

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.224/2018

The Imperial Electric Company (Private) Limited

Versus

M/s Zhongxing Telecom Pakistan (Private) Limited and others

Date of Hearing: 11.11.2019

Petitioner by: Ms. Habiba Alvi, Advocate

Respondents by: M/s Muhammad Shakeel Awan and Raza
Ullah Khan Niazi, Advocates for
respondent No.1.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, the Imperial Electric Company (Private) Limited, impugns the order dated 09.04.2018 passed by the Court of the learned Civil Judge, Islamabad, whereby the petitioner's application under Sections 5, 11 and 12 of the Arbitration Act, 1940 ("the 1940 Act") was dismissed.

2. The facts essential for the disposal of the instant petition are that on 07.05.2005, a contract for the Supply, Installation, Testing and Commissioning of D.G. Sets at B.T.S. Sites at the Central, North & South Regions of the P.T.C.L. CDMA WLL Project ("the Contract") was executed between the petitioner and respondent No.1. Clause 19.2.1 of the said Contract is reproduced herein below:-

"19.2.1 Amicable Settlement

If a dispute of any kind whatsoever arise between the ZTE and the Sub-Contractor in connection with, or arising out of, the Sub-Contractor or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, the parties shall attempt to settle such dispute amicably within 15 days from the date a dispute actually started and reduced to writing. The decision of Chief Executive Officer PTCL will be the final and be acceptable to both the Parties."

3. On 11.09.2014, the petitioner instituted a suit for recovery of Rs.1,10,878,059/- against respondent No.1 before this Court. When the said suit was instituted, this Court could exercise civil original jurisdiction. On 29.09.2015, respondent No.1 filed an application under Section 34 of the 1940 Act praying for the proceedings in the said suit to be stayed. Vide order dated 28.12.2015, this Court allowed

the said application and stayed the proceedings in the said suit. Furthermore, in the said order, it was observed that *“it shall be open to the parties to refer their disputes arising out of or in connection with the agreement dated 07.05.2005 pursuant to clause 19.2.1 thereof.”* The said order was not assailed any further.

4. Since clause 19.2.1 of the Contract required the dispute between the parties to be referred to respondent No.3/Chief Executive Officer of P.T.C.L., the petitioner, vide letter dated 17.05.2016, requested the Chairman, P.T.C.L. to arrange a preliminary meeting with the parties to the Contract prior to the commencement of the arbitration proceedings. Having not received any response, the petitioner, vide letter dated 25.07.2016, requested respondent No.3 to act as an Arbitrator in terms of clause 19.2.1 of the Contract and proceed with the arbitration proceedings. There is nothing on the record to show that the petitioner's said letters dated 17.05.2016 and 25.07.2016 had been responded to.

5. After this Court's civil original jurisdiction had ceased due to enactment of the Islamabad High Court (Amendment) Act, 2016, the matter was transferred to the Court of the learned Civil Judge, Islamabad. It was in these circumstances that the petitioner filed an application before the learned Civil Court under Sections 5, 11 and 12 of the 1940 Act praying for the revocation of the authority of respondent No.3 to act as an Arbitrator, and to declare that the arbitration clause in the Contract has ceased to have any effect. The petitioner has also prayed for the restoration of the proceedings in the suit. Respondent No.1 contested the said application by filing a written reply, wherein it was pleaded *inter alia* that where the parties had chosen to refer the dispute to a domestic forum of their choice, such a choice should be honored. Respondent No.2/P.T.C.L. had also filed a reply to the said application wherein it was pleaded *inter alia* that the petitioner had been contacted but did not show its willingness to refer the matter to arbitration.

6. Vide impugned order dated 09.04.2018, the learned Civil Court dismissed the petitioner's application under Sections 5, 11 and 12 of the 1940 Act. The said order has been assailed by the petitioner in the instant civil revision petition.

7. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that during the pendency of the instant civil revision petition, respondent No.3 filed an application (C.M.No.279/2019) before this Court; that in the said application, respondent No.3, who was named as the Arbitrator in clause 19.2.1 of the Contract, expressed his inability to act as an Arbitrator; that respondent No.1 neither wants the petitioner's suit for recovery to proceed nor does it want the matter to be resolved through arbitration; that since respondent No.3 has expressed his inability to enter upon reference, this Court cannot compel him to act as an Arbitrator; that by not entering upon reference, after the petitioner sent notices dated 17.05.2016 and 25.07.2016, respondent No.3 can be said to have failed to use all reasonable dispatch in entering upon or proceeding with the reference and making an award; and that by not entering upon reference after having been specifically requested to do so on two occasions, respondent No.3 can be said to have misconducted the proceedings. Learned counsel for the petitioner prayed for the revision petition to be allowed and for this Court to appoint an Arbitrator in replacement of respondent No.3. In the alternative, learned counsel for the petitioner prayed for this Court to declare that the arbitration agreement between the parties had ceased to have effect and for restoring the proceedings in the petitioner's suit.

8. On the other hand, learned counsel for respondent No.1 submitted that respondent No.3 had been named as the Arbitrator in the Contract between the petitioner and respondent No.1; that the petitioner had not assailed this Court's order dated 28.12.2015 whereby the proceedings in the petitioner's suit had been stayed under Section 34 of the 1940 Act; that since the petitioner had not filed an application under Section 8 of the 1940 Act, the learned Civil Court and for that matter this Court had no jurisdiction to appoint an Arbitrator in replacement of respondent No.3; that by not entering upon reference, respondent No.3 could not be said to have misconducted the proceedings; and that the petitioner neither had the right for revival of the proceedings in its suit nor for respondent No.3

to be replaced as an Arbitrator. Learned counsel for respondent No.1 prayed for the 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. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 6 above and need not be recapitulated.

10. After proceedings in the petitioner's suit for recovery were stayed pursuant to the order dated 28.12.2015 passed by this Court, the petitioner had vide notices dated 17.05.2016 and 25.07.2016 called upon respondent No.3, who was the Arbitrator named in clause 19.2.1 of the Contract, to enter upon reference. It is not disputed that respondent No.3 did not, at any material stage, enter upon reference or issue notices to the parties to the dispute (i.e. the petitioner and respondent No.1) for the commencement of the arbitration proceedings. This left the petitioner in a situation where the proceedings in its suit had been stayed and respondent No.3 as the sole Arbitrator was not entering upon reference. A solution for a party who is faced with such a predicament is provided in Sections 11 and 12 of the 1940 Act.

11. Section 11(1) of the 1940 Act provides that the Court may, on the application of any party to reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering upon or proceeding with the reference and making an award. Section 11(2) of the 1940 Act provides that the Court may remove an arbitrator or umpire who had misconducted himself or the proceedings.

12. In the case at hand, respondent No.3, who was the Arbitrator named in clause 19.2.1 of the Contract, had not entered upon reference even though he was required to do so by the petitioner through notices dated 17.05.2016 and 25.07.2016. It appears that respondent No.3 had no intention to enter upon reference. I say this because respondent No.3 had filed an application (C.M.No.279/2019) wherein it was explicitly pleaded that he was *“unable to act and perform his duties as the Arbitrator due to time constraints as he is currently the Chief Executive Officer of both Respondent No.2, i.e. Pakistan Telecommunication Company Limited (PTCL), and Pakistan*

Telecom Mobile Limited (Ufone).” This being so, respondent No.3 could not be compelled to sit as an Arbitrator. The willingness of an Arbitrator to enter upon reference and to adjudicate upon the contractual disputes between the parties to the reference is a *sine qua non* for arbitration proceedings. The responsibility to sit as an Arbitrator cannot be thrust on a person unwilling or not having sufficient time to discharge the responsibilities of an Arbitrator.

13. Since in the case at hand, respondent No.3 had failed to use all reasonable dispatch in entering on the reference, the requirement in Section 11(1) of the 1940 Act to remove him had been satisfied. The petitioner’s application before the learned Civil Court was also under Section 12 of the 1940 Act. Section 12(1) of the 1940 Act provides *inter alia* that where the Court removes one or more arbitrators, the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

14. By the time when the impugned order dated 09.04.2018 was passed by the learned Civil Court, respondent No.3 had not expressed his unwillingness in writing to perform the responsibilities of an Arbitrator. This Court cannot shut its eyes to the pleadings in respondent No.3’s abovementioned application (C.M.No.279/2019). Respondent No.3 has in effect failed to use all reasonable dispatch in entering on the reference.

15. As regards the contention of the learned counsel for respondent No.1 that the remedy before the petitioner was to have made an application for the appointment of an Arbitrator under Section 8 of the 1940 Act, suffice it to say that the same does not appeal to me. True, Section 8(1)(b) of the 1940 Act provides *inter alia* that if any appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

16. During the arguments, learned counsel for respondent No.1 was asked by this Court as to whether respondent No.1 was willing to

suggest the name of an Arbitrator in replacement of respondent No.3. The response of the learned counsel for respondent No.1 was an unequivocal 'No'. Since respondent No.1 was not willing to make suggestions for the appointment of an Arbitrator in respondent No.3's place, it is my view that the petitioner was correct in moving an application under Sections 5, 11 and 12 of the 1940 Act. In the case of Province of East Pakistan Vs. Abdur Rashid (1970 SCMR 319), it was held *inter alia* as follows:-

"Mr. Siddique Ahmed Chowdhury, learned senior Government Pleader concedes that the arbitrator did not take any steps between the date when he was called upon to enter upon the reference and the date of institution of the suit. His contention is that the negligence of the arbitrator does not warrant his removal under section 11, but such negligence fell within the mischief of section 8(1)(b) of the Arbitration Act. Section 11 clearly confers power on the Court to remove, on the application of any party to a reference, an arbitrator who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. In view of this express provision of section 11, it cannot be said that the arbitrator, in the instant case, was not removable under section 11. The trial Court removed the arbitrator under the said section and the High Court was justified in refusing interference in revision with the trial Court's decree removing the arbitrator."

(Emphasis added)

17. In the instant case, disputes between the parties could be referred to a sole Arbitrator appointed with the consent of the parties. Since the parties could not concur on the appointment of the Arbitrator, I am of the view that this Court, while deciding a revision petition against an order of the learned Civil Court refusing to remove an Arbitrator, has the jurisdiction not just to remove the named Arbitrator who refuses to enter upon reference but can also appoint an arbitrator in his place. In the case of Union of India Vs. Prafulla Kumar Sanyal (1979 3 SCC 631), it was observed that an order of reference can be either to an Arbitrator appointed by the parties whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator to an Arbitrator appointed by the Court. If no such Arbitrator had been appointed and where the parties cannot agree upon an arbitrator, the Court may proceed to appoint an Arbitrator itself.

18. The provisions of the 1940 Act should be interpreted in such a manner as to achieve the essential objective of speedy adjudication

through a domestic forum. The very purpose of the 1940 Act is to achieve adjudication within a short time by avoiding time consuming procedure in Civil Courts. The policy of law is that arbitration proceedings should not be unduly prolonged.

19. In the instant case, more than three years ago the petitioner had requested the Arbitrator named in clause 19.2.1 of the Contract to enter upon the reference. It is a matter of dismay that till date the arbitration proceedings have not even commenced. Respondent No.1 neither wants the petitioner's suit to be revived nor is forthcoming in suggesting the name of an Arbitrator to be appointed in respondent No.3's place. The quandary that has been created for the petitioner by respondent No.1 reminds me of the following observations made by the Indian Supreme Court in the case of M/s Guru Nanak Foundation Vs. M/s Rattan Singh & Sons (AIR 1981 SC 2075):-

“Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ('Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity.”

20. The said observations were a precursor for the Indian Parliament to enact the Arbitration and Conciliation Act, 1996. In Pakistan, a Bill to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto was tabled in our Parliament in the year 2015. We must not lose hope for this Bill to be given due attention by our Parliament.

21. In view of the above, the instant revision petition is allowed; the impugned order dated 09.04.2018 is set-aside; respondent No.3 is removed as the Arbitrator for not entering on the reference by failing to use all reasonable dispatch; and the Hon'ble Mr. Justice (Retired) Chaudhary Mansoor Ahmad (former Judge of the Hon'ble Lahore High

Court) is appointed as the sole Arbitrator, who shall fix his own fee and thereafter enter upon reference. There shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

*Qamar Khan**

Uploaded By : Engr. Umer Rasheed Dar