SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.M. Arbitration Petition No.03 of 2008

M/s Catalyst Communications Pvt. Ltd
Versus
M/s National Telecommunication Corporation through its Chairman

Date of Hearing: 10.05.2016
Petitioner by: Barrister Gohar Ali Khan
Respondent by: Mr. Hasnain Ibrhaim Kazmi and Ch. Shafiq-ur-Rehman, Advocates,
Mr. Asif Ranjha, Legal Advisor NTC

MIANGUL HASSAN AURANGZEB, J:- Through the instant petition under Section 20 of the Arbitration Act, 1940 ("the 1940 Act"), the petitioner, M/s. Catalyst Communications (Pvt.) Limited, prays for *inter-alia* the reference of disputes between the petitioner and the respondent (M/s Telecommunication Corporation) to arbitration. The petitioner also seeks the appointment of an arbitrator.

2. The record shows that on 22.04.2002, the petitioner and the respondent entered into a contract ("the Contract"), whereby the petitioner agreed to set up, operate, market and maintain Prepaid Calling Card Service and International Gateway Exchanges on behalf of the respondent. The Contract had a validity period of ten years (clause 9), which could be extended for an additional period of five years with the mutual consent of the parties (clause 10). Under clause 17.2 of the Contract, the petitioner agreed to install, test and commission, entirely at its own cost and expense, the platforms/equipments for Prepaid Calling Cards ("PCCs"), International Gateway Exchanges ("IGEs") and Payphones within the periods stipulated in the Contract. The petitioner was to develop at least three IGEs, one each in Islamabad, Lahore and Karachi. All destinations of the world were required to be connected through the IGEs either directly or through the petitioner's switching arrangements at U.S.A., U.K. and U.A.E. For outbound international traffic, the

petitioner's share in the revenue was agreed to be 30%, whereas the respondent's share was 70%.

3. On 15.01.2003, the Law, Justice & Human Rights Division, Government of Pakistan, confirmed that the Contract had been examined, and that it suffered from no legal infirmity. Clause 32 of the Contract is reproduced herein below:-

> *"Settlement of Disputes*
> *32. The provisions contained in this Clause shall survive the termination and/or expiration of this Agreement. Arbitration under this Clause shall be a condition precedent to any other action under law.*
> *The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Agreement or its interpretation. Any dispute between the Parties as to matters arising under this Agreement which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for amicable settlement may be submitted by either Party to arbitration in accordance with the provisions set out below.*
> *The arbitration proceedings shall be conducted in accordance with the Arbitration Act 1940 or any amendment or re-enactment thereof and the rules made there under. As sole arbitrator appointed by the Parties who shall be a retired judge of the Supreme Court of Pakistan shall hear each dispute submitted by a Party to arbitration.*
> *Arbitration proceedings shall, unless otherwise agreed by the Parties, be held in Islamabad.*
> *In any arbitration proceedings under this Agreement the decision of the arbitrator shall be final and binding and shall be enforceable in any court of competent jurisdiction, and each of the Parties waives any objections to or claims to immunity in respect of the enforcement of the claim."*

4. In compliance with its obligations under the Contract, the petitioner installed some equipment and made a request to the respondent for testing it so as to overcome any deficiency. The trial and testing commenced on 01.11.2002 for incoming traffic, but the respondent, on 09.01.2003, directed the petitioner to stop the process. This resulted in disputes and differences being developed between the parties. Consequently, the petitioner filed an application under Section 8 of the Arbitration Act, 1940, before the Court of learned Civil Judge, Islamabad, praying for the appointment of an arbitrator and the reference of the disputes to arbitration. The Hon'ble Mr. Justice (Retd.) Khan Khalil-ur-Rehman, was appointed as the sole arbitrator, who entered upon reference. During the pendency of the arbitration proceedings, the contesting parties negotiated a settlement. The

deed of settlement was placed before the learned sole arbitrator, and an arbitration award in terms thereof was rendered on 03.12.2003. A significant feature of the settlement was that the parties agreed that the Contract was to terminate on the date falling on the fifth anniversary of the effective date, which was agreed to be 13.11.2003. Hence, the contract was to terminate on 13.11.2008.

5. The congeniality in the contractual relationship between the parties was not long-lived. Disputes and differences again developed between the parties. This time the parties opted for arbitration without the intervention of the Court. The petitioner, on 29.11.2005, filed a statement of claim before the learned sole arbitrator (the Hon'ble Mr. Justice (Retd.) Khan Khalil-ur-Rehman). The claim made by the petitioner against the respondent was for various amounts under the following heads:-

i. Loss suffered by the petitioner as a result of delay in the commencement of test and trial operations.

ii. Loss suffered by the petitioner as a result of the respondent's failure to maintain ASR at the level of 55% minimum for Incoming International Traffic.

iii. Loss suffered by the petitioner as a result of the respondent's failure to release the petitioner's share of revenues.

iv. Loss suffered by the petitioner as a result of idle switching capacity.

v. Loss suffered by the petitioner as a result of the delay in launching Payphone Project under the contract.

vi. Loss suffered by the petitioner as a result of the delay in launching Prepaid Calling Card Project under the contract.

vii. Loss suffered by the petitioner due to the application of Higher Settlement Rates by the respondent.

6. The respondent contested the said claim and also filed a counter-claim on 09.12.2005. The arbitration proceedings culminated in an arbitration award dated 15.08.2006. The said arbitration award was made a Rule of Court, and a judgment and decree dated 30.04.2007 was passed in terms thereof by the learned civil court. The learned Single Bench of this Court allowed an appeal against the said judgment and decree and the matter was remanded to the learned civil court with the direction to consider the objections to the award raised by the respondent. Thereafter, the case was transmitted to this Court,

because it was beyond the pecuniary jurisdiction of the learned civil court. This Court, vide judgment and decree dated 20.05.2013, made the arbitration award dated 15.08.2006 a Rule of Court, and a judgment and decree in terms thereof was passed.

7. A few weeks prior to the rendering of the arbitration award dated 15.08.2006, the Chairman, Pakistan Telecommunication Authority ("P.T.A."), in his letter dated 09.06.2006 to the respondent, observed that the Contract for setting up IGEs and provision of International Telephone Arrangement/Services had been entered into without a formal written approval of the P.T.A. Furthermore, the Chairman, P.T.A., took the position that the Contract was violative of *inter-alia*, the provisions of Access Promotion Rules, 2004, and the Access Promotion Regulations, 2005. Consequently, the following directions were issued by the Chairman P.T.A. to the respondent:-

> *"4. Keeping in view the foregoing factors, the irresponsible attitude of the licensee towards the writ of the Authority, the very nature and extent of the agreements being violative of the provisions of the Act, the Rules and the Regulations, and to ensure level playing field in the market, the Authority hereby directs NTC:*
>
> *(a) to terminate all such arrangements including the aforementioned agreements with immediate effect i.e., 9th June, 2006 and submit compliance within three days of this letter.*
>
> *(b) to furnish traffic data, details about CDRs and transactional data for the period and deposit outstanding dues to the Authority within 10 days of issuance of this letter.*
>
> *(c) non-compliance to the directions of the Authority as contained in Para 5(a), (b) supra by NTC may constrain the Authority to initiate legal action under section 23 of the Act."*

8. The respondent on the same very day (i.e. 09.06.2006), suspended the Contract. Vide letter dated 10.06.2006, the respondent informed the Chairman, P.T.A., that the Contract between the petitioner and the respondent had been examined by the Law Division, Government of Pakistan, and no legal infirmity had been pointed out. Furthermore, paragraph 3 of the said letter dated 10.06.2006 is reproduced herein below:-

> *"3. On the issue of the illegality of the said agreements, it is apprised that approval of the authority was not required when*

> *these agreements were signed. NTC entered into these Agreements with M/s. CATCOM and M/s. ZAHRA Communication on 11th April 2002 by permission of Ministry of Science & Technology for setting up of International Gateway and provisioning of International telephony. ISI and PTA were represented in the meeting in which this permission was granted. In addition to that, the subject Agreement of NTC was duly amended with the approval of PTA. Reliance is placed on letter No.Dir(c)/PTA/68/98 dated 2nd January 2003 of PTA whereby DG (Law) duly vetted the existing amendment to these very Agreements of NTC."*

9. The Chairman, P.T.A., was requested by the respondent to reconfirm the directions issued in its letter dated 09.06.2006 in the light of the information furnished by the respondent in its letter dated 10.06.2006. Vide letter dated 14.06.2006, P.T.A. reconfirmed the directions contained in its letter dated 09.06.2006, and called upon the respondent to forthwith show compliance with the said directions. Consequently, vide letter dated 14.06.2006, the respondent terminated the Contract with immediate effect.

10. Aggrieved by the termination of the Contract, the petitioner invoked the constitutional jurisdiction of the Hon'ble Lahore High Court, Rawalpindi Bench, by filing W.P.No.2313/2006 against *inter-alia,* the respondent and P.T.A. In the para-wise comments to the said writ petition, the respondent took a preliminary objection to the effect that *"an equally adequate and efficacious remedy through a reference to the arbitration is available to the petitioner."*

11. It appears that the petitioner had instituted W.P.No.1781/2005 before the Hon'ble Lahore High Court, Rawalpindi Bench, against the respondent and the Government of Pakistan, praying for the following relief:-

> *"It is respectfully prayed that direction to the respondents to restrain from terminating international gateway operations of the petitioner company illegally, arbitrarily and discriminately in exercise of their administrative powers or otherwise.*
> *It is also prayed that the respondents may graciously be directed to refrain from causing illegal harassment to the petitioner in any manner whatsoever."*

12. On 27.06.2005, the following ad-interim order (annexed at page 157 of Arbitration Petition No.03/2008) was passed by the Hon'ble High Court:-

"In the meanwhile, no detrimental action contrary to the express provision of law shall be taken against the interest of the petitioner, subject to notice for an early date."

13. The petitioner had also instituted an appeal (F.A.O. No.112/2006) before the Hon'ble Lahore High Court, Rawalpindi Bench, against the respondent etc,, challenging the suspension order issued by the respondent without issuing any notice under Section 23 of the Pakistan Telecommunication (Reorganization) Act, 1996. This appeal was admitted to regular hearing on 28.06.2006, whereon the Hon'ble High Court suspended the operation of the impugned order.

14. Yet another Writ Petition (bearing No.2313/2006) was instituted by the petitioner against the respondent and three others, before the Hon'ble Lahore High Court, Rawalpindi Bench. In this writ petition, the following relief was prayed for:-

"In view of the above, it is respectfully prayed that this Hon'ble Court may graciously be pleased to declare the directive dated 07 June 2006 issued by the respondent No.3 to be manifestly illegal, void, contrary to the provisions of the Pakistan Telecommunication (Reorganization) Act 1996 thus without lawful authority and of no legal effect based on malafides and ulterior motives. It is further prayed that this Hon'ble Court may graciously be pleased to declare the orders dated 09.06.2006 and 14.06.2006 to be illegal acts, without lawful authority, based on malafides and ulterior motives. The petitioner also prays for the costs and grant of any other relief to which it is found entitled by this Hon'ble Court in law justice and equity keeping in view the facts and circumstances of the case."

15. In this writ petition, adequate disclosure about W.P.No.1781/2005 and F.A.O.No.112/2006, was made with the request for all these cases to be connected. All these three cases were dismissed vide consolidated judgment dated 02.02.2016, by the learned Single Bench of this Court. All the three cases were held to be not maintainable due to the availability of an alternative remedy. It is pertinent to reproduce herein below paragraph 20 of the said consolidated judgment:-

"20. Even otherwise, under Clause 32 of the admitted agreement dated 22.04.2002 the disputes between the parties are required to be settled through arbitration proceedings conducted in accordance with Arbitration Act and petitioner had previously invoked jurisdiction of the said forum. Case of petitioner is distinguishable from the case laws cited because terms and conditions of agreement cannot be seen in isolation from subsequent legislative developments in shape of Access

Promotion Rules, 2004. Access Promotion Regulation 2005 and Pakistan Telecommunication Amendment Act, 2006. While the agreement itself has undergone period stipulated therein. Consequently the relief with regard to statutory obligations has become infructuous and at the most, petitioner retains remedy of demanding damages that also after the breach of contract is established, therefore, referred case law does not extend any help to the petitioner."

16. The petitioner had already, on 09.05.2008, filed a petition under Section 20 of the 1940 Act (Arbitration Petition No.06/2008, later renumbered as Arbitration Petition No.03/2008) praying for the appointment of an arbitrator, and a reference of the differences and disputes between the petitioner and the respondent to arbitration in terms of clause 32 of the Contract. The said petition was amended on 14.05.2009. The disputes and differences sought to be referred to arbitration were as follows:-

"*i. Illegal suspension of operation*
ii. Termination of the contract agreements on 09.06.2006 on the directive of PTA.
iii. Non access of the technical and administrative personnel of the Petitioner into the premises of NTC where all the equipments of the Petitioner are installed in the room allocated as Switch room.
iv. The losses caused to the Petitioner for a period of June, 2006 to March, 2008 by termination of operation and termination of contract.
v. Non taking initiative by the Respondent on the request of the Petitioner for collection of receivables of Rs.143,728,946 resulting into loss of 25% share and interest accruing thereof.
vi. The losses due to termination of the contract agreement and suspension thereof."

17. Learned counsel for the petitioner submitted that all the prerequisites for making an order of reference to arbitration have been satisfied in this case; that the disputes and differences between the petitioner and the respondent arise from and are related to the terms of the Contract, which had been unlawfully terminated by the respondent; that the respondent had raised objections to the maintainability of the writ petition instituted by the petitioner to the effect that there exists an arbitration clause in the Contract between the parties, which clause can be invoked for the resolution of the disputes between the said parties; and that the petition under Section 20

of the 1940 Act has been filed within the limitation period. The learned counsel for the petitioner prayed for the petition under Section 20 of the 1940 Act to be allowed and a retired judge of the Superior Courts to be appointed as an arbitrator in terms of clause 32 of the Contract.

18. On the other hand, learned counsel for the respondent submitted that the petition under Section 20 of the 1940 Act is barred under the principles of *res judicata* as well as the principles underlying Order II, Rule 2 of the Code of Civil Procedure, 1908 ("C.P.C."); that on two earlier occasions, arbitration proceedings between the petitioner and the respondent had taken place - the first arbitration proceedings culminated in a consent arbitration award dated 03.12.2003, whereas the second arbitration proceedings culminated in an arbitration award dated 15.08.2006, which was made a Rule of Court, vide judgment and decree dated 20.05.2013, passed by this Court; that successive arbitration proceedings are not permissible under the 1940 Act; that there is no dispute existing between the petitioner and the respondent which could be referred to arbitration; that the petitioner had challenged the termination of the Contract dated 22.04.2002 in F.A.O.No.112/2006 and W.P.No.2313/2006; that multiplicity of proceedings must be avoided; and that the respondent had terminated the Contact on the directions of the Chairman, P.T.A. Learned counsel for the respondent in making his submissions placed reliance on the law laid down in the cases of Pakistan Industrial Development Corporation (PIDC) Vs. Muhammad Iqbal (2015 CLC 1066), and Industrial Fabrication Company through Managing Director Vs. Managing Director Pak American Fertilizer Limited (PLD 2015 Supreme Court 154).

19. I have heard the arguments of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of Arbitration Petition No.03/2008, have been set out in sufficient detail in paragraphs 1 to 10 above and need not be recapitulated.

20. The vital question that needs to be answered is whether in view of the earlier arbitration proceedings culminating in the arbitration award dated 15.08.2006, Arbitration Petition No.03/2008 between the same contesting parties is barred by the principle of constructive *res judicata* enumerated in Section 11 of the C.P.C. and the provision of Order II, Rule 2 of the C.P.C.

21. An arbitration agreement merely provides for an alternative forum for resolution of disputes. Thus, all disputes that the parties agree to resolve by arbitration are to be resolved by arbitration. As long as the disputes that are covered under the arbitration agreement remain unresolved, the parties would be free to take recourse to arbitration for resolution of the said disputes and the other party would be contractually bound to submit the disputes to arbitration. With regard to the submission as to the applicability of the principles of' *res judicata* as provided in Section 11 C.P.C. to arbitration proceedings, it may be appreciated that Section 41 of the 1940 Act provides that the provisions of C.P.C. will apply to the arbitration proceedings. The provisions of *res judicata* are based on principles that there shall be no multiplicity of proceedings and there shall be finality of proceedings. This is applicable to the arbitration proceedings as well. Administration of justice would require that there should not be multiplicity of proceedings and the parties should not be permitted to raise disputes over and over again, once the disputes have been settled either by a pronouncement of a court of competent jurisdiction or by an award of an Arbitrator.

22. It may be recalled that the petitioner had filed the statement of claim in the earlier arbitration proceedings on 29.11.2005. The Contract had not been suspended/terminated by the respondent, when the said statement of claim was filed. The respondent, in these arbitration proceedings, had filed a counter-claim on 09.12.2005. By this stage also, the said Contract had not been suspended/terminated. The learned sole arbitrator in the arbitration award dated 11.08.2006, had given findings on each of the claims made by the petitioner, as well as the respondent's counter-claim. The Contract was suspended by

the respondent on 09.06.2006, and terminated on 14.06.2006. By this stage, the petitioner's statement of claim, and the respondent's counter-claim in the second arbitration proceedings had already been filed.

23. The questions involved in the subsequently instituted arbitration petition (Arbitration Petition No.03/2008) primarily arise and flow from the suspension and termination of the Contract. As mentioned above, the suspension and termination of the Contract were subsequent to the filing of the statement of claim and the counter-claim in the earlier arbitration proceedings. When the earlier arbitration proceedings were instituted, the Contract had not been suspended/terminated by the respondent. Therefore, no claim regarding the termination of the Contract could have been raised in the earlier arbitration proceedings so as to attract the provisions of Explanation IV to Section 11 C.P.C. An arbitration award concludes questions which are actually referred to arbitration. The earlier arbitration award dated 15.08.2006, does not deal with the question of the termination of the Contract. The dispute regarding the termination of the Contract was not referred to the learned sole arbitrator in the earlier arbitration proceedings since the cause of action for the same was not available on such an occasion. Accordingly, the cause of action for the earlier referred dispute and the present dispute are different. Therefore, the analogy of constructive *res judicata* or the provision of Order II, Rule 2 C.P.C. are not applicable to the present case. In view of the different causes of actions, the same petitioner had a right to file successive references for arbitration. Therefore, in my view an arbitration petition seeking reference to arbitration of disputes and differences which had not arisen prior to the institution of the earlier arbitration proceedings, are not barred under the principles of *res judicata,* and or Order II, Rule 2, C.P.C.

24. The claim made by the petitioner in the earlier arbitration proceedings may be considered in juxtaposition with the claim now being made by the petitioner against the respondent

through Arbitration Petition No.03/2008, to see whether the petitioner is seeking to re-agitate the claims made earlier.

Claims made by the petitioner in the earlier arbitration proceedings	Claims for which reference to arbitration is presently sought by the petitioner
(i) Loss suffered by the petitioner as a result of delay in the commencement of test and trial operations. (ii) Loss suffered by the petitioner as a result of the respondent's failure to maintain ASR at the level of 55% minimum for Incoming International Traffic. (iii) Loss suffered by the petitioner as a result of the respondent's failure to release the petitioner's share of revenues. (iv) Loss suffered by the petitioner as a result of idle switching capacity. (v) Loss suffered by the petitioner as a result of the delay in launching Payphone Project under the contract. (vi) Loss suffered by the petitioner as a result of the delay in launching Prepaid Calling Card Project under the contract. (vii) Loss suffered by the petitioner due to the application of Higher Settlement Rates by the respondent.	(i) Illegal suspension of operation; (ii) Termination of the contract agreements on 09.06.2006 on the directive of PTA. (iii) Non access of the technical and administrative personnel of the Petitioner into the premises of NTC where all the equipments of the Petitioner are installed in the room allocated as Switch room. (iv) The losses caused to the Petitioner for a period of June, 2006 to March, 2008 by termination of operation and termination of contract. (v) Non taking initiative by the Respondent on the request of the Petitioner for collection of receivables of Rs.143,728,946 resulting into loss of 25% share and interest accruing thereof. (vi) The losses due to termination of the contract agreement and suspension thereof."

25. A glance at the petitioner's statement of claim and the respondent's defence and counter-claim in the earlier arbitration proceedings, and the pleadings in Arbitration Petition No.03/2008, shows that the issues / questions involved in both these cases are not substantially the same. Merely because an issue or two may have an overlap will not be a ground to dismiss the subsequently instituted arbitration petition. If there is such an overlap the arbitrator will have the jurisdiction to decide whether or not to adjudicate upon such a matter. In holding the Arbitration Petition No.03/2008, is not barred under Section 11 or Order II, Rule 2, C.P.C., I am guided by the law laid down by the superior courts in the Pakistani, Indian and English jurisdictions, in the following judgments:-

PAKISTAN:

(i) In the case of Haji Hashim Haji Ahmed & Bros Vs. Trading Corporation of Pakistan (PLD 1977 Karachi 180), it has been held as follow:-

> ***"This is no warrant for the wide proposition that there can be only one reference under an arbitration agreement. There is nothing in the Arbitration Act so to restrict the right of an aggrieved party and there can be cases where successive resort can be had to arbitration, if successive disputes arises in and series of transaction under the same contract as long as the contract remained operative and disputes arise regarding each such transaction separately."***

(ii) In the case of Abdul Sattar Mandokhal Vs. Port Qasim Authority (2001 YLR 758), the learned Single Bench of the High Court of Sindh held as follows:-

> ***"16. Commercial contract[s] generally and more particularly building contract[s] inherently are serial contract[s] each series comprised of numerous stages, each [stage] may comprise of bundle of reciprocal obligations, and each of the obligation may give rise to a claim and same if converted into a difference may give rise to a reference to an arbitration.***
>
> ***17. It is not always necessary that each and every dispute or difference may be subject-matter of reference. A situation may arise where a claim is made by one party and that claim is settled after negotiation. It is only those claims, which are not settled, may be converted into a dispute/difference worth to be referred to arbitration. ...***
>
> ***23. From what has been discussed above it is clear that it is only a dispute that had been referred to arbitration, whether an award was given or not, cannot be the subject-matter of a subsequent reference and to that extent such dispute may be hit by the principle of res judicata and not otherwise. Disputes, which could have been raised when making a reference. but, were not raised, could not be said to be hit by the principle of constructive res judicata. There can be successive claims depending on nature of contract, maturing into a difference and at the option of party to the agreement may be subject-matter of reference. The moment a party exercises its option to convert a dispute into a reference, other party is obliged to enter into the arbitration and subject to limitation, same cannot be resisted on the ground that it was not raised at a particular point in time."***

(iii) The law laid down in the case of Abdul Sattar Mandokhal Vs. Port Qasim Authority (Supra) was quoted with approval in the case of National Engineering Services Pakistan (Pvt.) Limited Vs. Steel Mills Corporation (2003 YLR 1696). The author judge (The Hon'ble Mr. Justice Mushir Alam) of both these judgments was subsequently elevated to grace the Hon'ble Supreme Court of Pakistan, hence, the judgment deserves respect and reverence.

(iv) In the case of Abdul Hussain Shah Vs. Allah Ditta (PLD 2009 Lahore 224), an earlier arbitration award between the parties had been declared unenforceable and ineffective by the Court. Therefore, a fresh suit on the original cause of action was held to be maintainable. The bar of *res judicata* was held not to be an obstacle in the way of the plaintiff to maintain a subsequent suit.

(v) In the case of City Schools (Pvt.) Limited Vs. Azmat Nawaz (2013 CLD 451), the defendant had filed an application under Section 34 of the 1940 Act praying for staying the suit in view the arbitration agreement between the parties. The said application was allowed and the suit was stayed. The defendant, thereafter, filed an application under Section 20 of the 1940 Act. The plaintiff sought the dismissal of the said application on the ground that the defendant had earlier field an application for reference to arbitration on which no findings were given by the Court. At page 456 of the report, the Hon'ble Lahore High Court, held as follows:-

> *"6. It is settled principle of law that in order to apply the bar of res judicata it is imperative for the Court to first determine as to whether issue was raised, determined and decided in the former proceedings before the parties. In this case bare reading of the earlier order dated 1-3-2011 passed by learned trial Court on an application under section 8 read with section 34 of the Act makes it crystal clear that only the proceedings of the suit for recovery lodged by the petitioner were stayed and no order was passed with regard to appointment of Arbitrator. Since no findings were recorded by the learned trial Court on this specific dimension of the matter, therefore, invocation of doctrine of res judicata is out of place in the circumstances of this case."*

(vi) In the case of Muhammad Akbar Vs. Muhammad Tariq (2014 YLR 2218), the plaintiff had filed a suit for declaration and permanent injunction etc, against the defendants before the Hon'ble High Court of Sindh. The defendants filed an application under Order VII, Rule 11 CPC praying for rejection of the plaint on the ground that the dispute raised by the plaintiff in the suit had been decided in earlier arbitration proceedings. The Hon'ble High Court, after going through the plaint and the material available on the record, came to the conclusion that the dispute raised in the suit had been finally resolved in an arbitration award, which had been made a Rule of Court with the consent of

the parties. As the matter raised in the suit was directly and substantially in issue in the earlier arbitration proceedings between the parties, the Hon'ble High Court, by invoking the provisions of Section 11 CPC, rejected the plaint with costs.

INDIA:

(vii) In the case of Balmukund Rina Vs. Gopiram Bhotica (AIR 1920 Calcutta 808), it has been held by Rankin, J. as follows:-

> *"Where by the terms of a contract the parties agree to refer all disputes arising on or out of it to arbitration, the right to make a submission is not exhausted by reason of the mere fact that one award final and complete has issued from it; there may be an indefinite number of awards, as it is possible to have further disputes over the same claim which are not covered by the first award and the arbitrators have jurisdiction to make awards from time to time in disputes arising out of the contract as such disputes arise."*

(viii) In the case of Pushraj Vs. Clive Mills Company (AIR 1960 Calcutta 180), the learned Single Judge of the Calcutta High Court, after referring to Russell's Arbitration (1957), held at paragraph 19 of the said report as follows:-

> *"(19) One arbitration agreement therefore can produce one or more awards and the law of arbitration, as I understand it, does not nurse any dogma to say that it can never do so under any circumstances* because *of some fancied universal doctrine of legal merger of the arbitration agreement in the award. The records of arbitration are replete with numerous instances where under particular arbitration, agreements or special rules of arbitration the same arbitration agreement has given rise to interim awards supplemental awards and successive awards. See Russell's Arbitration* 16th Edn. pages 230 and *289. Whether in a particular case the arbitration agreement can do so or not will depend primarily on the connotation and denotation of the arbitration agreement itself and secondarily on the nature of the dispute referred and the terms and character of the award thereupon. This is however very far from saying that the same point can be decided over and over again by different awards, which of course cannot be done."*

(ix) In the case of Seth Kerorimall Vs. Union of India (AIR 1964 Calcutta 545), P. C. Mallick, J. held that the same dispute once referred and embodied in an award could not be subject-matter of a fresh reference and to that extent rule of *res judicata* applied to arbitration proceeding. The learned Judge, however, further held that there was no authority for the proposition that the disputes that could have been raised but were not raised previously could not be raised on the principle of constructive

res judicata. At paragraphs 9, 10 and 11 of the report, it has held as follows:-

> *"9. ... the same dispute once referred and embodied in an award cannot be the subject matter of a fresh reference and to that extent the rule of res judicata applies to arbitration proceeding. There is no authority for the proposition that disputes which could have been raised but were not raised previously, could not be raised on the principle of constructive res judicata. There is authority for the proposition that the principles of Or. II r. 2 is not applicable to arbitration proceedings. It is not necessary for me in the instant case to consider to what extent the rule of constructive res judicata is applicable to arbitration proceeding because I hold on fact that the instant dispute was expressly left out of consideration in the previous arbitration proceeding on the ground that the arbitrator lacked jurisdiction to entertain the dispute."*
> *10. ... Further it is not the law that all disputes in relation to one contract must be disposed of in one reference. Failure to raise any such dispute in one reference, does not debar a party from raising other disputes to be adjusted in a subsequent reference. Principles to Or. II r. 2 do not apply to arbitration proceedings."*
> *11. ... To bar a subsequent reference, it must be shown that the disputes sought to be referred were actually referred and decided in the previous proceeding. If not actually referred, there would be no bar to a subsequent reference. The instant dispute was expressly left out in the previous reference. Neither the principles of Or. II r. 2 nor the rules of constructive res judicata. I apprehend can be invoked to bar the present reference."*

(x) In the case of Satish Kumar Vs. Surinder Kumar (AIR 1970 SC 833), the Supreme Court of India quoted with approval the following portion of the unreported decision in the case of M/s. Uttam Singh Dugal & Co. V. The Union of India:-

> *"It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference."*

(xi) In the case of Jiwnani Engineering Works Vs. Union Of India (AIR 1978 Cal 228), it has been held as follows:

> *"7. ... A claim which could have been raised and which had not been raised, in my opinion, should be considered to be barred even though the provisions of Order 2 Rule 2 of the Code of Civil Procedure in terms do not apply to arbitration proceedings in appropriate cases. ... The principle behind Order II of the Code of Civil Procedure is salutary. The principle is to prevent multiplicity of proceedings. Order 2 Rule 2 of the Code deals with the vice of splitting a cause of action. The purpose of arbitration proceedings is speedy disposal of disputes. To say*

that hundred or more different disputes could be permitted to be entertained simply because one was not part of the previous dispute would be defeating the object of arbitration proceeding. I do not see why the principles behind Order 2 of the Code should not be applied in the arbitration proceedings."

(xii) In the case of M/s. Alkarma Vs. Dehli Development Authority (AIR 1981 Dehli 230), the Delhi High Court disagreed with the ratio in the case of Jiwnani Engineering Works Vs. Union Of India (AIR 1978 Cal 228), regarding the applicability of Order II, Rule 2, to arbitration proceedings. It was held by the learned Single Judge of the Delhi High Court at paragraph 13 of the Report, as follows:-

"13.....With respect to the learned Judge, I fell bound to refer on the applicability of Order II, Rule 2, to arbitration proceedings. The reason is that the arbitrator is not a Court. Order II, Rule 2 applies to proceedings before a Court. It cannot apply to proceedings before the arbitrator. It is a penal provision. It is draconian in nature. To apply Order II, Rule 2 to arbitrations will not only be illegal but also unjust. I do not deny that the principle of res judicata applies to arbitration. That doctrine is founded in public policy and applies equally to suits and awards."

(xiii) In the case of Shah Construction Co. Ltd. Vs. Municipal Corporation of Delhi (AIR 1985 Delhi 358), it has been held as follows:-

"It is not the law that all disputes in relation to one contract must be disposed of in one reference. Failure to raise any such dispute in one reference does not debar a party from raising other disputes to be adjudicated in a subsequent reference. ... In many cases, it may be necessary or desirable to have different disputes arising under the same contract referred to arbitration at different times"

(xiv) In the case of K.V. George Vs. Secretary to Govt., Water and Power Department, (AIR 1990 SC 53), the Indian Supreme Court has held that principles of *res judicata* as provided in Section 11 of the Code of Civil Procedure are applicable to arbitration proceedings, as by virtue of Section 41 of the 1940 Act, the provisions of C.P.C. will apply to arbitration proceedings and that the provisions of *res judicata* are based on the principles that there shall be no multiplicity of proceedings and that there shall be finality of proceedings and that the said principles are also applicable to arbitration proceedings. In that case, a second reference which was answered by an Arbitrator

by passing an award was struck down by the High Court of Kerala applying the principles of Order 2, Rule 2 C.P.C. and the said judgment of Kerala High Court was upheld by the Supreme Court.

(xv) In the case of Indian Oil Corporation Limited Vs. SPS Engineering Limited (2011) 3 SCC 507, it has been held that the question whether the claim is barred by the principles of *res judicata* has to be examined by the Arbitral Tribunal since a decision on *res judicata* requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration.

(xvi) In the case of Tehri Hydro Development Corporation Limited Vs. Jai Parakash Association Limited (AIR 2013 SC 920), it was held that the second arbitration cannot be said to be barred by the first arbitration because the first arbitration was with respect to the issue of non-preparation of a final bill and non-refund of security deposit, whereas the second arbitration was with respect to claims that had got crystallized on the preparation of the final bill.

ENGLAND:

(xvii) In the case of Purser & Co. (Willingdon) Ltd. v. Jackson (1976 (3) All ER 641), it was held that in arbitration proceedings it was the terms of reference of the arbitration which determined the issue which the arbitrator had to decide. Accordingly, if a particular issue was included in the terms of reference, the claimant would be estopped by the doctrine of *res judicata* from raising that issue in subsequent arbitration proceedings even though the arbitrator had made no award in relation to that issue. Where, however, an issue was not included in the terms of reference, even though a dispute between the parties about it existed at the time of arbitration, the claimant would not be estopped from raising the issue in subsequent arbitration proceedings. It was further held that a contract on its true construction may provide for arbitration and matters to be raised in a second reference which were not included in the first

reference, even though the cause of action subsisted at the time of the first reference.

26. There is force in the contention of the learned counsel for the respondent that since the petitioner's claim regarding *"non taking initiative by the respondent on the request of the petitioner for collection of receivables of Rs.143,728,946/- resulting into losses of 25% share and interest accruing thereon*" had earlier been resolved by the learned sole arbitrator in the earlier arbitration proceedings, this matter could not be re-agitated by the petitioner. Although, a petitioner cannot re-agitate the claims which were the subject matter of the earlier arbitration proceedings, this will be a matter for the learned arbitrator to consider.

27. As regards the contention of the learned counsel for the respondent that since the questions regarding the termination of the Contract had already been decided by this Court through its consolidated judgment dated 02.02.2016, they cannot be re-agitated by the petitioner in arbitration proceedings, suffice it to say that vide the said judgment dated 02.02.2016, Writ Petition Nos.1781/2005, 2313/2006, and F.A.O.112/2006, were dismissed as not maintainable. One of the grounds on which the said three cases were dismissed was that Clause 32 of the Contract provided for the resolution of disputes between the petitioner and the respondent through arbitration. There are no findings given on the legality or otherwise as to the termination of the Contract dated 22.04.2002. Therefore, the said judgment does not in any manner preclude the petitioner from questioning the validity of the termination of the contract and or making claims against the respondent on the basis of the said termination.

28. The contention of the learned counsel for the respondent that the respondent cannot be held liable for terminating the Contract because the respondent had terminated the Contract in compliance with the directions issued by the Chairman P.T.A. This, I am afraid, cannot be a plausible defence for the respondent. The respondent has all along, in the proceedings before the Hon'ble High Court, been defending the termination of

the Contract. In the written comments to W.P.No.2313/2006, the respondent had taken a preliminary objection to the maintainability of the said petition on the ground that an alternative remedy of arbitration was available to the petitioner. If the respondent did not consider the direction of the Chairman P.T.A. to terminate the Contract to be lawful or valid, it should not have blindly followed it. The superior courts have time and again enunciated that public functionaries are bound to obey and carry out only lawful orders and ought not bound to become a party to the acts which are not in accordance with the law. In the case of Ramesh M. Udeshi Vs. The State (2005 SCMR 648), it has been held that compliance with an illegal or incompetent direction/order could neither be justified on the plea of the same having been issued by the superior authority, nor could the same be defended on the ground that non-compliance thereof would expose the subordinate officer/authority to disciplinary action for defying the orders of the superior authority.

29. In the case at hand, the respondent did not file a reply to the petition under Section 20 of the 1940 Act. This is despite the fact that this Court had, vide order dated 01.04.2009, directed the respondent to file a reply to the amended petition within a period of fifteen days. The amended petition was filed on 14.09.2009, but the respondent never bothered to file a reply. This Court gave two more opportunities (on 17.06.2009 and 10.07.2009), to file a reply, but the respondent remained unmoved.

30. Section 20 (3) & (4) of the 1940 Act reds as follows:-

> *"(3) On such application being made the Court shall direct notice thereof, to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.*
>
> *(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the 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."*

(Emphasis added)

31. Once the Court issues notice to the respondents in the application under Section 20 of the 1940 Act, requiring them to show cause as to why the agreement should not be filed, the respondents are expected to file their reply to such a notice in a period not more than that fixed by the Court or a period permitted by law to file a written statement. The Court is not supposed to wait endlessly for the respondents to file their reply to a notice under Section 20 (3) of the 1940 Act. Arbitration is a time saving device and parties to arbitration proceedings are expected to adhere strictly to time lines. In the event the respondents do not come up with a 'sufficient cause' in their reply or do not file a reply within the time stipulated by the Court, the Court is to assume that there is no cause or reason not to refer the matters in dispute between the parties to arbitration. No formal order closing the right of the respondent to file a reply is required under the special law, and the Court, once satisfied that the respondents, despite having notice/knowledge of the application under Section 20 of the 1940 Act, have not filed a reply, ought to refer the matter to arbitration in terms of the arbitration agreement and Section 20 (4) of the 1940 Act. An application under Section 20 of the 1940 Act is to be adjudicated upon expeditiously and should be kept pending for the least possible time. Adjournments to file a reply to a notice under Section 20 of the 1940 Act, should be granted only if the respondent comes up with a sufficient cause for filing it within a stipulated period. Adjournments for such a purpose should not be granted by a Court in routine.

32. The conditions for making a reference to arbitration, in the instant case, are satisfied. In the case of Project Director Balochistan Minor Irrigation & Agricultural Development Project Quetta, Cantt Vs. Murad Ali and Company (1999 SCMR 121), it has been held that the following four conditions have to be satisfied before an application under Section 20 of the 1940 Act can be filed:-

(i) That there is an agreement between the parties containing arbitration clause.
(ii) That the agreement had been entered into before institution of the suit with respect to the subject-matter of the agreement.
(iii) That a difference has arisen between the parties to which the agreement applies.
(iv) That the Court to which application is made has jurisdiction in the matter to which the agreement relates.

33. A similar view has been taken in the cases of Rakshani Builders (Pvt.) Ltd. Vs. Capital Development Authority (2015 YLR 2116), Strong Built Enterprises (Pvt.) Limited Lahore Vs. Fauji Fertilizer Company Limited (1998 MLD 1628), and Manzoor Construction Company Limited Vs. University of Engineering and Technology (1984 CLC 3347). A 'dispute' implies an assertion of a right by one party and repudiation thereof by another. Reference in this regard made to the judgment in the case of Lithuanian Airlines Vs. Bhoja Airlines (Pvt.) Limited (2004 CLC 544).

34. In view of the foregoing, the application under Section 20 of the 1940 Act, is allowed. The Hon'ble' Mr. Justice (Retd.) Nasir-ul-Mulk, former Chief Justice of Pakistan, is appointed as the sole arbitrator, who may enter upon reference after receipt of a copy of this order. The venue of the arbitration proceedings shall be Islamabad. Rupees 1.5 million is fixed as the learned arbitrator's fee, which shall be paid to the learned sole arbitrator by the petitioner and the respondent in equal proportion.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*