

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

**CASE NO. : W.P. NO.4045-2021**

**Samsons Group of Companies**

**Vs.**

**Panthers Developers etc.**

**Petitioner by : Mr. Wasif Aleem, Advocate**  
**Respondents by : Mr. Noman Amin Farooqi, Advocate**  
**Date of decision : 31.03.2022**

**AAMER FAROOQ J.** The instant writ petition has arisen out of proceedings pending before respondent No.3, which are in the nature of Application under section 20 of the Arbitration Act, 1940 along with other miscellaneous applications, filed by Panthers Developers against the petitioner. During the course of proceedings, an application was filed by respondent No.1 for appointment of local commission to inspect the site where the work was to be carried out; the referred application was allowed by learned trial court, which has been challenged before this Court.

2. Learned counsel for the petitioner *inter alia* contended that under Order XXVI Rule 9 CPC, the court could have only appointed a local commission to inspect the site within its local jurisdiction and not beyond. It was submitted that in case, site was to be inspected a commission was to be issued to another court in terms of section 76 of Code of Civil Procedure, 1908, as the site is in Khyber Pakhtunkhwa.

3. Learned counsel for respondent No.1 *inter alia* contended application filed by respondent No.1 was not under Order XXVI Rule 9 CPC but was under section 41(b) read with Schedule II of the Arbitration Act, 1940. It was contended that there is no bar for a commission to be

appointed for inspection of the site which is beyond territorial jurisdiction of the Court. Reliance was placed on cases reported as 'Messrs Commodities Trading International Corporation Vs. Trading Corporation of Pakistan Ltd and another' (1987 CLC 2063), 'Abdul Sattar Vs. Port Qasim and others' (2003 CLC 132), 'Excel Techno Solutions FZE, UAE through Sole Proprietor and another Vs. Messrs Oil and Gas Development Company Limited through counsel and another' (2019 CLC 416), 'Ovex Technologies (Private) Limited Vs. PCK PK (Private) Limited and others' (2020 CLD 15) and 'M/s AB Sukab Vs. M/s Ghee Corporation of Pakistan' (PLD 1993 Karachi 508).

4. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

5. The controversy, raised in the instant petition, has been spelt out hereinabove, hence needs not be reproduced.

6. The petitioner, in nutshell, is aggrieved of appointment of local commission to inspect the site situated at Malam Jaba Swat, KPK.

7. The examination of the application filed by respondent No.1 shows that same is under section 41 of the Arbitration Act, 1940 (the Act) and under the said provision, the civil court, hearing the application on proceedings pursuant to arbitration agreement, has the jurisdiction to pass orders which are mentioned in Second Schedule to the Act. At Sr. No.1 of Second Schedule, it is provided that orders can be passed for detention, preservation and inspection of any property. In case reported as 'Abdul Sattar Vs. Port Qasim and others' (2003 CLC 132), it was observed that where inspection of the property is essential to examine the dispute *inter se*

the parties, the same could be done under section 41 *ibid*. In case reported as ‘Messrs Commodities Trading International Corporation Vs. Trading Corporation of Pakistan Ltd and another’ (1987 CLC 2063), it was observed that first part of section 41 makes CPC applicable to all proceedings before and court and appeal under the Arbitration Act; the second Part provides that the purpose of and in relation to the arbitration proceedings the court shall exercise such powers and pass orders as specified in the second schedule to the Act; it was observed that the court can pass interim orders for detention and preserving the property, custody or sale of goods, appointment of receiver and grant interim injunction. In case reported as ‘Abdul Sattar Vs. Port Qasim and others’ (2003 CLC 132), the Hon’ble Sindh High Court observed that a commission can be appointed for local investigation or issuance of object in order to elucidate facts and dispute. In case reported as ‘Excel Techno Solutions FZE, UAE through Sole Proprietor and another Vs. Messrs Oil and Gas Development Company Limited through counsel and another’ (2019 CLC 416), this Court observed that Arbitration Act, 1940 being a special enactment would prevail over provisions of CPC and section 41 of the Arbitration Act, 1940 starts with the words ‘subject to the provisions of this Act’ and therefore petitioner could not have filed an appeal under section 39 of the Arbitration Act, 1940. Similar view were expressed in case reported as ‘Ovex Technologies (Private) Limited Vs. PCK PK (Private) Limited and others’ (2020 CLD 15). In case reported as ‘Iltaf Hussain Vs. Zafar Iqbal and others’ (2015 CLC 447), the Hon’ble Lahore High Court held that discretion exercised by the courts also cannot be interfered with in the High Court under Article 199 of the Constitution. In

case reported as ‘Sarhad Development Authority through Chairman, Peshawar Vs. Land Acquisition Collector/Deputy Commission, Abbotabad and 19 others’ (1998 SCMR 730), the Hon’ble Supreme Court of Pakistan upheld the appointment of local commission; it was observed that under Order XXVI Rule 9 CPC, when the court deems it proper for the purpose of elucidating any point in dispute or for ascertaining any matter referred to in the said rule, a Commission is deputed for the required purpose; it was added that object of the local investigation is to obtain evidence which from its peculiar nature can best be had from the spot inspection itself; such evidence enables the court to properly and correctly understand and assess the evidence on record.

8. In view of above discussion of facts and law, the objection raised to the impugned order by learned counsel for the petitioner is not sustainable; firstly, the order was passed under section 41 read with Second Schedule to the Arbitration Act, 1940 and secondly the wording of Order XXI Rule 26 CPC cannot be interpreted to the effect that local commission can only examine spot which is within territorial jurisdiction of the court. Moreover, section 76 of CPC is not applicable in the facts and circumstances, as it pertains to issuance of commission to another court for examination of any person and not otherwise.

9. The order impugned does not suffer from any illegality or jurisdictional error warranting interference, hence instant petition is without merit and is accordingly dismissed.

**(AAMER FAROOQ)**  
**JUDGE**

Approved for reporting

