

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.209/2018
M/s K & N International
Versus

M/s Motorway Operations and Rehabilitation Engineering (Private)
Limited

Date of Hearing: 02.04.2019
Petitioner by: Mr. Jameel Hussain Qureshi, Advocate,
Respondent by: Mr. Misbah ul Mustafa, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, K&N International, impugns the order dated 02.05.2018, passed by the Court of the learned Additional District Judge, Islamabad, whereby its appeal against the order dated 28.03.2018 passed by the Court of the learned Civil Judge (West), Islamabad, was dismissed. Vide the said order dated 28.03.2018, the learned Civil Court dismissed the petitioner's application under Section 20 of the Arbitration Act, 1940 ("the 1940 Act") on the ground of *res judicata*.

2. The facts essential for the disposal of the instant revision petition are that vide letter dated 01.07.2015, K&N International (hereinafter referred to as "the petitioner") gave a proposal to M/s Motorway Operations and Rehabilitation Engineering (Pvt.) Ltd. (hereinafter referred to as "the respondent") for the development and up-gradation of designated Motorways Service Area ("M.S.A.") to international standards on Built, Operate and Transfer ("BOT") basis. Vide letter dated 03.07.2015, the respondent accepted the petitioner's offer on the terms and conditions mentioned in the said letter. On 30.07.2015, a Memorandum of Understanding ("M.O.U.") was executed between the respondent and K&N International (Pvt.) Ltd. (hereinafter referred to as "K&N (Pvt.) Ltd."). It is pertinent to note that the said M.O.U. was not executed between the petitioner but with K&N (Pvt.) Ltd. Under the terms of the said M.O.U., the

respondent was to handover designated M.S.A.s, i.e. at Chakri and Sukhekhi to K&N (Pvt.) Ltd. on BOT basis.

3. It is pertinent to mention that the arrangement between the parties to the said M.O.U. was subject to the execution of a legally binding agreement after finalization of mutually agreed terms and conditions. Clause 9(d) of the said M.O.U. provided that the agreement was to be signed simultaneously with the submission of security deposit and performance guarantee by 15.08.2015. Vide letter dated 18.09.2015, the respondent informed the petitioner that the agreement would be signed on 30.10.2015. It is an admitted position that at no material stage, did the respondent execute a formal agreement with either the petitioner or K&N (Pvt.) Ltd. However, on 03.03.2016, a performance guarantee for an amount of Rs.30 Million was furnished by Trust Investment Bank Limited (Guarantor) in favour of the respondent on the instructions of K&N Solutions (Pvt.) Ltd.

4. Vide letter dated 21.03.2016, the respondent terminated the M.O.U. Furthermore, K&N (Pvt.) Ltd., was called upon to *“cease all activities relating to the aforementioned MoU immediately.”*

5. On 02.04.2016, a legal notice on behalf of K&N (Pvt.) Ltd. was issued to the respondent calling upon the latter *“to settle all outstanding issues”*. The said legal notice was not graced with a reply.

6. On 13.05.2016, the petitioner filed an application under Section 20 of the 1940 Act before the learned Civil Court praying for the matters in dispute between the parties to be referred to arbitration. On 29.07.2016, the respondent filed an application for the rejection of the petitioner's said application on the ground that the same was not accompanied with a board resolution, or the memorandum and articles of association authorizing Mr. Adnan Hameed to file the said application. Vide order dated 04.11.2016, the learned Civil Court allowed the respondent's said application and dismissed the petitioner's application under Section 20 of the 1940 Act primarily on the ground that the said application had

been filed unauthorizedly. The said order dated 04.11.2016 was not assailed any further.

7. On 04.08.2017, the petitioner once again filed an application under Section 20 of the 1940 Act before the learned Civil Court praying for the disputes arising from and related to the terms of the M.O.U. to be referred to arbitration. The respondent filed an application for the dismissal of the petitioner's said application on the ground that an attempt had been made to vex the respondent by abusing the process of the Court. Vide impugned order dated 28.03.2018, the learned Civil Court allowed the respondent's said application and dismissed the petitioner's application under section 20 of the 1940 Act on the ground of *res judicata*. The petitioner preferred an appeal against the said order dated 28.03.2018 before the Court of the learned Additional District Judge, Islamabad. Vide order dated 02.05.2018, the said appeal was dismissed. The said concurrent orders passed by the learned Courts below have been impugned 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 revision petition, submitted that it was the petitioner's proposal and not that of K&N (Pvt.) Ltd. which was accepted by the respondent on 03.07.2015; that the acceptance of the petitioner's proposal created a binding contract between the petitioner and the respondent; that due to a typographical mistake "*K&N International (Private) Limited*" was entered in the M.O.U.; that in fact the said M.O.U. was executed between the petitioner and the respondent; that the said M.O.U. bears the stamp of the petitioner and not that of K&N (Pvt.) Ltd.; that the petitioner was a sole proprietorship and Mr. Adnan Hameed was its sole proprietor; that the legal notice dated 02.04.2016 was in fact sent to the respondent on behalf of the petitioner; that reference to K&N (Pvt.) Ltd. in the said legal notice was also a typographical error; that the respondent had addressed letters dated 03.07.2015 and 18.09.2015 to the

petitioner and not to K&N (Pvt.) Ltd.; that all dealings regarding the M.O.U. were between the petitioner and the respondent; that termination of the said M.O.U. was not for valid reasons; that a company by the name of “*K&N International (Private) Limited*” does not exist; that a national tax number had been issued by the Federal Board of Revenue to the petitioner and not to K&N (Pvt.) Ltd.; and that the dispute as to whether or not the petitioner was the real party to the M.O.U. could be decided in the arbitration proceedings.

9. Furthermore, learned counsel for the petitioner submitted that the title of the second application under Section 20 of the 1940 Act clearly shows that the same had been filed by the sole proprietorship i.e. the petitioner; and that since in the earlier round, there had been no adjudication on merits, the subsequent application under Section 20 of the 1940 Act could not have been dismissed on the ground of *res judicata*. Learned counsel for the petitioner prayed for the concurrent orders passed by the learned Courts below to be set-aside.

10. On the other hand, learned counsel for the respondent submitted that the concurrent orders passed by the learned Courts below do not suffer from any legal infirmity so as to warrant interference in the revisional jurisdiction of this Court; that the M.O.U. which contains an arbitration clause was executed by the respondent with K&N (Pvt.) Ltd. and not with the petitioner; that the petitioner was a rank outsider and did not have the *locus standi* to file an application under section 20 of the 1940 Act; that even if the application under section 20 of the 1940 Act filed by the petitioner is considered to have been filed by K&N (Pvt.) Ltd., the same was not maintainable as it was not accompanied by a board resolution, or the memorandum and articles of association of the said company authorizing Mr. Adnan Hameed to file the said application; that the earlier application dated 13.05.2016 filed under section 20 of the 1940 Act was dismissed by the learned Civil Court on the ground that it was not accompanied by such a

board resolution, or the memorandum and articles of association; and that the subsequent application dated 04.08.2017 filed under section 20 of the 1940 Act was correctly dismissed by the learned Civil Court on the ground of *res judicata*. Learned counsel for the respondent prayed for the revision petition to be dismissed.

11. 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 revision petition have been set out in sufficient detail in paragraphs 2 to 7 above, and need not be recapitulated.

12. The sole ground on which the learned Civil Court, vide order dated 28.03.2018, dismissed the petitioner's application under section 20 of the 1940 Act was that the same was barred under the principle of *res judicata*. However, the learned appellate Court did not dismiss the petitioner's appeal on the same ground on which the learned Civil Court had dismissed the petitioner's application under section 20 of the 1940 Act, but held that since the M.O.U. containing the arbitration clause was executed between the respondent and K&N (Pvt.) Ltd., and not the petitioner, the petitioner could not file the said application and seek reference to arbitration.

13. As mentioned above, the earlier application under section 20 of the 1940 Act on 13.05.2016 was filed by the petitioner through its Chief Executive Officer, Mr. Adnan Hameed. The said application was not filed by K&N (Pvt.) Ltd. Had the said application been filed by K&N (Pvt.) Ltd., a resolution of the board of directors of the said company authorizing Mr. Adnan Hameed to file the said application would have been necessary. Since the order dated 04.11.2016 passed by the learned Civil Court, whereby the petitioner's application under section 20 of the 1940 Act was dismissed on the ground that the same was not accompanied by a board resolution, was not challenged any further and had, therefore, attained finality, I refrain from expressing my views *qua* the legality of the said order.

14. Now, the second application under section 20 of the 1940 Act was filed by the petitioner through Mr. Adnan Hameed, Chief Executive Officer/Sole Proprietor. It must be borne in mind that the title of the earlier application had not made reference to a sole proprietorship. Additionally, perusal of the learned Civil Court's order dated 04.11.2016 shows that the same was not decided on the merits of the case. The learned Civil Court had explicitly mentioned in the said order that the merits of the case were not being touched. Therefore, the crucial question that arises is that whether the subsequent application under section 20 of the 1940 Act could have been dismissed on the ground of *res judicata* when the earlier application had not been decided on merits.

15. It is well settled that the matter on which plea of *res judicata* was founded should have been finally adjudicated and decided in previous proceedings in order to furnish a ground for such a plea to succeed. The principle of *res judicata* cannot be pressed into service unless it is established that the matter in issue was earlier adjudicated on merits and conclusively decided. In the case of Province of Punjab Vs. Malik Ibrahim and Sons (2000 SCMR 1172), it has been held *inter alia* that in order to attract the principles of *res judicata*, the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. In the case of Hafiz Noor Muhammad Vs. Ghulam Rasul (1999 SCMR 705), the Hon'ble Supreme Court observed that in order to apply the bar of *res judicata*, the Court must first determine whether the issue was raised, determined and decided in the former proceedings between the parties. Taking into account the principles of law laid down in the said juridical precedents, I am of the view that the petitioner's subsequent application could not have been dismissed on the ground of *res judicata*.

16. As regards the order dated 02.05.2018 passed by the learned appellate Court, whereby the petitioner's appeal against the learned Civil Courts' order dated 28.03.2018 was dismissed,

the same has dealt with the question that the application under section 20 of the 1940 Act had not been filed by K&N (Pvt.) Ltd., even though the M.O.U. containing the arbitration clause had been executed with the said company. An appeal is in continuation of the original proceedings and the appellate Court has ample power to thrash out and scrutinize the documents available on the record in the light of the arguments advanced by the respective parties. An appellate Court, while hearing an appeal against an order of the Trial Court, exercises the same jurisdiction which is vested in the trial Court and the *lis* becomes open without any restrictions placed by the order appealed against. In short, the appellate Court can do all that the original Court can do.

17. In the case at hand, the appellate Court, in its order dated 02.05.2018, adverted to the question that the application under section 20 of the 1940 Act was filed by the petitioner when the M.O.U. containing the arbitration clause had been executed between K&N (Pvt.) Ltd. and the respondent. The contention of the learned counsel for the petitioner that the entry of "*K&N International (Private) Limited*" in the M.O.U. was a typographical error did not find favour with the learned appellate Court. Consequently, the petitioner's appeal against the learned Civil Court's order dated 28.03.2018 was dismissed by the learned appellate Court *albeit* on different grounds.

18. The petitioner and its sole proprietor are prudent commercial persons of business. Vigilance ought to have been shown when the M.O.U. dated 30.07.2015 was being executed. In the said M.O.U., the party executing the same with the respondent has been described as "*a private company limited by shares registered under the Companies Ordinance, 1984*". The legal notice dated 02.04.2016 was also addressed to the respondent on behalf of "K&N (Pvt.) Ltd.". For several months after the execution of the said M.O.U., no effort was made to correct the name of the party to the said M.O.U. Therefore, the plea taken by the petitioner that the entry of "*K&N International (Private) Limited*" in the

M.O.U. was a typographical error does not appeal to reason, and the same has correctly been spurned by the learned appellate Court.

19. True, the respondent had addressed letters dated 03.07.2015 and 18.09.2015 to the petitioner and not to K&N (Pvt.) Ltd. However, for the present purposes, what needs to be determined is whether a person could enforce an arbitration agreement to which he is not a party. It is well settled that only the parties to an agreement could enforce the arbitration clause contained therein by filing an application under section 20 of the 1940 Act. Section 20(1) of the 1940 Act reads thus:-

“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, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.”
(Emphasis added)

20. Section 20(1) of the 1940 Act makes it clear that a person who has not entered into an arbitration agreement cannot enforce it by instituting arbitration proceedings with the intervention of the Court. It is not the petitioner’s case that it is a successor in interest of K&N (Pvt.) Ltd. Since the petitioner/K&N International was not a party to the M.O.U. containing an arbitration clause, it was not competent to file an application under section 20 of the 1940 Act. The right to arbitrate is a contractual right and it cannot be enforced by anyone who is not a party to the contract containing the arbitration clause. In the case of Inayatullah Khan Vs. Obaidullah (1999 SCMR 2702), the arbitrators to whom a dispute had been referred had rendered an award, wherein they proposed partition of a property between the parties to the arbitration agreement and also other co-sharers who had not signed the arbitration agreement and had not joined the reference. Such a reference and award was declared to be ineffective and void. In the case of Pakistan through Secretary,

Ministry of Religious Affairs Vs. Dallah Real Estate and Tourism holding company (2013 CLC 1411), it has been held *inter-alia* that a person who was not a party to an arbitration agreement could not be proceeded against under such an agreement. Additionally, in the case of Ali Khan Vs. Barat Khan (PLD 2005 Lahore 340), it has been held that arbitrators derive their jurisdiction to undertake dispute resolution from the consent of the parties as recorded in the arbitration agreement, and that the arbitrators lack jurisdiction to adjudicate upon the rights of a person who is not a party to the arbitration agreement. By the same analogy, it can safely be held that a person who is not a party to an arbitration agreement cannot enforce the same by filing an application under section 20 of the 1940 Act.

21. In view of the above, the instant revision petition, being devoid of merit, is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2019

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING