

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

**Civil Revision No. S – 95 of 2010**

Messer's Fauji Fertilizer Co. Ltd. & others.....Applicants.  
Versus  
Haji Arbab Ali (deceased) through his LRs and others.....Respondents.

Date of Hearing: **28-02-2022**

Date of Judgment: **28-02-2022**

Mr. Sarfraz Ali Akhund, Advocate for the Applicants.  
*Nemo* for the Respondents.

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** – Through this Civil Revision, the Applicants have impugned Judgment dated 29.01.2010, passed by Additional District Judge-II, Khairpur in Civil Appeal No.98 of 2006 (**Haji Arbab Ali through his Legal Heirs v. Messer's Fauji Fertilizer Co. Ltd. and others**), whereby, while partly allowing the Appeal, Judgment dated 13.11.2006, passed by Senior Civil Judge-1, Khairpur in Civil Suit No.124 of 2006 (Old No.185 of 1987) has been modified to the extent that finding in respect of Issue No.9 has been given in favour of the Respondents, whereby the matter has been referred for arbitration.

**2.** Learned Counsel for the Applicants has contended that the said finding of the Appellate Court has come from nowhere as it was never the case of Respondent No.1 that there was an agreement for arbitration, whereas, it was never pressed upon. Per learned Counsel, Respondent No.1 had filed a Civil Suit under Section 9 CPC, which has been decided by the Trial Court on merits; whereas, the Appellate Court has also come to the conclusion that on merits no case was made out by Respondent No.1, and therefore, in that case finding in respect of Issue No.9 for referral of the matter for arbitration is uncalled for. In support of his contention, he has relied upon the cases of *Government of NWFP and others v. Mohibullah* (**1990 CLC 1703**) and *Naseer and others v. Muhammad Hanif* (**2004 YLR 2154**).

**3.** I have heard learned Counsel for the Applicants; whereas, nobody has turned up on behalf of the Respondents despite being served. It

further appears that the Respondent No.1 had filed Civil Revision No.100 of 2010 impugning the same Judgments of the two Courts below on merits, but that was not pursued diligently; hence, was dismissed for Non-Prosecution by way of order dated 22.11.2021.

**4.** It appears that the Respondent No.1 had filed a Suit for declaration settlement of accounts, damages and injunction, which was dismissed by the Trial Court on merits and was maintained by the Appellate Court. However, in respect of issue No.9 i.e. ***Whether the plaintiff is entitled to the relief claimed?*** the Appellate Court has been pleased to hold as under:

“In view of the reasons given to the preceding issues, I am of the considered view that the appellant/plaintiff is entitled to the relief that the respondents / defendants shall refer to the arbitration as already agreed between the parties and the arbitrator shall decide all the questions related to the transaction of business and account and the issue No.9 is replied in accordingly”.

**5.** Perusal of the aforesaid finding of the Appellate Court reflects that it is not only perverse; but against the facts as well as law inasmuch as the Respondent No.1 had never pleaded that there was some Arbitration clause / Agreement between the parties; nor was pressed upon. If that be so, then for such purposes, the Respondent No.1 was required to file an Application under Section 20<sup>1</sup> of the Arbitration Act, 1940. This was never done or pleaded on behalf of Respondent No.1. At the same time, the Applicants also never filed an Application under Section 34 (*ibid*) but filed a written statement and contested the matter on merits. On such basis, the Trial Court proceeded on merits of the case and finally came to the conclusion that the Respondent No.1 had failed to make out a case for

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<sup>1</sup> **20. Application to file in Court arbitration agreement.** \_\_ (1) 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, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(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.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

grant of the relief so prayed for. Once the Court had taken cognizance and decided the matter on merits, whereas, none of the parties had pleaded any safeguard or shelter under the Arbitration Agreement; then the Suit was simplicitor a Suit under Section 9 CPC and the Appellate Court was not required to enter into this issue for referral of the matter for Arbitration. The cases relied upon by Counsel for the Applicants reported as *Government of NWFP and others v. Mohibullah* **(1990 CLC 1703)** and *Naseer and others v. Muhammad Hanif* **(2004 YLR 2154)** also support such contention.

**6.** In view of hereinabove facts and circumstances of this Court, this Civil Revision is allowed to the extent as prayed for and the finding of the Appellate Court in its Judgment dated 29.01.2010 in respect of issue No.9 is hereby set aside.

**JUDGE**

Ahmad