. (AIR 1972 Delhi 202), it has been held that even if the C.P.C. were to be repealed, the Courts will still be authorized to apply the provisions of the C.P.C., and this would be done only because of the authority conferred on the Court by section 41 of the 1940 Act.

19. The impugned order dated 02.04.2018 passed by the learned Civil Court does not fall within any of the categories enumerated by section 39 of the 1940 Act. The said section explicitly provides that an appeal shall lie from the orders listed in the said section, “*and from no others.*” It is, therefore, manifest that an appeal against the order passed by the learned Civil Court rejecting the petitioner’s application under section 41 of the 1940 Act was not maintainable.

20. Section 141 of the C.P.C. provides that the procedure provided in the C.P.C. in regard to suits shall be followed, as far as can be made applicable, in all proceedings in any Court of civil jurisdiction. Now while the proceedings under section 41 of the 1940 Act are proceedings in a Court of civil jurisdiction within the meaning of section 141 C.P.C., they are nevertheless proceedings under the 1940 Act within the meaning of section 41(a) of the said Act. In the case of Union of India Vs. N.K. Pvt. Ltd. (AIR 1972 Delhi 202), it was held that though by virtue of section 141 C.P.C., a provision of the C.P.C. would apply to a proceeding before the Court under the 1940 Act, an order passed in such a proceeding would be an order passed in a proceeding which is before the Court under the 1940 Act and, therefore, the order itself would be an order under the said Act. Section 141 C.P.C. only applies “the procedure” under the C.P.C. to

proceedings in a Court of civil jurisdiction. Substantive rights provided in the C.P.C., including the right of appeal, are not matters of procedure and, therefore, are not made applicable to proceedings under the 1940 Act by virtue of section 141 C.P.C.

21. Section 41(a) of the 1940 Act provides that the provisions of the C.P.C. shall apply to all proceedings before the Court and to all appeals under the 1940 Act. Although by virtue of section 2(2) C.P.C., an order rejecting a plaint under Order VII, Rule 11, C.P.C., is a decree, and is appealable as such, section 41(a) of the 1940 Act is itself subject to section 39 of the said Act which does not provide a right of appeal against an order rejecting an application filed under section 41 of the 1940 Act. The right of appeal being a creature of a special enactment, one must look only to the enactment for the extent and manner in which it is to be exercised. The 1940 Act being a special enactment would prevail over the provisions of the C.P.C. Section 41 of the 1940 Act opens with the words *“subject to the provisions of this Act”*. Section 39 of the 1940 Act is a provision to which section 41 is subject. Therefore, the petitioner could not have filed an appeal under section 39 of the 1940 Act against the impugned order dated 02.04.2018 rejecting the petitioner’s application under section 41 of the 1940 Act. Consequently, the instant revision petition against the said order is held to be maintainable. In holding so, I derive guidance from the law laid down in the following cases:-

- (i) In the case of Union of India Vs. Mohindra Supply Co (AIR 1962 SC 256), it has been held as follows:-

“Under S. 39 (1), an appeal lies from the orders specified in that sub-section and from no others. The legislature has plainly expressed itself that the right of appeal against orders passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away.”

- (ii) In the case of Jute Corporation of India Limited Vs. M/s Konark Jute Limited (1986 Orissa 283), the dispute between a company and its purchasing agent were referred to arbitration. It was held that an appeal against an injunctive order passed by a Civil Court restraining the purchasing agent from

receiving an amount under a bank guarantee was not maintainable.

- (iii) In the case of Municipal Corporation of Greater Bombay Vs Patel Engineering Company Ltd. (AIR 1984 Bombay 80), an order granting interim injunction under section 41(b) read with paragraph 4 of Schedule-II of the 1940 Act was held not to be an appealable order under section 39 of the said Act. Furthermore, section 39 of the 1940 Act was interpreted in the following terms:-

“The two sub-sections of S. 39 are manifestly part of a single legislative pattern. The language of the section is plain and unambiguous. By sub-sec. (1) the right to appeal is conferred against the specified orders and against no other orders; and from an appellate order passed under sub-sec. (1) no second appeal except an appeal to Supreme Court lies. In order that an appeal may lie against an order, it must be shown to be one included in any of the clauses (i) to (vi) of sub-sec. (1) of S. 39 of the Act since an appeal being a creature of statute, the right of appeal cannot be extended by implication and the legislature has plainly expressed itself that the right of appeal against orders passed under the Act may exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away.”

- (iv) In the case of Sharma Ice Factory Vs. Jewel Ice Factory (AIR 1975 Jammu & Kashmir 25) and Mohamed Esoof Vs. V.R. Subramanyam (AIR 1957 Mysore 78), the Court had issued an injunction on an application under Order XXXIX, Rule 1, C.P.C. This application was filed along with an application under section 20 of the 1940 Act. It was held that the injunction was granted only because Order XXXIX, Rule 1, C.P.C. had been specifically made applicable to proceedings under the 1940 Act by virtue of section 41(a) of the said Act. Furthermore, it was held that since the injunctive order was passed under the provisions of the 1940 Act, an appeal could not have been filed against the same under section 39 of the said Act. In the said case, the appeal filed against the injunctive order was treated as a revision petition and allowed.
- (v) In the case of Krishnawati Devi Vs. H.M. Misra (AIR 1974 Allahabad 209), an appeal against an order passed by a Civil

Court for the appointment of a receiver while the matter in dispute between the parties is pending before the Arbitrators was held not to be maintainable. Furthermore, it was held as follows:-

“Sub-clause (b) of Section 41 of the Act read with the second schedule confers power on the court to appoint a receiver, whereas sub-clause (a) of that Section regulates the procedure to be followed in disposing of an application for appointment of a receiver. The appointment of the receiver, in the instant case, was not made, nor could be made under the provisions of the Code of Civil Procedure in as much as the power to appoint a receiver is contained in sub-clause (b) of Section 41 read with the second schedule of the Act. The provisions of the Code of Civil Procedure could not, therefore, be taken into aid to contend that the present appeal is maintainable. In fact, the order was passed by the court under Section 41 (b), and not under Order 40, Rule 1 of the Code of Civil Procedure. That being so, the appeal was not governed by the provisions of the Code of Civil Procedure.”

- (vi) In the case of the *State of Himachal Pradesh Vs. M/s. H.S. Sobti and Co., (AIR 1973 Himachal Pradesh 1)*, it was held that an order granting an interim injunction under section 41(b) of the 1940 Act was not an appealable order under section 39(1) of the said Act.
- (vii) In the case of *Puppalla Ramulu Vs. Nagidi Appalaswami (AIR 1957 Andhra Pradesh 11)*, it was held that an appeal was not maintainable against an order of a subordinate Court dismissing an application for passing a decree in terms of the Arbitration Award. It was held that when the legislature thought it fit to provide for appeals only in six cases, it is beyond the scope of a Court to confer a right of appeal in other cases by influence. Furthermore, it was held that the only remedy against such an order was a revision petition.

22. Coming to the merits of the case, the contract dated 28.01.2014 between petitioner No.1 and the respondent along with the documents which were agreed to be a part of the contract have been brought on record. I have gone through these documents, and do not find petitioner No.1 described therein as a company limited by shares. Even the recitals to the said contract do not clarify as to whether petitioner No.1 is a company or a sole proprietorship. The

respondent signed the contract without being certain as to whether petitioner No.1 was a company or a sole proprietorship. Even if it is assumed that at the time of the execution of the said contract, the respondent had considered petitioner No.1 to be a company, the question that crops up in the mind is why did the respondent not require a board resolution of that company authorizing petitioner No.2 to sign the contract? No due diligence appears to have been carried out by the respondent in this regard prior to the execution of the contract.

23. True, petitioner No.1, in its application under section 41 of the 1940 Act, described itself as a company, and along with the instant petition filed a share certificate issued by Ras Al-Khaimah Free Trade Zone Authority showing petitioner No.2 to be holding one share valuing AED 100,000/- in petitioner No.1. The said share certificate has formed the sole basis for the learned Civil Court to hold that petitioner No.1 was a company limited by shares requiring a resolution of its Board of Directors authorizing petitioner No.2 to file the application under Section 41 of the 1940 Act. But this by itself would not be conclusive proof as to petitioner No.2 being a company limited by shares. A share certificate is, in the normal course, issued by a company in favour of a shareholder. The said share certificate was not issued by petitioner No.1 in petitioner No.2's favour. Perusal of the impugned order shows that the learned Civil Court had not had sight of the documents pertaining to petitioner No.1's incorporation as a company. This Court, in its revisional jurisdiction, cannot look into documents that had not been placed on the record of the learned Civil Court. By rejecting the application under Section 41 of the 1940 Act, the learned Civil Court proceeded on the assumption that petitioner No.1 was a company limited by shares. In order to resolve the factual controversy as to whether petitioner No.1 was a company (as asserted by the respondent) or a sole proprietorship (as asserted by the petitioners), I am of the view that the learned Civil Court ought to have given an opportunity to the contesting parties to adduce evidence.

24. There was nothing preventing the learned Civil Court to have framed an issue and required the contesting parties to lead evidence on the question whether petitioner No.1 was a company or a sole proprietorship. Indeed, only after conclusively holding that petitioner No.1 was a company limited by shares could the learned Civil Court have decided to reject the applications under sections 8 and 41 of the 1940 Act on account of not being accompanied with a board resolution or the Memorandum and Articles of Association of petitioner No.1 authorizing petitioner No.2 to file the said applications.

25. It was not disputed that an application under Order 1, Rule 10 read with Order VI, Rule 17, C.P.C. had been filed by the petitioners seeking petitioner No.2's impleadment in the application under section 41 of the 1940 Act as a co-petitioner with petitioner No.1. Although reference has been made to the said application in the impugned order dated 02.04.2018 but the learned Civil Court gave no decision thereon. An omission to decide the said application amounts to non-exercise of jurisdiction by the learned Civil Court.

26. In view of the above, the instant petition is allowed; the impugned order dated 02.04.2018 passed by the learned Civil Court is set-aside; the matter is remanded to the learned Civil Court to decide the pending applications afresh and, if need be, after the framing of an issue on the question as to whether petitioner No.1 is a company limited by shares. There shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2018.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

Uploaded By: Zulqarnain Shah