JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

FAO NO.58 OF 2015

M/S OIL & GAS DEVELOPMENT COMPANY LIMITED
VS.
M/S ADMORE GAS (PVT.) LTD.

Petitioner by : Mr. Saad M. Hashmi, Advocate.

Respondents by : Rai Azhar Iqbal Kharal, Advocate.

Date of hearing : 01.09.2020.

LUBNA SALEEM PERVEZ, J. Present Appeal is filed against order dated 08.04.2015, whereby, the learned Civil Judge, West-Islamabad has set aside his own ex-parte order passed on 08.11.2014, and directed the Respondent/Defendant to submit its written statement.

2. The facts giving rise to the instant appeal are that the appellant/OGDCL, a public limited company, entered into an agreement dated 19.01.2005, supplemented by supplementary deed dated 05.09.2006, with the respondent for sale and purchase of petroleum products. The appellant filed application under section 20(4) of Arbitration Act, 1940, against the respondent for delayed/short payment on account of stock purchased, lifted and exported during May, 2008. Several notices were issued to the respondents by the Court to tender appearance, however, due to constant non attendance, and after substituted service through publication of notice in Daily Jang on 18.01.2014, the learned Civil Judge passed order dated 18.02.2014, to proceed ex-parte against the present respondent and thereafter, the application for appointing Arbitrator as per agreement was allowed vide Ex-parte Judgment dated 27.10.2014, and vide order dated 08.11.2014, the

learned Civil Judge appointed Arbitrator in the matter. The Arbitrator commenced proceedings by issuing notices to the parties. Respondent challenged the ex-parte judgment dated 27.10.2014, and order dated 08.11.2014, vide application/petition dated 14.03.2015, for setting aside/recalling of ex-parte orders/judgment dated 27.10.2014 and 08.11.2014. Learned Civil Judge, vide order dated 08.04.2015, set aside the ex-parte judgment dated 27.10.2014 and order dated 08.11.2014, whereby, the application under clause 20(4) of Arbitration, Act, 1940, for appointment Arbitrator was allowed. Hence present appeal.

3. Learned counsel for appellant submitted that the learned Civil Judge has erred in recalling/setting aside orders dated 08.04.2015 and 27.10.2014, vide impugned order dated 08.04.2015 without considering the fact that the application of the respondent was time barred and was not supported by application for condonation of delay; that the main order dated 18.02.2014, whereby it has been ordered to proceed ex-parte against the respondent is still intact as the respondent did not seek setting aside of this order; that before passing the order for ex-parte proceedings against the respondent, vide order dated 18.02.2014, the case was fixed for hearing several times when the respondent did not enter appearance and even after the publication of notice in the Daily Jang as a substituted service the respondent deliberately avoided to attend the court proceedigns; that all the notices were issued on the same registered address of the respondent, mentioned on the documents which was used for correspondence between the parties and on which address the Arbitrator issued notice for proceedings; the respondent has intentionally and deliberately avoided attendance before the trial Court for unknown reasons; that, therefore, the ground that no notice was received by the respondent is not tenable; that after substituted service through publication of notice in newspaper in accordance with law, the ground that no notice was

received by the respondent is misleading; that statutory period of completion of arbitration proceedings is four months, however, the application for setting aside ex-parte order for appointment of arbitrator has been filed after four months shows the conduct of the respondent whose intention is to delay the legally due payment of the appellant; that the conduct of deliberate and intentional avoidance of participation in proceedings before learned Civil Judge and then after considerable time seeking setting aside of order on frivolous ground tantamount to abuse of process of law.

4. On the other hand, learned counsel for the respondent vehemently controverted the contentions of the learned counsel for the petitioner and submitted that application dated 09.03.2015, filed for setting aside orders dated 27.10.2014 & 08.11.2014, was well in time as the limitation for setting aside of ex-parte order is three years; that the FAO filed before this Court is not maintainable as the memo of appeal has not been signed by the appellant as the same was signed by the counsel of the appellant who has also filed his affidavit in support of the appeal; that no authority has been given to the advocate to file the appeal as no resolution has been filed along with power of attorney; that pleadings are to be signed by the party under Order VI Rule 14, he relied on judgment reported as Pak Turk Enterprises (Pvt.) Ltd. versus Turk Hava Yollari (Turkish Airlines Inc.) (2015 CLC 1); that the knowledge of ex-parte order dated 27.10.2014 and appointment of Arbitrator, vide order dated 08.11.2014, was gained from the notice of the Arbitrator for arbitration proceedings; that the short order dated 08.04.2015, categorically mentioned that ex-parte proceedings are dropped, thus there was no further requirement of formally filing application for setting aside of order dated 18.02.2014. He relied on judgment reported as Mst. Rasheedan Bibi Versus Abdul Razzaq (2018 MLD 19), Mst. Rasheedan Bibi versus Abdul Razzaq (2019 YLR

602) and Major Muhammad Nouman Versus Usman Habib (PLD 2019 Islamabad 255); that section 2(2) of CPC defines "Decree" and section 2(9) of CPC defines the term "Judgment" which are distinct from each other; that no notice was issued to the respondent before passing order on 08.02.2014; that the appellant has not taken any ground with regard to non-setting aside of order dated 08.02.2014.

5. In rebuttal, learned counsel for the appellant with regard to objection raised for maintainability of FAO referred order dated 16.01.1999, for delegation of powers to the Directors, issued by Regulation Section OGDCL, Head Office, whereby, powers of signing plaint, written statement, applications, affidavit, counter affidavits, petitions and memorandum of appeal have been delegated to head of the department concerned or in his absence next senior officer available in the department and in terms of this power delegation order, the Chief Law Officer of the appellant has signed the power of attorney which also grant power to counsel for the appellant to present pleadings and appeal etc. Moreover, it has been settled that the appeal is the continuation of original proceedings in view of the judgment of Ismail Versus Razia Begum (1981 SCMR 687), wherein, it has been held that *non-signing of plaint by them at the proper stage was a mere irregularity and consequently the learned District judge was entirely justified to direct that the said irregularity may be rectified*. In Proviince Of Punjab Versus Muhammad Sharif (PLD 1990 Lahore 208) it has been held that *under Order III Rule 4 the Power of Attorney in favour of the counsel ensures till termination with the permission of the Court or till proceedings are finally ended……. no separate power of attorney was necessary in favour of the counsel who could have filed appeal on the basis of Power of Attorney presented before trial Court.* In case reported as Shadoo Muhammad Khan versus Ganmoon and 2 others (1989 MLD 4624), it is held that *the defect in pleading, application, memorandum of appeal*

with regard to presentation, signing and verification are technical irregularities relating to matter of procedure and same cannot furnish basis for rejection of plaint, application or memorandum of appeal. Learned counsel further submitted that the ex-parte judgment has been passed after deliberate absence from the proceedings, where after, the arbitration proceedings were commenced and, therefore, valuable right has been accrued to the appellant which cannot be taken away by allowing the application dated 09.03.2015 for setting aside the ex-parte judgment dated 27.10.2014 and order dated 08.11.2014, which lacks sufficient cause and reasonable excuse.

6. Arguments heard. Record perused.

7. Learned counsel for the respondent has raised question of maintainability of the present FAO on the ground that the appeal and the affidavit in support have been signed by the counsel of the appellant instead of appellant. I have examined the Power of Attorney filed along with the present appeal which was signed by Ahmed Hassan, Chief Law Officer, Oil and Gas Development Company Limited, Islamabad, under powers delegated to him, vide order dated 16.01.1999, issued by the appellant company. This Power of Attorney grants power to the learned counsel to the appellant to present the pleadings before the High Court, as such, the pleadings were signed by the learned counsel for the appellant duly authorized to do so in terms of said Power of Attorney signed by concerned authorized officer of the company. Case laws of the Hon'ble Supreme Court and High Court relied upon by the learned counsel for the appellant has settled the issue, wherein it has been held that the appeal is the continuation of original proceedings. In the judgment re: ***Ismail v. Mst. Razia Begam (1981 SCMR 687)*** it has been held that *non-signing of plaint by them at the proper stage was a mere irregularity and consequently the*

learned District judge was entirely justified to direct that the said irregularity may be rectified. In the case titled as ***Province of Punjab v. Muhammad Sharif(PLD 1990 Lahore 208)*** it has been decided that *under Order III Rule 4 the power of attorney in favour of the counsel ensures till termination with the permission of the Court or till proceedings are finally ended…….. no separate power of attorney was necessary in favour of the counsel who could have filed appeal on the basis of power of attorney presented before trial Court*. In case reported as ***Shadoo Muhammad Khan v. Ganmoon (1989 MLD Lahore 4624)***, it has been observed that *the defect in pleading, application, memorandum of appeal with regard to presentation, signing and verification are technical irregularities relating to matter of procedure and same cannot furnish basis for rejection of plaint, application or memorandum of appeal*. The objection raised by the learned counsel for the respondent, in view of above referred case law is, therefore, rejected.

8. Case of the appellant is that the ex-parte proceedings have been ordered by the learned Trial Court after due compliance of procedure relating to service of notice on the respondent, therefore, without any plausible reason, the ex-parte judgment and order for nomination of Arbitrator cannot be set-aside. Record shows that the arbitration petition under section 20(4) of Arbitration Act, 1940, for appointment of Arbitrators in terms of clause 19 of the agreement between the parties was filed by the appellant before this Court which was later on transferred to Civil Judge 1st Class, West-Islamabad on 07.02.2012. The learned Trial Judge on receipt of this Arbitration petition issued notices to both the parties. It has been observed that initially no one put appearance from either party to pursue the arbitration petition, however, appellant later on joined the proceedings but the respondent only attended the proceedings on 09.03.2015, where after the order sheet does not show any attendance on behalf of the respondent, therefore, the

learned trial Court issued order for substituted service through proclamation in the newspaper daily Jang. The learned trial Court after being satisfied with the substituted service, proceeded ex-parte against the respondent and allowed the arbitration petition filed by the appellant u/s 20(4) of the Arbitration Act, 1940, vide judgment dated 27.10.2014, with the direction to file agreement of arbitration as well as names of arbitrators. Since, the respondent was not in attendance in the proceedings before learned Trial Court, therefore, the nomination of Arbitrator on their behalf was not submitted. The learned Court, having no other alternative but to appoint the Arbitrator nominated by the appellant to furnish his award within the prescribed period of four months provided under the act, vide order dated 08.11.2014, appointed the Arbitrator. As per record, the respondent tendered appearance on receipt of notice issued by Arbitrator and obtained copy of the judgment dated 27.10.2014, and thereafter filed petition for setting aside of the said judgment. The reason for not attending the proceedings before the Court as apprised was that no notice has been received by them for the proceedings under section 20(4) of the Arbitration Act, 1940, and that the proclamation of notice was published in Daily Jang, Rawalpindi, whereas, the registered office of the respondent is in Karachi. The contention of the respondent was accepted by the learned trial Court which allowed the petition of the respondent and set-aside the ex-parte judgment dated 27.10.2014 and order dated 08.11.2014. The substituted service is governed, vide Order V Rule 20 CPC, according to which the substituted service through the modes prescribed in Rule 20 would be adopted when the Court is satisfied and has reason to believe that the respondent is avoiding the service by keeping out of the way or that the summons through ordinary course could not be served on the respondent. For reference Order V Rule 20 CPC is reproduced below:

> ***"20.Substituted service****-(l) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order for service of the summons by-*
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> *(a) affixing a copy of the summons at some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain; or*
> *(b) any electronic device of communication which may include telegram, phonogram, telex, fax, radio and television; or*
> *(c) urgent mail service or public courier services; or*
> *(d) beat of drum in the locality where the defendant resides; or*
> *(e) publication in press; or*
> *(f) any other manner or mode as it may think fit:*
>
> *Provided that the Court may order the use of all or any of the aforesaid manners and modes of service simultaneously.*
>
> ***Effect of substituted service.--****(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.*
>
> ***Where service substituted time for appearance to be fixed.--****(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require which shall not ordinarily exceed fifteen days.".*

9. The Hon'ble High Court of Sindh, Karachi, in case titled as ***Javed Raza v. Razi Ahmad (1991 MLD 2602)***, has dealt with the provision of Order V Rule 20CPC and has observed as follows:

> *"There was nothing either in the application under Order 5, Rule 20, C.P.C. or in the accompanying affidavit that the plaintiff does not know any other address of the said defendants. No order for affixation of copy of summons was made at some conspicuous place in the Court house and/or upon some conspicuous part of the house in which the defendant last resided as required under Order 5, Rule 20, C.P.C. Service by publication is an extraordinary mode of effecting service on a defendant and can only be resorted to when conditions warranting it exist and strict compliance is made of the provisions of Order 5, Rule 20, C.P.C. This is not so here*.".

10. The record attached with the appeal has been carefully examined and it is noted that notices in the ordinary course have been issued to the respondent, however, as evident from the record, appended with the appeal, there is no finding recorded by the learned trial Court regarding service of notices through modes prescribed under Order V Rule 20 CPC before adopting the mode of substituted service through publication in press. Keeping in view the dictum laid down in the above judgment, the extra ordinary mode of effecting service should be the last

resort of the trial Court when it is satisfied and has reasons to believe that the other mode of service of notice on the respondent are either not possible or the respondent is avoiding receipt of notice. Service of notice on the respondent is the essential requirement of law to ensure the attendance of the parties to participate in the proceedings so as to arrive at just and impartial conclusion as important rights of the parties are involved in the matter. Thus, it is mandatory to adopt all the modes of effecting service prescribed under the law and unless and until it is finally determined through various modes of service that there is no possibility of appearance of the party to proceed with the matter, the ex-parte proceedings should not be commenced.

11. I have given anxious thought to the contention of the learned counsel for the appellant that order dated 18.02.2014, wherein the Court has ordered to proceed ex-parte against the respondent is in field and unless this order is set-aside, the respondent despite setting aside of judgment dated 27.10.2014, would be proceeded ex-parte. In this regard I am of the view that the interlocutory orders during the course of proceedings got merged in the judgment which determines the fate of the proceedings when the judgment is set-aside all the interlocutory orders are also set-aside with the judgment.

14. Moreover, keeping the facts and circumstances of the case and clause 19 of the agreement between the parties, the learned trial Court in his concluding para of the impugned order dated 08.04.2015, has rightly held as under:-:

> *"Indeed the respondents have precious right attached with the present case but the petitioner had every right to be listened in the main petition. Even if the instant application is not accepted, it would definitely create such a loop hole/lacuna in the proceedings, the ultimate effect of which will be on the arbitration proceedings and the award. It is interesting to note the respondent had not filed any reply to the application of condonation of delay and further the version of the petitioner has also not been controverted as such. The main argument of the respondent was that*

the impugned order was appealable as the same operated as decree. However, the said order cannot be treated as decree as the mandate of the said order has not been finalized in the shape of award and the same was also ex-parte. The petition in hand is well supported by affidavit and other relevant documents, same is hereby accepted and order/judgment dated 27.10.2014 & 08.11.2014 is hereby set aside. This order be annexed with main file.".

13. In view of the above the instant appeal filed by the appellant has no force and is hereby **dismissed**.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on this _____ day of September, 2020.

JUDGE

M. JUNAID USMAN