

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.92/2019
M/s Exceed Private Limited
Versus
Jamil Ahmed Khan and others

Date of Hearing: 03.07.2019
Appellant by: M/s Ali Nawaz Kharal and Muhammad Bilal Waince, Advocates
Respondents by: Mr. Imran Ali Kayani, Advocate for the respondents/P.H.A.F.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellant, M/s Exceed Private Limited, impugns the judgment and decree dated 03.05.2019, passed by the Court of the learned Civil Judge, Islamabad, whereby application under Order VII, Rule 11 of the Code of Civil Procedure, 1908 ("C.P.C."), filed by respondents No.1 to 3/defendants No.1 to 3, was allowed and the plaint in the appellant's suit for declaration, mandatory and permanent injunction and recovery, was rejected.

2. Learned counsel for the appellant submitted that on the basis of the arbitration clause in the agreement dated 19.08.2016 between the appellant and Pakistan Housing Authority Foundation ("P.H.A.F."), the proceedings in the suit could, at best, only be stayed, but the plaint in the suit could not be rejected; that the claims made by the appellant in its suit were such which could not be resolved through arbitration; that in order to seek injunctive relief, the appellant could have filed a civil suit against P.H.A.F.; that P.H.A.F., by filing applications under Section 10 C.P.C. and Order I, Rule 10 C.P.C., had abandoned its right to seek the disputes between the parties to be referred to arbitration; and that the notice for the termination of the agreement issued by P.H.A.F. was unlawful, and liable to be declared as such by a Court of plenary jurisdiction. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned order dated 03.05.2019, to be set-aside.

3. On the other hand, learned counsel for P.H.A.F. submitted that earlier the appellant had filed a suit in which it had raised disputes arising from and related to the agreement executed between the appellant and P.H.A.F.; that the proceedings in the said suit were stayed by the learned Civil Court by allowing P.H.A.F.'s application under Section 34 of the Arbitration Act, 1940 ("the 1940 Act"); that thereafter, an Arbitrator was appointed who is adjudicating upon the disputes between the said parties; that after the filing of the said suit, notice for the termination of the agreement had been issued to the appellant; that in the appellant's second suit, it had challenged the said notice for the termination of the agreement; that the disputes arising between the parties as a result of the issuance of such a notice can be resolved by the Arbitrator, who is already adjudicating upon the disputes between the parties; and that the appellant is at liberty to have its contractual disputes decided in accordance with the arbitration clause contained in the agreement dated 19.08.2016. Learned counsel for P.H.A.F. prayed for the appeal to be dismissed.

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

5. The record shows that on 07.06.2018, the appellant filed a suit against the respondents before the learned Civil Court. In the said suit, the appellant sought multiple reliefs, including a declaration to the effect that the notice of termination dated 27.04.2018, issued by the Chief Executive Officer of P.H.A.F. was unlawful. By virtue of the said notice, respondent No.1 had terminated the agreement dated 19.08.2016 for the construction of D&E Type Multi Storey Apartments at Sector I-12, Islamabad (Packages-9).

6. It is an admitted position that the said agreement contained an arbitration clause providing for the disputes and differences between the parties to the said agreement to be resolved through arbitration. The said agreement also provided that before the

disputes and differences could be referred to arbitration, they were first required to be submitted to the Engineer for a decision.

7. It is also an admitted position that none of the defendants in the said suit (i.e. the respondents herein) filed a written statement. Respondents No.1 to 3, however, filed the following applications:-

- (i) The application under Order VII, Rule 11 C.P.C., praying for the rejection of the plaint on the ground that the appellant had earlier filed a suit on the same cause of action,
- (ii) The application under Section 10 C.P.C., praying for the proceedings in the appellant's suit to be stayed on the ground that the earlier suit filed by the appellant had been stayed by the learned Civil Court on 20.04.2018 by allowing an application under Section 34 of the 1940 Act.
- (iii) The application under Section 34 of the 1940 Act, praying for the proceedings in the suit instituted by the appellant to be stayed due to the presence of the arbitration clause in the agreement dated 19.08.2016.

8. Vide impugned order dated 03.05.2019, the learned Civil Court allowed respondents No.1 to 3's application under Order VII, Rule 11 C.P.C. and rejected the plaint in the appellant's suit. The said order has been assailed by the appellant in the instant regular first appeal.

9. Perusal of the operative part of the impugned order dated 03.05.2019 shows that the reason which prevailed with the learned Civil Court in rejecting the plaint was that the appellant had not taken the steps in accordance with clause 67 of the agreement to resolve its disputes and differences with P.H.A.F. The learned Civil Court was also cognizant of the fact that the appellant's earlier suit had been stayed under Section 34 of the 1940. The learned Civil Court took the view that even if a fresh cause of action had accrued to the appellant, all the matters could be resolved and decided by the Arbitrator already appointed. The appellant's suit was held not to be maintainable and therefore, the learned Civil Court rejected the plaint.

10. It is an admitted position that on 26.10.2017, the appellant had filed a suit for declaration etc, against the respondents. The said suit was filed after disputes and differences arising from and relating to the terms of the agreement dated 19.08.2016 had arisen between the parties thereto. P.H.A.F. was defendant No.1 in the said suit. Its application under Section 34 of the 1940 Act praying for stay of the proceedings in the suit on the ground that there existed an arbitration clause in the said agreement, was allowed by the learned Civil Court, vide order dated 20.04.2018. The appellant's appeal against the said order was dismissed by this Court, vide judgment dated 07.12.2018 reported as Messrs Exceed Private Limited Vs. Pakistan Housing Authority Foundation (2019 YLR 427). Prior to the said judgment having been passed by this Court, the appellant instituted another suit for declaration etc. against P.H.A.F. and others before the learned Civil Court. This appeal has arisen from an order passed in the said suit.

11. In the impugned order dated 03.05.2019, it has not been held that the appellant had filed the second suit on the same cause of action on the basis of which the earlier suit was filed. The basis on which the learned Civil Court has rejected the plaint in the appellant's second suit is the existence of the arbitration clause in the agreement between the appellant and P.H.A.F. The said arbitration clause provided that before the matters in disputes between the parties could be taken or referred to arbitration, they, in the first instance, had to be referred to the Engineer for a decision. The party aggrieved of the decision of the Engineer had the right to give notice of its intention to refer the matter to arbitration within a specified time frame.

12. It is an admitted position that after the proceedings in the appellant's first suit were stayed, an Arbitrator was appointed and he is presently adjudicating upon the disputes and differences between the appellant and P.H.A.F. As regards the disputes and differences between the appellant and P.H.A.F., (other than the ones which were the subject matter of the earlier suit and are presently under adjudication before the Arbitrator), there was nothing preventing the appellant from resolving such disputes and

differences in accordance with the dispute resolution mechanism contained in clause 67 of the agreement.

13. It is well settled that if a person who has been a party to an arbitration agreement brings a suit ignoring that agreement, the defendant's remedy if he wants to rely on that agreement, was to proceed under Section 34 of 1940 Act and to ask for stay of the suit. An exception has been created under Section 34 of 1940 Act to the general law and empowers the Court with jurisdiction to decide the dispute or to refuse to do so in case of the existence of an arbitration agreement. If in a contract, there is a provision of resolution of a dispute between the parties by way of arbitration and the parties have agreed to such a forum, then such forum is to be resorted to and given preference before filing a suit.

14. Once a party exercises the option to invoke the arbitration clause by filing an application under Section 34 of the 1940 Act that is a manifestation of its readiness and willingness to do all things necessary for the proper conduct of the arbitration. In the case at hand, an application under Section 34 of the 1940 Act had been filed on behalf of P.H.A.F. The filing of such an application implied that P.H.A.F. is ready and willing to have the disputes which were the subject matter of the appellant's suit adjudicated upon by the Arbitrator. In the case of S.H. Hashim Hussain Vs. Pakistan Defence Officers' Housing Authority (2005 SCMR 1782), it has been held *inter-alia* that even though the decision of the Engineer/Consultant had attained finality, because it was not subjected to a challenge in an arbitration proceedings within the time stipulated in the contract, yet the Court allowed the application under Section 34 of the 1940 Act when the plaintiff had sued to recover the amount determined by the Engineer/Consultant to be due to him.

15. The Court, upon an application under Section 34 of the 1940 Act, can only stay the proceedings in the suit but not dismiss the suit or reject the plaint in the suit. In the case of Nasir Khan Vs. Province of Punjab through Secretary, Irrigation, Punjab Lahore (2006 YLR 87), it has been held *inter-alia* that the mere existence of arbitration clause in the agreement between the plaintiff and

the defendant does not authorize the Court to dismiss the suit outright.

16. It is also well settled that an appeal is a continuation of the original suit and the Appellate Court has ample power to scrutinize the documents on the record in the light of the arguments advanced by the contesting parties. An Appellate Court while hearing an appeal against an order/judgment or a decree of a Trial Court exercises the same jurisdiction which vested in the Trial Court. In an appeal, the *lis* becomes open and the Appellate Court can do all that the original Court could do. Reference in this regard may be made to the law laid down in the case of Gul Rehman Vs. Gul Nawaz Khan (2009 SCMR 589), Inayat Vs. Darbara Singh (AIR 1920 Lahore 47), North-West Frontier Province Government, Peshawar Vs. Abdul Ghafar Khan (PLD 1993 SC 418) and Province of Punjab through Collector Bahawalpur Vs. Col. Abdul Majeed (1997 SCMR 1692).

17. In the case of CGM (Compagnie General Maritime) Vs. Hussain Akbar (2002 CLD 1528), the defendant in a suit had filed an application under Order VII, Rule 10 C.P.C., praying for the plaint in the suit to be returned on the ground that the contract/bill of lading had contained an exclusive jurisdiction clause providing for the disputes under the contract/bill of lading to be brought before the Tribunal de Commerce in Paris. The trial Court at Karachi passed an order dismissing the said application and holding that the suit shall proceed at Karachi. The order of the trial Court dismissing the said application was assailed in an appeal. An appeal against the said order was allowed by the Hon'ble High Court of Sindh and the proceedings in the suit were stayed due to the exclusive jurisdiction clause which are treated like arbitration clauses.

18. In view of the above, the impugned order dated 03.05.2019 is modified in that the proceedings in the appellant's suit are stayed; and the appellant shall be at liberty to resolve its disputes and differences with P.H.A.F. (which were the subject matter of the said suit), in accordance with the dispute resolution

mechanism provided in the agreement dated 19.08.2016 between the said parties.

(MOHSIN AKHTAR KAYANI)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 07/08/2019

(JUDGE)

(JUDGE)

Qamar Khan*

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