**IN THE SUPREME COURT OF PAKISTAN**
(Appellate Jurisdiction)

**Present:**
Mr. Justice Qazi Faez Isa
Mr. Justice Amin-ud-Din Khan

**Civil Petition No. 4222/2018**
(On appeal against the judgment dated 26.09.2018 passed by the Islamabad High Court, Islamabad, in C. R. No. 193/2017)

*Sardar Muhammad Kamal-ud-Din Khan* ... *Petitioner*

***Versus***

*Syed Munir Syed and others* ... *Respondents*

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| For the Petitioner: | Mr. Hassan Rashid Qamar, ASC<br>Mr. Mehmood A. Sheikh, AOR |
| For Respondent No. 1: | Mr. M. Shehzad Siddique, ASC<br>Syed Rifaqat Hussain Shah, AOR |
| For Respondent No. 2: | Nemo |
| For Respondent No. 3: | Mr. M. Nazir Jawwad, ASC<br>Mr. Tariq Aziz, AOR |
| Date of Hearing: | 18.02.2022 |

**ORDER**

**Qazi Faez Isa, J**. This petition assails the judgment of a learned Single Judge of the High Court who in exercise of revisional powers under section 115 of the Code of Civil Procedure, 1908 ('**the Code**') set aside two concurrent orders, respectively of the learned Civil Judge dated 9 November 2016 and of the learned Additional District Judge dated 16 March 2017, and held that, '*the Arbitrator named in the agreement dated 01.05.2015 shall proceed expeditiously with the reference*.'

2. We note that a petition for leave to appeal has been filed despite the setting aside of two concurrent orders. The learned counsel responds to our observation why an appeal was not filed by stating that since the petition was filed within thirty days, which is the prescribed period for the filing of an appeal, this petition may be converted into an appeal and relies

on the judgment in the case of *Gul Jan v Naik Muhammad*[1] and in particular the following portion thereof[2]:

> 'We may conclude by observing that the practice of filing a petition for leave to appeal before this Court under Article 185(3) of the Constitution where an appeal is competent before this Court under Article 185(2) of the Constitution or under any statute but has become barred by time amounts to hoodwinking or deceiving the spirit as well as the express provisions of Article 185(3) of the Constitution and such practice must be brought to an end. It must be made clear to all that if an appeal competent before this Court has not been filed within the period of limitation prescribed for filing of the same then the only remedy available in that regard is to file a time-barred appeal and seek extension of time or condonation of delay in filing of the same in terms of rule 2 of Order XII or rule 1 of Order XXII of the Supreme Court Rules, 1980. It must also be made clear to all through this judgment that no petition for leave to appeal filed under Article 185(3) of the Constitution can be entertained by the office of this Court in any case where an appeal is competent before this Court under Article 185(2) of the Constitution or under any statute and that no such incompetent petition for leave to appeal, even if erroneously entertained by the office of this Court can be converted into or treated as an appeal except in the case of an incompetent petition for leave to appeal filed within the period of limitation for filing a competent appeal.'

The learned counsel for the respondent No. 1 objected to the conversion of this petition into an appeal and states that since the Arbitrator (respondent No. 2) has now announced the Award the petition cannot be converted into an appeal. However, the learned counsel representing the Capital Development Authority (respondent No. 3) says that the petition merits conversion into an appeal, but adds that since the dispute is between private parties he does not want to make any submissions on the merits of the case.

3. The learned Mr. Shehzad Siddique's objection to the conversion of the petition into an appeal is not a valid objection, because what he effectively says is that this case has become infructuous, a proposition with which we do not agree as the arbitration proceeded and the Award was made pursuant to the impugned judgment. In this case an appeal

[1] PLD 2015 Supreme Court 421.
[2] Ibid, paragraph 9, p. 465.

was maintainable as of right, but mistakenly the petitioners filed a petition for leave to appeal, but did so within the prescribed period of thirty days for filing an appeal; the petition was filed on 23 October 2018 impugning the judgment dated 26 September 2018. The conversion of the petition into an appeal also does not undermine any right or benefit of any of the respondents. Therefore, this petition is converted into an appeal and the office is directed to number it as such.

4. The learned counsel for the appellant submits that the respondent No. 1 had filed a '*Suit for declaration, specific performance of agreement dated 01.05.2015, permanent and mandatory injunction*' in the Court of Civil Judge, Islamabad (West) on 22 June 2015. The appellant (defendant No. 1) filed his written statement, but did not file an application under section 34 of the Arbitration Act, 1940. The suit was dismissed by the learned Civil Judge *vide* order dated 23 December 2015, which is reproduced hereunder:

> 'No one turned up on behalf of the plaintiff despite repeated calls. Now the court time is about over, therefore, case file cannot be kept pending further. Hence, the suit in hand is hereby dismissed due to non-prosecution. File be consigned to record room.'

Subsequently, the respondent No. 1 (plaintiff in the suit) moved an application seeking restoration of the suit but then withdrew his application through which he had sought the restoration of the suit. The respondent No. 1 abandoned the litigation initiated by him, then invoked arbitration and proceeded before the Arbitrator. The appellant submitted an '*Application under section 31 and all other enabling provision*[s] *of the Arbitration Act, 1940*' ('**the application**') challenging the '*validity, effect and existence*' of the said agreement dated 1 May 2015 ('**the said agreement**'). The learned Civil Judge *vide* order dated 9 November 2016 allowed the appellant's application and stayed the arbitration proceedings. The respondent No. 1 appealed this order but his appeal was dismissed. The respondent then invoked the High Court's power of revision under section 115 of the Code. The learned counsel submits that the respondent No. 1 could not unilaterally initiate and proceed to arbitration and do so

after having invoked the court's civil jurisdiction, by filing the suit, which was dismissed and then abandoned.

5. The learned counsel representing the respondent No. 1 states that the instant appeal became infructuous when the Arbitrator (respondent No. 2) gave his Award, which he has brought on record through CMA No. 710 of 2022.

6. We have heard the learned counsel and with their assistance examined the referred to Award. The first question requiring consideration is whether the learned Judge of the High Court could exercise powers of revision under section 115 of the Code, and then whether this was an appropriate case to do so in. To consider this it would be appropriate to reproduce section 115 of the Code:

> '115. Revision. (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-
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> (a) to have exercised a jurisdiction not vested in it by law, or
> (b) to have failed to exercise a jurisdiction so vested, or
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:
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> Provided that, where a person makes an application under this subsection, he shall, in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court:
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> Provided further that such application shall be made within ninety days of the decision of the subordinate Court which shall provide a copy of such decision within three days thereof and the High Court shall dispose of such application within three months
>
> (2) The District Court may exercise the powers conferred on the High Court by subsection (1) in respect of any case decided by a Court subordinate to such District Court in which no appeal lies and the amount or value of the subject

> matter whereof does not exceed the limits of the appellate jurisdiction of the District Court.'
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> (3) If any application under subsection (1) in respect of a case within the competence of the District Court has been made either to the High Court or the District Court, no further such application shall be made to either of them.
>
> (4) No proceedings in revision shall be entertained by the High Court against an order made under subsection (2) by the District Court.'

7. The impugned judgment does not state which particular provision of section 115 of the Code was invoked. Leaving aside the question that a particular provision of section 115 was not mentioned we also note that its substance was also not stated. The exercise of revisional powers is circumscribed by section 115 of the Code. Clauses (a) and (b) are attracted when jurisdiction, which is vested in a court, is not exercised or when jurisdiction is not vested in a court yet the court assumes jurisdiction. And, clause (c) is with regard to a court exercising jurisdiction illegally or with material irregularity. Conversely, when the order of a subordinate court is within its jurisdiction and such court has not exercised jurisdiction illegally or with material irregularity revisional jurisdiction cannot be exercised.[3] The power of revision cannot be used by a higher court to substitute its own discretion or authority.[4] A revision also does not lie when the law provides for an appeal. And this Court has held[5] that, '*The words "no appeal lies thereto" are words of general input and there is nothing in the section to confine their operation only to first appeals*.' However, it does not follow that whenever an appeal is not provided for a revision would lie. A revision can only be filed if the order/judgment which has been impugned comes within clauses (a), (b) and/or (c) of subsection (1) of section 115 of the Code. The Privy Council explained when section 115 would apply and when it would not:

> 'Section 115 applies only to cases in which no appeal lies, and, where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High

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[3] *N. S. Venkatagiri Ayyangar v Hindu Religious Endowments Board, Madras,* PLD 1949 Privy Council 26.
[4] *Hadayat Ullah v Murad Ali,* PLD 1972 Supreme Court 69.
[5] *Municipal Committee v Aziz Elahi,* PLD 1970 Supreme Court 506.

> Court to satisfy itself upon three matters (a) That the order of the Subordinate Court is within its jurisdiction (b) That the case is one in which the court ought to exercise jurisdiction and (c) That in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the Subordinate Court upon questions of fact or law.'[6]

The learned counsel representing respondent No. 1 was unable to show that the jurisdiction exercised by the learned Civil Judge, in staying the arbitration proceedings, was not within its jurisdiction or that the Court had exercised its powers illegally or with material irregularity.

8. The impugned judgment had assumed that the said agreement was a valid agreement between the parties and contained an enforceable arbitration clause. However, the appellant had assailed the said agreement and its enforceability challenging its '*validity, effect and existence*' which was not addressed in the impugned judgment. The learned Judge of the High Court assumed revisional jurisdiction in a case which was not within the scope of section 115 of the Code. He also framed two questions (in paragraph 17) which, with respect, did not emanate from the application, reproduced hereunder:

> '17. The vital questions that need to be determined in these proceedings are (1) whether the petitioner, by instituting a suit for declaration etc. against respondent No. 1, had waived his right to initiate arbitration proceedings against respondent No. 1; and (2) whether the sole Arbitrator appointed by the petitioner and respondent No. 1 in the agreement dated 01.05.2015 can be said to be biased on account of him having signed the said agreement as a witness and Arbitrator.'

9. The impugned judgment held (in paragraph 25) that there is no provision in the Arbitration Act, 1940 which debarred the respondent No. 1 from instituting arbitration proceedings once his suit had been dismissed. This, with respect to the learned Judge, is not correct. Under

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[6] *N. S. Venkatagiri Ayyangar v Hindu Religious Endowments Board, Madras,* PLD 1949 Privy Council 26, p. 30.

the Arbitration Act arbitration may be initiated *without intervention of a court* (Chapter II) or *with intervention of a court* (Chapter III) or recourse may be had to *arbitration in suits* (Chapter IV). Section 20(1) of the Arbitration Act states that, '*where any persons have entered into an arbitration agreement* ***before the institution of any suit with respect to the subject-matter of the agreement*** *or any part of it...*' (emphasis added). The respondent No. 1 had instituted a suit with respect to the subject-matter of the said agreement, and having done so he could not, after the dismissal of his suit, resort to arbitration unilaterally and by disregarding the procedure prescribed by section 20 of the Arbitration Act, 1940.

10. The learned Judge of the High Court observed (in paragraph 43 of the impugned judgment) that an application under section 33 of the Arbitration Act should have been filed by the appellant. The application was filed '*under section 31 and all other enabling provision*[s] *of the Arbitration Act, 1940*', and section 31 vests in the court jurisdiction to determine '*the validity, effect or existence*' of '*an arbitration agreement*'. Therefore, with respect, we do not agree with the learned Judge with regard to holding that the application was not maintainable under section 31.

11. Therefore, the impugned judgment of the High Court cannot be sustained for the following reasons. Firstly, in the facts and circumstances of the case, the High Court could not have invoked its powers of revision. Secondly, a revisional Court cannot substitute its own opinion, discretion or authority with that of the Civil Court, which, as in the present case, had jurisdiction and had exercised it; in such a scenario the High Court could only exercise revisional jurisdiction if the subordinate court had committed an illegality or a material irregularity, which was also not the case. Thirdly, the application under section 31 of the Arbitration Act was incorrectly held not maintainable. Fourthly, the two questions formulated for consideration were not such questions which could have been considered and answered in the exercise of the revisional jurisdiction under section 115 of the Code.

12. That since respondent No. 1's counsel relied on the Award of the Arbitrator we may also briefly comment upon it. The Award comprises of seven typed pages; the said agreement is reproduced over four pages; two pages mention the history of the litigation between the parties and the '*reliefs*' given by the Arbitrator cover one page. The Award does not state that a written claim was submitted by the respondent No. 1; that he led evidence, let alone the Arbitrator having discussed it; does not state that the appellant was given an opportunity to reply to the claim; that the appellant was provided an opportunity to lead evidence and allowed him to cross-examine the respondent No. 1 and his witnesses. This is confirmed by the following paragraph from the Award:

> 'I had issued notices to both of the parties for 02.10.2018. On 02.10.2018 Syed Munir Syed along with his counsel Muhammad Shahzaad Siddiqui appeared before me who tendered his wakalatnama but no one has turned up on behalf of Mr. Kamal ud Din Khan till 05:30 PM. As a precaution I have issued to both of the parties one day notice for 03.10.2018. Again, Syed Munir Syed along with his counsel appeared at 04:00 PM and we waited till 05:30 PM but no one turned up. Thereafter, I had no other option except to proceed against Mr. Kamal ud Din Khan Ex-parte.'

The Award is dated 4 October 2018, confirming that it was made in undue haste and in disregard of the requirements of *due process* and *fair trial*, respectively, mandated by Article 4 and Article 10A of the Constitution of the Islamic Republic of Pakistan. Therefore, leaving aside the legal points determined by us above, the Award is also not sustainable.

13. For the reasons mentioned above this appeal is allowed and the impugned judgment is set aside.

Judge

Judge

Islamabad
18.02.2022
*(Farrukh)*

Approved for Reporting