

## IN THE HIGH COURT OF SINDH AT KARACHI

Suit 1044 of 2019 : China Petroleum Pipeline Bureau vs. BST Services, Business Supply & Technology Services (Private) Limited

For the Plaintiff : Mr. Abdul Qayyum Abbasi Advocate

For the Defendant : Mr. Basil Nabi Malik Advocate

Date of Hearing : 28.01.2020

Date of Announcement : 28.01.2020

### JUDGMENT

**Agha Faisal, J.** This suit has been filed under Section 20 of the Arbitration Act, 1940, (“Act”) whereby the plaintiff is seeking a reference to arbitration, in enforcement of the arbitration clause in contracts executed *inter se*.

2. Mr. Abdul Qayyum Abbasi, Advocate, argued on behalf of the plaintiff and submitted that two contracts were executed between the parties hereto, dated 02.10.2016 and 14.03.2017, respectively (“Contracts”). It was demonstrated from the record that each of the Contracts contained an arbitration clause, which stipulates that in case of any dispute, relating to the said Contracts, the same shall be referred to the arbitration.

Learned counsel submitted that the plaintiff had raised invoices for contractual dues, and the same were pointed out from the court file, however, they remained unpaid, notwithstanding that the defendant had specifically admitted its liability and the quantification thereof.

Learned counsel also referred to a completion certificate dated 19.09.2017, demonstrating that the plaintiff had performed its role in the Contracts entirely and to the satisfaction of the defendant.

Learned counsel further demonstrated from the record that an undertaking was issued by the defendant, wherein it had admitted the contractual dues, however, undertook to pay the same at later date due to paucity of funds.

Learned counsel argued that notwithstanding the foregoing, the defendant failed to honour its obligations and, therefore, the plaintiff sought to settle the matter by negotiation, as demonstrated from the letter dated 28.03.2019. Learned counsel submitted that the aforesaid narrative demonstrated that the plaintiff has performed its role in the Contracts and despite the contractual dues having been admitted by the defendant the same had not been paid thereto.

In conclusion it was articulated that the requirements for invocation of arbitration have already been completed, hence, it is just and proper to refer the matter to the arbitration in view of the Section 20 of the Act.

3. Mr. Basil Nabi Malik, Advocate for the defendant submitted that no case for reference of the matter to arbitration was made out. Learned counsel bulwarked his submission on the rationale that the Sui Southern Gas Company Limited (“SSGCL”) is a proper party to the present proceedings (and any arbitration proceedings) and in such regard an application to implead them as a defendant had been made<sup>1</sup>; the documents relied upon by the plaintiff were denied; the dues referred to supra are contingent upon payment to the defendant by the SSGCL, hence, the present suit is premature; the defendant is also in litigation with SSGCL in respect of the matters related to the present controversy, therefore, initiation of parallel proceedings is unwarranted; that clause 4(h) of the Contracts contained a dispute resolution mechanism and in the presence of a specified mode resort to arbitration was in any event unmerited<sup>2</sup>; the arbitration clause in itself was vague and hence unenforceable.

4. This court has heard the respective learned counsel and has considered the law, documentation and authority to which its surveillance was solicited. The question before this court is

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<sup>1</sup> *Federation of Pakistan vs. Ch. Fazal Muhammad*, reported as 2005 YLR 2896.

<sup>2</sup> *Mehdi K. Lavji vs. Province of Sindh & Others*, reported as 2010 MLD 561.

regarding the forum for mitigation of the dispute between the parties *inter se*, hence, it is endeavoured to eschew any comment upon the merits of the respective claims<sup>3</sup>.

At the very onset it is imperative to record that the execution of the Contracts and the existence of the arbitration clause therein is an admitted position by both parties. Therefore, the question before this Court is the determination as to whether any justifiable grounds have been advanced by the defendant to preclude a reference to arbitration, as sought by the plaintiff.

5. It is apparent that the Contracts were executed exclusively between the plaintiff and the defendant herein, hence, the rights and obligations contained thereunder are *prima facie* reciprocal. SSGCL is not a party to the aforementioned Contracts, hence, cannot be compelled to become party to any arbitration proceedings between the parties herein. The defendant has preferred an application under Order 1 Rule 10 CPC to implead SSGCL as a party herein, for the reasons elaborated in the affidavit accompanied the same. It is observed that the grounds invoked therein are unsubstantiated; SSGCL has no privity with the Contracts; no justification has been advanced to demonstrate as to how SSGCL could be forced to become party to an arbitration when it is an admitted position that SSGCL has never consented in respect thereof, therefore, the said application, being CMA 214 of 2020, is hereby dismissed.

6. It has been argued that the defendant has a nexus with SSGCL and the contracts *inter se* are the subject matter of litigation. It was also averred that since the allegedly supervening contracts are under litigation, therefore, purportedly ancillary contracts could not be looked into independently.

This contention cannot be sustained as it is an admitted fact that the plaintiff is not party to any litigation that may exist between the defendant and SSGCL. It is also apparent that even after institution of the present suit no effort was made by the defendant to seek the impleading of the plaintiff in the allegedly ancillary proceedings. It is thus observed that the defendant has been unable

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<sup>3</sup> *Agro Trade (Private) Limited & Another vs. Karachi Port Trust & Others* reported as 2018 CLC 1140.

to dispel the view that any purported relationship between the defendant and the SSGCL is extraneous to the present determination.

However, the question of contingency of obligations may be a defence available to the present defendant, on merit, and it may exercise the right of said defence in the appropriate proceedings uninfluenced by any observation made herein.

7. The arbitration clauses in the Contracts are similar in nature and state that the parties shall seek to settle any dispute amicably through negotiation and upon failure thereof, submit the matter to the arbitration. The record before this court demonstrates that the plaintiff did, in fact, attempt to seek resolution of the controversy through negotiation and upon failure in such regard sought enforcement of the arbitration clause. It is well settled law that the arbitration clause is to be considered independently as the sole determination to be made is with respect to the forum for the resolution of disputes *inter se* upon the terms contained therein. The relevant clause is *prima facie* devoid of ambiguity and the objection in respect thereof, stipulating that it was unenforceable on account of ambiguity, cannot be sustained.

8. Learned counsel for the defendant had argued that in presence of specific dispute resolution mechanism provided in the Contracts, resort to arbitration was unmerited and in such regard had relied upon clause 4(h) of the Contracts, wherein it is stated that in case of dispute on any quantity/item, during quantity verification, the remaining verified quantities/amount shall be paid while the disputed quantity/item shall be dealt in accordance with the relevant clause specified elsewhere.

This clause pertains to the dispute with respect to the quantities and items during the quantity verification process. The clause under reference refers to mitigation of specified issues during the tenancy of the Contract and has no nexus with the present facts and circumstances, wherein it is demonstrated that the plaintiff has fulfilled its role in respect of the Contracts. The present dispute is confined to the recovery of contractual dues, which according to the

learned counsel for the plaintiff, are admittedly due and payable by the defendant. In such regard, this objection of the defendant is not sustainable and authority cited is distinguishable in the present facts and circumstances.

9. In view of the foregoing it appears that there exists an arbitration agreement exclusively between the parties herein<sup>4</sup> and proceedings have been commenced by a party to the arbitration agreement<sup>5</sup>; while there may be a dispute upon the merits of the claim, however, there is no dispute with regard to the existence of an arbitration clause / agreement; there exists a dispute<sup>6</sup>, *prima facie*, of a nature in respect whereof the arbitration agreement applies; admittedly no proceedings under Chapter II of the Act have been instituted; there is no cavil to the application having been preferred within limitation and / or to the jurisdiction of this court to determine this matter; notice hereof was duly received by the defendant and no sufficient cause has been shown to preclude a reference to arbitration<sup>7</sup>.

Therefore, this suit (application under Section 20 of the Act) is allowed and this matter is hereby referred to the arbitration. Mr. Justice (retired) Shahid Anwar Bajwa is appointed as arbitrator, upon a fee to be settled by the learned arbitrator, to determine the dispute between the parties in accordance with the law, uninfluenced by any observation herein contained.

JUDGE

Khuhro/PA

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<sup>4</sup> Per *Saleem Akhtar J.* in *Commodities Trading International Corporation vs. Trading Corporation of Pakistan & Another* reported as 1987 CLC 2063.

<sup>5</sup> Per *Shabbir Ahmed J.* in *Lithuanian Airlines vs. Bhoja Airlines (Private) Limited* reported as 2004 CLC 544.

<sup>6</sup> Per *Shaikh Azmat Saeed J.* in *Industrial Fabrication Company vs. Pak American Fertilizer Limited* reported as PLD 2015 Supreme Court 154.

<sup>7</sup> Per *Muhammad Ali Mazhar J.* in *Sadat Business Group Limited vs. Federation of Pakistan & Another* reported as 2013 CLD 1451.