JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.42/2018
M/s Exceed Private Limited
Versus
Pakistan Housing Authority Foundation and others

Date of Hearing:	27.09.2018
Appellant by:	Mr. Ali Nawaz Kharal, Advocate.
Respondents by:	Mr. Imran Ali Kayani, Advocate for respondents No.1 and 2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellant, M/s Exceed Private Limited, impugns the order dated 20.04.2018, passed by the Court of the learned Civil Judge (West), Islamabad, whereby application under Section 34 of the Arbitration Act, 1940 ("the 1940 Act"), filed by respondent No.1 (Pakistan Housing Authority Foundation) was accepted and the proceedings in the appellant's suit for *"declaration, recovery, mandatory and permanent injunction"* were stayed.

2. The facts essential for the disposal of the instant appeal are that on 19.08.2016, the appellant and respondent No.1 entered into a contract for *"Construction of Multi-Storey Apartments under Package-09 at Sector I-12, Islamabad"* ("the contract"). Pursuant to the provisions of the contract, the appellant had furnished a performance bond for an amount of Rs.9,04,56,613/-, being 10% of the contract price, in respondent No.1's favour.

3. Respondent No.3 (Meinhardt (Pakistan) Pvt. Ltd.) was appointed as the Engineer by respondent No.1. On 13.02.2017, notice to commence the works was issued to the appellant by respondent No.3. Disputes and differences arising from and related to the terms of the said contract arose between the appellant and respondent No.1. The said parties blamed each other for the delay in the execution of the works under the contract.

4. On 26.10.2017, the appellant filed a suit for declaration, recovery, damages, mandatory and permanent injunction against

respondents No.1 to 4. On 21.12.2017, respondent No.1 filed an application under Section 34 of the 1940 Act praying for the proceedings in the said suit to be stayed. The appellant contested the said application by filing a written reply.

5. Admittedly, clause-67 of the said contract provides for the disputes and differences between the appellant and respondent No.1 to be referred, in the first instance, to the Engineer and in the event, the Engineer fails to resolve the disputes or decides them within an agreed time frame, the aggrieved party can challenge the Engineer's decision in arbitration under the provisions of the 1940 Act.

6. Vide order dated 20.04.2018, the learned Civil Court allowed respondent No.1's application under Section 34 of the 1940 Act and stayed the proceedings in the appellant's suit. The said order dated 20.04.2018 has been assailed by the appellant in the instant appeal.

7. It may be mentioned that on 27.04.2018, respondent No.1 issued a notice terminating the appellant's employment. Furthermore, the appellant was informed that after a lapse of fourteen days, respondent No.1 will enter upon the site and the works.

8. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that since respondent No.1 had not responded to several letters, including a legal notice sent by the appellant, respondent No.1 had waived its right to have its disputes with the appellant resolved through arbitration; that prior to the filing of the suit, respondent No.1 had not been ready and willing to resolve the contractual disputes in accordance with the dispute resolution mechanism enshrined in clause-67 of the contract; that respondent No.1 by seeking an adjournment on 21.12.2017 to file a written statement had taken a step in the proceedings and, therefore, was not entitled to have the proceedings in the suit stayed on account of the arbitration clause in the contract; that the contractual disputes between the appellant and respondent No.1 cannot be referred to arbitration

without the pre-condition of a reference to the Engineer being satisfied; that there was nothing preventing respondent No.1 to have referred its disputes with the appellant to the Engineer in terms of clause-67.1 of the contract; that at no material stage, was any effort made by respondent No.1 to amicably settle its disputes with the appellant; and that the learned Civil Court erred by not appreciating that respondent No.1 by filing the application under Section 34 of the 1940 Act had tried to procrastinate and avoid the adjudication of contractual disputes through a Court of plenary jurisdiction. Learned counsel for the appellant prayed for the appeal to be allowed in terms of the relief sought therein.

9. On other hand, learned counsel for respondent No.1 submitted that respondent No.1 is ready and willing to have its contractual disputes with the appellant resolved in accordance with the provisions of the contract; that if the appellant had any claims against respondent No.1, it could have raised those claims in accordance with the procedure provided in the contract; that prior to the institution of the suit, the appellant had neither raised its claim against respondent No.1 before the Engineer nor initiated a process of amicable settlement of the disputes; that at no material stage, had respondent No.1 applied to the learned Civil Court for an adjournment so as to file a written statement; that although on 21.12.2017, the learned Civil Court had adjourned the matter to 10.02.2018 for the filing of a written statement, but after the said order was passed respondent No.1 later that day filed an application under Section 34 of the 1940 Act; that since respondent No.1 had not applied for an adjournment for the filing a written statement, respondent No.1 cannot be said to have taken a step in the proceedings so as to disentitle it from seeking a stay of the proceedings in the suit; that since the proceedings in the suit have been stayed, it is now for the appellant to agitate its contractual disputes strictly in accordance with the provisions of the contract; that the mere fact that clause-67 of the contract provides a pre-condition of the reference of the disputes to the Engineer before they could be

raised in arbitration does not, in any manner, prevent respondent No.1 from applying for the proceedings in the suit to be stayed; that if respondent No.1 is to raise a claim against the appellant, it would be strictly in accordance with the procedure provided in the contract; that for raising a claim against respondent No.1, the appellant must strictly adhere to the procedure provided in the contract; and that the impugned order passed by the learned Civil Court does not suffer from any legal infirmity. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

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

11. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs-2 to 7 above and need not be recapitulated.

12. It is an admitted position that on 19.08.2016, the appellant and respondent No.1 entered into the contract. The documents which formed part and parcel of the contract were listed in clause-2 of the contract. One such document was the General Conditions-Part I. Clauses-67.1 to 67.4 provide for a mechanism for the resolution of the disputes between the appellant and respondent No.1 arising from and related to the contract. Clause-67.3 of the General Conditions-Part I was amended by the parties to the contract to provide for arbitration under the 1940 Act. The said clauses of the General Conditions-Part I and the amendment contained in Particular Conditions of Contract-Part II are reproduced in **"Schedule-A"** hereto.

13. Clause-67.1 provides *inter-alia* that if a dispute of any kind whatsoever arises between the appellant (contractor) and respondent No.1 (employer), the same shall, in the first place, be referred in writing to the Engineer. The Engineer is required to give notice of his decision within a period of 84 days from the date of the receipt of the reference. If the appellant or respondent No.1 is dissatisfied with the Engineer's decision, the dissatisfied party may within 70 days of the said decision give notice to the

other party of his intention to commence arbitration. Clause-67.2 of the General Conditions-Part I provides that after the issuance of the notice of the intention to commence arbitration, the parties shall attempt to settle their disputes amicably before the commencement of arbitration. Arbitration may be commenced on or after the 56th day after the date of the notice of the intention to commence arbitration. Clause-67.3 of the Particular Conditions of Contract-Part II provides that the arbitration is to be in accordance with the provisions of the 1940 Act.

14. I propose, in the first instance, to deal with the contention of the learned counsel for the appellant that by failing to respond to the notices issued by the appellant to respondent No.1, prior to the institution of the suit, respondent No.1 cannot be said to be ready and willing to refer the disputes, arising from and related to the contract, to arbitration and, therefore, the learned Civil Court erred by allowing respondent No.1's application under Section 34 of the 1940 Act.

15. Section 34 of the 1940 Act is reproduced herein below:-

> ***"34. Power to stay legal proceedings where there is an arbitration agreement.--** Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."*
> **(Emphasis added)**

16. It is well settled that in order that a stay may be granted under Section 34 of the 1940 Act, it is necessary that the following conditions should be fulfilled:-

(1) The proceeding must have been commenced by a party to an arbitration agreement against any other party to the agreement;
(2) The legal proceedings which are sought to be stayed must be in respect of a matter agreed to be referred;
(3) The applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceedings after

appearance;

(4) The applicant should satisfy the Court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration; and

(5) The Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement.

17. Granting stay under Section 34 of the 1940 Act is discretionary as the section indicates but the occasion for the exercise of discretion does not arise unless all the conditions stated in the section are fulfilled. Since parties to an arbitration agreement cannot be lightly relieved from their bargain, the discretion has to be exercised sparingly and cautiously. The readiness and willingness of a party filing the application under Section 34 of the 1940 Act is said to be a *sine qua non* for the applicability of that Section. A defendant applying for the suit/proceedings to be stayed has to satisfy the Court that he is and was, at the commencement of the suit/proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. It is clear from the terms of Section 34 of the 1940 Act that the readiness and willingness must exist not only when an application for stay is made but also at the commencement of the legal proceedings. The employment of the words "was" and "still remains" show unmistakably that such readiness and willingness must exist on the date when the suit/legal proceedings were commenced and must continue to exist till the application under Section 34 of the 1940 Act is filed.

18. There appears to be a difference of opinion as to whether a defendant's conduct prior to the institution of the suit is of relevance for the Court in exercising its discretion whether or not to allow the application seeking a stay of the suit on the basis of the existence of an arbitration agreement between the parties. The earlier view of the Superior Courts in several cases was that a defendant's unwillingness to respond to a plaintiff's request for arbitration, prior to the institution of the suit, cannot deprive him of his right to seek a stay of legal proceedings/suit. Reference in this regard may be made to the following case law:-

i) In the case of Muhammad Yousuf Burney Vs. S. Muhammad Ali (1983 CLC 1498), it was held as follows:-

> ***"Under section 34 of the Arbitration Act stay of the suit will be granted provided there is an arbitration agreement and the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. The readiness and willingness to go to the arbitration is to be considered at the time of commencement of the proceedings and not before.... Earlier acts of the applicant from which inference can be drawn to show that he was not ready and willing for arbitration cannot be pressed in service for rejection of the stay application..."***
> **(Emphasis added)**

ii) In the case of Gabole Brothers Vs. Government of Pakistan (PLD 1972 Karachi 515), it was held as follows:-

> ***"[S]ince the readiness on the part of the parties to the contract to refer to arbitration, is to be determined at the time when the suit is instituted and the defendant is called upon to appear and answer, and not when the same was contemplated or threatened. If he decides to ask for stay he can do so before the filing of the written statement. Till that time his choice is absolutely unfettered and his silence and omission to invoke the arbitration clause will be totally inconsequential."***

19. Where the conduct of a defendant prior to the institution of a suit is such as would indicate his resistance to efforts made by the plaintiff to initiate arbitration proceedings, such a defendant cannot claim to be *"ready and willing to do all things necessary to the proper conduct of the arbitration"* and seek to have the proceedings in the suit stayed. Silence and inaction on the part of the defendant to the plaintiff's requests for the commencement of arbitration prior to the institution of the suit may justify the inference that the defendant was not ready or willing to go to arbitration at the time when the suit was instituted.

20. In the case of Dr. Muhammad Shafi Vs. Maj. (Retd.) M. Iqbal Hussain (PLD 1996 Lahore 667), the learned Civil Court had allowed the defendant's application under Section 34 of the 1940 Act and stayed the suit instituted by the plaintiff. Prior to the institution of the suit, the plaintiff had addressed letters to the defendant conveying the plaintiff's intention to refer the disputes to arbitration. The position taken by the defendant was that going

to arbitration would be an exercise in futility. The Hon'ble Lahore High Court set-aside the learned Civil Court's order, primarily, on the ground that there was sufficient material on the record to show that after the dispute had arisen between the parties, the plaintiff had been time and again asking the defendant to have the dispute settled through arbitration; and that it was non-cooperation on the defendant's part that had forced the plaintiff to file the suit. This conduct on the defendant's part is said to have shown his unwillingness to have the dispute decided through arbitration. Furthermore, it was held as follows:-

> ***"In the present case according to the arbitration clause the arbitrators were to be appointed by mutual consent. The appellant in his letter referred to above has been time and again called upon the respondent to mutually agree to arbitration. In the two replies made by the respondent, the respondent had clearly indicated its unwillingness to have the dispute settled through arbitration. In face of this conduct it cannot [b]e held that the respondent was, at the time when the suit was filed, ready and willing to do all things for proper conduct of arbitration."***

21. Additionally, in the case of Food Corporation of India Vs. M/S. Thakur Shipping Co. Ltd. (AIR 1975 SC 469), it was held as follows:-

> ***"Where a party to an arbitration agreement chooses to maintain silence in the face of repeated requests by the other party to take steps for arbitration the case is not one of "mere inaction". Failing to act when a party is called upon to do so is a positive gesture signifying unwillingness or want of readiness to go to arbitration."***

22. The question as to whether an applicant seeking a stay of the suit/legal proceedings was "ready and willing to do all things necessary to the proper conduct of the arbitration" as required by Section 34 of the 1940 Act is a question of fact. Learned counsel for the appellant was asked to show from the record the steps taken by the appellant, prior to the institution of the suit, for the resolution of its disputes with respondent No.1 in accordance with the dispute resolution mechanism enshrined in clauses-67.1 to 67.4 of the General Conditions-Part I. Learned counsel for the appellant referred to the appellant's letters dated 14.03.2017, 12.06.2017, 29.07.2017, 26.09.2017, 14.10.2017 and legal notice

dated 16.10.2017. Now in none of these letters has the appellant requested the Engineer to give his decision under clause-67.1 of the General Conditions-Part I. There is no document on the record showing that the appellant had required respondent No.1 to refer disputes and differences either to the Engineer or to arbitration. Even in the said legal notice dated 16.10.2017, the appellant's counsel did not require the reference of the disputes between the appellant and respondent No.1 either to the Engineer or arbitration in accordance with the provisions of the contract. Through the said letters, the appellant had raised contractual claims against respondent No.1.

23. Since there is no document on the record to show that respondent No.1 took no steps for referring the matters in dispute with the appellant to arbitration in spite of being urged to do so by the appellant, it cannot be held that respondent No.1 was not ready and willing to go to arbitration prior to the institution of the suit by the appellant. Mere inaction or lack of response on the defendant's part to the plaintiff's claim for payment of money cannot be construed as unwillingness on the defendant's part to cooperate in the commencement of the arbitration proceedings. In the case of Atinbose Vs. Heavy Engineering Corporation (AIR 1983 Calcutta 376), it has been held that demand for money, if not replied to would be a case of mere inaction and would not be considered as want of readiness and willingness on the part of the applicant for stay.

24. Since the appellant, prior to the institution of the suit, has not taken any step for the initiation of the process for the resolution of its disputes with respondent No.1 in accordance with the procedure prescribed in clauses 67.1 to 67.4 of General Conditions-Part I, respondent No.1 could not have been accused of being unwilling to do all things necessary to the proper conduct of the arbitration. Consequently, I am of the view that the appellant's such objection is without any substance.

25. I do not find substance in the contention of the learned counsel for the appellant that since the proceedings had been

adjourned by the learned Civil Court for the filling of a written statement, this amounted to a waiver on the appellant's part to apply for the stay of the suit. The order sheet of the learned Civil Court shows that on 03.11.2017, a memorandum of appearance was filed on behalf of respondent No.1, and on 14.11.2017, the matter was adjourned in routine to 21.12.2017 for the filing of a written statement. On 21.12.2017, respondent No.1 filed an application under Section 34 of the 1940 Act. The order sheet does not show that a request for an adjournment had been made on behalf of respondent No.1 for filing a written statement. On 14.11.2017 (i.e., the date after a memorandum of appearance had been submitted on behalf of respondent No.1), the matter had been adjourned in routine for the filing of a written statement. In these circumstances, respondent No.1 cannot be said to have displayed an unequivocal intention to proceed with the suit and give up its right to apply for the proceedings in the suit to be stayed under Section 34 of the 1940 Act. It is in cases where a party seeks a number of adjournments specifically for the purpose of filing a written statement, and after doing so files an application under Section 34 of the 1940 Act, would a Court be justified in dismissing such an application. A party applying on a number of occasions specifically for the filing a written statement evinces an intention to have the matter adjudicated upon by the Court.

26. As regards the contention of the learned counsel for the appellant that the matters in dispute between the appellant and respondent No.1 cannot be referred to arbitration without the satisfaction of the pre-condition of having such matters first referred to the Engineer, it appears that the learned counsel for the appellant had lost sight of the fact that it is the appellant who in disregard of clause-67.1 of General Conditions-Part I has instituted a civil suit against respondent No.1. It is not disputed that the claims made by the appellant in the said civil suit are with respect to the contract dated 19.08.2016 between the appellant and respondent No.1. It was for the appellant, being the claimant,

to have referred its claims or disputes to the Engineer in accordance with the provisions of the contract. Indeed, the appellant will have to satisfy the pre-condition of a reference of its disputes with respondent No.1 to the Engineer, and in the event, the appellant is not satisfied with the Engineer's decision, can it agitate its disputes in arbitration in accordance with the abovementioned clauses of the General Conditions-Part I. The mere fact that the dispute resolution clause in the contract provides for the disputes to be referred to the Engineer, in the first instance, did not in any manner take respondent No.1's right to apply for the proceedings in the suit to be stayed. Now that the proceedings in the suit have been stayed, it would be for the appellant to agitate its claims (which was the subject matter of the suit) in accordance with the dispute resolution mechanism provided in the contract.

27. In view of my findings aforementioned, I am of the opinion that there is no merit in this appeal which is accordingly dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018.

(JUDGE)

APPROVED FOR REPORTING.

*Qamar Khan**

"SCHEDULE-A"

GENERAL CONDITIONS-PART I

Settlement of Disputes

67.1 Engineer's Decision

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract 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, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

67.2 Amicable Settlement

Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided

that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

67.3 Arbitration

Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and
(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2,

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

67.4 Failure to Comply with Engineer's Decision

Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 and 67.2 shall not apply to any such reference.

PARTICULAR CONDITIONS OF CONTRACT PART-II

67.3 Arbitration

Deleted the word "under the rules of Conciliation and Arbitration of International Chamber of Commerce" appearing after the words "specified in the contract" And replace with the words "under the rules of arbitration act,1940 as amended or any statutory modification or re-enactment thereof for the time being in force.