ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.347 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE

Plaintiffs:	**Vertiv Pakistan (Pvt.) Ltd. & Vertiv (Singapore) through Mr. Salman Hamid, Advocate.**
Defendant No.1:	**NTG Pakistan (Pvt) Ltd. Through Mr. Zubair Ahmed, Advocate.**

For hearing of CMA No.4004/2018

Date of Hearing:	**09.05.2018**
Date of Order:	**31.05.2018**

O R D E R

Muhammad Junaid Ghaffar J. This is an Application under Section 34 of the Arbitration Act, 1940 filed on behalf of Defendants No.1 & 2, whereby, it has been prayed to stay instant proceedings and refer the matter to Arbitration. Learned Counsel for the said Defendants has contended that Plaintiff No.1 and Defendant No.1 had a relationship of Partnership pursuant to an Agreement dated 01.10.2014, wherein, Clause-26 provided that if any difference or dispute arises between the parties hereto, the matter shall be referred to Arbitration, and therefore, the issue raised on behalf of the Plaintiff in this matter is covered by the Arbitration Clause, hence listed application be allowed. He submits that Defendants have not participated in the proceedings as well and they are willing to proceed with the matter before the Arbitrator in terms of Agreement, therefore, listed application merits consideration. In support he has relied upon **PLD 1981 SC**

553 ***(Pakistan International Airlines Corporation v. Messrs Pak Saaf Dry Cleaners)***, **PLD 1961 Karachi 700** ***(Messrs Gill & Co. (Karachi) Ltd. V. Messrs Samad Aziz & Co.)*** & **1990 CLC 47** ***(Hyderabad Municipal Corporation v. Messrs Columbia Enterprises)***.

2. On the other hand, learned Counsel for the Plaintiffs has referred to para-3 of the application as well as his counter affidavit and has contended that the Defendants No.1 & 2 have surrendered to the jurisdiction of this Court when they state in the application that *"without prejudice to its right to submit a detailed defence and a proper written statement"* which means that they have entered into the proceedings and wish to defend themselves through a written statement. According to the learned Counsel, in such situation when intention is shown to participate in the proceedings before the Court, the prayer of staying Suit cannot be granted. He has further contended that other Defendants have already filed their reply and therefore this is also one of the grounds not to grant this application. On merits he has contended that mere invoking the Arbitration clause through an application under Section 34 of the Act ibid, does not suffice; as first of all the dispute has to be pointed out and according to him there is no dispute between the parties, which could be referred to Arbitration, whereas, this is only a Suit for recovery of money as the Defendants after being supplied various products have defaulted in payment. Per learned Counsel refusal to pay is not a dispute and he has relied upon **2016 YLR 2322** ***(Shin Satellite Public Company Limited through Attorney v. Messrs KASB Technology Services Limited).***

3. I have heard both the learned Counsel and perused the record. This is a Suit for Declaration, Injunction, Recovery,

Compensation and Damages, whereas, through prayer clause the Plaintiff seeks the Declaration that they are entitled for recovery of an amount of Rs.30,282,896/- (US$: 270,383/- @Rs:112/$) plus Rs.2,708,702/- being the principal amount due from the Defendant No.1 with an additional prayer of injunction, mark-up and compensation. Through listed application the Plaintiff has sought stay of the proceedings pursuant to Clause-26 of the Agreement between the parties. The relevant portion of the said clause reads as under:-

> "if any difference or dispute arises between the parties hereto, touching the true intent of construction or the incident or consequence of this Agreement or of the applicable statutes or anything then or thereafter done, executed, omitted or suffered in pursuance of the Agreement, or any of the applicable statutes, or relating to any breach or alleged breach of any statute, adversely affecting either party hereto, such difference or dispute, may, if the parties hereto agree, be resolved by them amicably and in the absence of an amicable resolution thereof, shall be referred to Arbitration as a condition precedent to any action at law.
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> The Arbitration proceedings shall be conducted in accordance with the Arbitration Act, 1940, or any amendment or re-enactment thereof and the rules made thereunder by two (02) arbitrators, one (01) to be appointed by each party hereto and the arbitrators so appointed shall, before entering upon the reference, appoint an umpire. The arbitrators and the umpire shall be retired judges of the Supreme Court of Pakistan, or falling the availability of such persons as arbitrators and umpire, retired judges of High Court. The decision of the arbitrators or umpire, as the case may be, shall be final and binding. The venue of Arbitration shall be Karachi. The language of the Arbitration shall be English. Each party hereto shall bear its own costs for any Arbitration proceedings, unless specified otherwise in the arbitral award. The parties hereto may seek execution of the arbitral award through a Court of law having competent jurisdiction."

4. Though the above clause as agreed provides that if any difference or dispute arises between the parties hereto, touching the true intent of construction or the incident or consequence of this Agreement or of the applicable statutes or relating to any breach of this Agreement, such difference or dispute may, if the parties agree be resolved by them amicably and in the absence of an amicable resolution thereof, shall be referred to Arbitration as a condition precedent to any action at law. The Defendants No.1 & 2

seek protection under this clause for stay of the proceedings. However, firstly I would like to observe, that if the Defendants No.1 & 2 were of the opinion that there was any dispute between the parties in relation to the Agreement in question; then perhaps they ought to have approached this Court under Section 20 of the Arbitration Act, 1940, for appointment of an Arbitrator and decision thereof. Whereas, this is vice versa in this matter as the Plaintiff has come before this Court seeking recovery of the amount due as alleged and in such Suit listed application has been filed. This appears to be an attempt by the Defendants No.1 & 2 to delay instant proceedings for the reason that it is merely a case of recovery against them and nothing else. This does not appear to be any dispute as to or in relation to the agreement itself. If there was any defective supply (which may be a case of Defendants No.1 & 2), then as stated, they ought to have approached the Court first to show their bonafide as to the defective supply. This has not been done admittedly. In the case reported as ***Messrs Shell Pakistan Ltd. V. Messrs Bhoja Air (Pvt.) Ltd***. (**2007 MLD 1424**) a learned Single Judge of this Court has been pleased to observe as under:-

> "Even otherwise, for deciding an application wider section 34 of the Arbitration Act one of the important consideration that weighs with the Court is the conduct of the defendant as well. It is incumbent on the defendant to press into service the application under section 34 ibid to show that the defendant before filing of the suit was and is ready and willing to arbitrate."

5. It also appears to be a matter of record that various goods and services were supplied and for such purposes on each occasion, purchase orders were placed for such goods and services by the Defendants No.1 & 2 and were accordingly supplied and rendered by the Plaintiff. However, when Invoices were raised, the Defendants No.1 & 2 failed to settle them, whereas, it also appears

to be a matter of fact that against the total outstanding a sum of US $ 50,000/- was paid by Defendants No.1 & 2, hence it can be safely concluded that there is no dispute between the parties except the outstanding amount as above. It is settled law that the parties while seeking various relief(s) under Arbitration Act including an application under Section 20 & 34 of the Act (ibid) must not be allowed to take refuge under procedural advantages to avoid a trial as contemplated within ambit of general law. Though in this matter, the Suit is not entirely based on a Promissory Note, however, there is a series of Judgments of this Court, wherein, it has been held that when the Suit is for recovery of an amount on the basis of a Promissory Note, then no dispute between the parties could be referred to Arbitration in terms of the Agreement. In this matter it purely appears to be a case of simple recovery and as stated the Defendants No.1 & 2 have not come up before the Court seeking enforcement of the Arbitration Agreement and for referral of their dispute to the Arbitrator. Reliance may be placed on the case reported as ***Mst. Suriya Waseem Usmani and 9 others v. L & M International (Pvt.) Ltd. And another)*** **(2002 CLD 624).** Finally reliance may also be placed on the case cited by the learned Counsel for the Plaintiff ***(Shin Satellite Public Company Limited-Supra),*** wherein, Para Nos.50 & 51 it has been observed as under:-

> "50. It is settled law, as discussed in detail hereinabove, that the dispute must be specified in the application under section 34 of Arbitration Act, 1940. The person applying under Section 34 has to satisfy the Court firstly; that there was an agreement to refer, secondly; that the suit related to any matter agreed to be referred to Arbitration and thirdly; that there was a "dispute" between the parties which was covered by the Arbitration clause in the agreement, and unless this was shown, the suit could not be stayed. The suit for recovery of money filed on the basis of an agreement which contains an Arbitration clause, on account of mere fact that the defendant is not ready and willing to pay the amount owed by him to the plaintiff under such agreement does not mean that a dispute has arisen between the parties, which should be referred to Arbitration for its resolution.

> 51. Whenever an application is made under section 34 of the Arbitration Act, 1940 for stay of the proceedings in suit and the defendant fails to specifically state the dispute between the parties, however, only refers to Arbitration clause in the agreement between the parties, this omission alone is sufficient to dismiss the application for stay of suit."

6. In view of the above facts and circumstances of this case, I am of the view that no case for indulgence is made for staying the proceedings in terms of Section 34 of the Arbitration Act. Accordingly, the listed application (CMA No.4004/2018) is hereby dismissed.

7. All other listed applications are adjourned.

Dated: 31.05.2018

Judge