IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A. 211 of 2018

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Osman Ali Hadi

[Pakistan State Oil Company Limited (PSO) V. M/s. Gillani (Pvt. Ltd. & another]

Date of hearing	:	06.02.2025
Date of decision	:	06.02.2025
Appellant	:	Through Mr. Ghulam Muhammad Dars, Advocate.
Respondent Nos.2	:	Through M/s. Aqib Hussain and Abdur Razzak, Advocates.

JUDGMENT

Muhammad Osman Ali Hadi, J: The Appellant has filed the instant appeal against Judgment and Decree (dated 26.04.2018 and 10.05.2018) passed in Suit No.1725 of 2000 (**"the Impugned Judgement"**), whereby the Appellants' Suit was dismissed.

2. The prelude to the instant proceedings are that the Appellant entered into an agreement with Respondent No.1 for sub-leasing a Plot (No. 44) in Karachi measuring approx. 19,338 square yards, for a period of 25 years commencing from 31.07.1990 (**"the Agreement"**), for the Appellant to *inter alia* use for constructing tank terminal, public bonded warehouse for hoarding and storing containers etc. The said Plot was previously allotted to Respondent No. 1 by Respondent No.2 vide Board Resolution No. 1020 dated 12.05.1990. When formalities of signing the Agreement and receiving NOC's between all parties were concluded, the Appellant advanced a sum of Rs.3,677,000/- (Rupees Three Million Six Hundred Seventy Seven Thousand Only) to Respondent No. 1 as security deposit, per the Agreement. Subsequently, without getting into specific merits of the Appellants' grievances for the sake of brevity (nor is the same before us), the Appellant claimed that Respondent No.1 committed serious default and failed to fulfill its obligations under the Agreement, pursuant to which they issued Respondent No. 1 a Legal Notice dated 29.01.2000 seeking refund of payments advanced by them. After to-ing and fro-ing, Respondent No.1 despite initially agreeing to return the Appellants' funds,

failed to do so, pursuant to which the Appellant filed recovery Suit No.1725 of 2000 before the Hon'ble High Court of Sindh at Karachi (**"the Trial Court"**), impleading both the instant Respondents as Defendants, in which the Appellant claimed return of Rs. 25,484,524.96/- as monies allegedly paid by them to Respondent No. 1.

3. That upon commencement of the Suit, notices were served upon the Respondents but they neither appeared nor filed any response. Respondent No.2 was debarred from filing their Written Statement vide order dated 07.08.2001. However, Respondent No. 2 subsequently did furnish Written Statement on 28.03.2002 which was taken on file. It is relevant to mention Respondent No.1 remained away from the proceedings, but later approached the Honourable Court and filed an application u/s 34 of the Arbitration Act, 1940 (**"the Act"**), whereby they sought stay of the Suit proceedings and further sought the matter to be referred to arbitration. Their application was allowed vide order dated 25.11.2002, and the Trial Court referred the matter to arbitration. Respondent No. 1 nominated Mr. S.M. Baqar as their proposed arbitrator, and the Appellant sought time to intimate a name for their proposed arbitrator. There was a delay in nomination by the Appellant for appointment of their arbitrator, however, the same was condoned by the Learned Court vide order dated 27.10.2003, after which, the Appellant then nominated Mr. Ejaz Ahmed Khan to act as arbitrator on its behalf. Subsequently it transpired Respondent No.1 had failed to provide requisite fee payment to its nominated arbitrator, namely, Mr. S.M. Baqar, due to which he refused to act as an arbitrator on its behalf, which Mr. Baqar conveyed to the Court vide letter dated 13.03.2004. The arbitration proceedings never commenced any further.

4. The matter appears to have remained stagnant until 09.04.2007 when the Appellant filed an application under section 151 Code of Civil Procedure, 1908 (**"CPC"**), in the Suit before the Trial Court (being CMA No. 2885 / 2007), seeking reinstatement / restoration of the Suit, which was allowed by the Trial Court vide order dated 15.09.2008 and the arbitration agreement was superseded and the Suit restored.

5. It is the contention of the Appellant that after much delay and since Respondent No.1 repeatedly remained evasive and did not take any steps towards the arbitration proceedings, the Appellant was left to no option but to file the mentioned application (i.e. CMA No. 2885 / 2007) seeking reinstatement/restoration of the Suit. It is pertinent to mention Respondent No.

1 willfully remained absent and did not file any counter-affidavit to the said application, despite being aware of the proceedings, as can be evidenced from Statement dated 29.04.2008 filed by its Counsel (at pg. 231 of the file) before the Trial Court, in which the Counsel states though they were engaged by Respondent No. 1 in the Suit, but they have not received any instructions and as such requested the Court to send all further notices and summons directly to Respondent No. 1. That pursuant to the said order whereby the Suit was restored, Respondent No.1 was sent further letter/notice, but they continued to remain evasive and still failed to appear or file any response and/or Written Statement, and were accordingly debarred from filing the same vide order of the Court dated 15.01.2010. Subsequently issues were framed and evidence was recorded through an appointed Commissioner (namely Mr. Abdul Shakoor Dhelvi Advocate). The Appellant and Respondent No. 2 both produced one witness each, for examination. Once the evidence stage was concluded and the Commissioner submitted their report dated 07.10.2015 before the Trial Court, the matter was fixed for Final Arguments.

6. When the matter was finally taken up on 15.03.2018 by the Trial Court, the learned Single Judge passed the Impugned Judgement & Decree dated 26.04.2018 & 10.05.2018 dismissing the Suit, primarily on the basis that earlier order dated 15.09.2008 in CMA No.2885 of 2007 passed by the Trial Court was void. It is from these facts and circumstances out of which the instant Appeal arises.

7. Learned Counsel for the Appellant has premised his arguments on the contention the Impugned Judgement was incorrect in holding that under the Arbitration Act, 1940, (**"the Act"**) the previous order of the Trial Court dated 15.09.2008 was void and of no effect. He has further contended the learned Single Judge has erroneously applied section 8(1)(c) of the Act, whereas as per the Counsel for the Appellant, section 8(1)(b) of the Act was applicable. Counsel for the Appellant has also vehemently contended that the Impugned Judgment is incorrect in holding the Trial Court did not have jurisdiction to hear the matter once it was referred to arbitration, and incorrect in its finding that the Trial Court becomes *corum non judice* under section 32 of the Act. Learned Counsel submits the learned Single Judge has also erroneously misinterpreted the provisions of section 32 of the Act. He has further averred that the learned Single Judge has erred in holding that mentioning a wrong provision of law when filing their Application (i.e. CMA No. 2885 / 2007 under section 151 C.P.C.) was fatal to the Suit. Learned Counsel for the Appellant

submits that it is well settled principle that mentioning of a wrong section of law in the title of an application does not merit dismissal of the matter. He has lastly contended the learned Single Judge has erred in holding there was *mala fide* on the part of the Appellant, and he submits that the Trial Court had the power to either fill a vacancy in the arbitration proceedings or to supersede the same, and the Trial Court opted for the latter (which power was invoked when passing order dated 15.09.2008). In support of his submissions he has relied upon the following case-laws: AIR 1957 Patna 712; AIR1956 Rajhastan 129 & AIR 1966 Madhya Pradesh 177; AIR 1959 Bombay 549; AIR 1963 Andhra Pradesh 28; AIR 1958 Madras 420; AIR 1978 Madras 91 & AIR 1938 Madras 205.

8. Respondent No. 1 has remained absent from the instant proceedings, and Counsel for Respondent No. 2 has not furnished any submissions.

9. We have heard the Counsels in the matter and have gone through the Impugned Judgement and record of the case. The Impugned Judgment in essence has held that the substantial proceedings concluded before the Trial Court were invalid, since the matter was previously referred to arbitration vide Court order dated 25.11.2002 (**"referral date"**), on an application filed by Respondent No. 1 under section 34 of the Arbitration Act, 1940 (**"the Act"**), and hence the Trial Court ceased to have jurisdiction in hearing / adjudicating the matter after the referral date. The Impugned Judgement further held that order dated 15.09.2008 allowing CMA No. 2885/2007 filed by the Appellant under section 151 C.P.C. was incorrect as the said application was filed under a wrong provision of law, and the Trial Court (as per the learned Single Judge) did not have jurisdiction to pass such an order for restoration. The Impugned Judgment further holds the Appellant was attempting to frustrate the arbitration proceedings by continuous delay. The learned Single Judge cited Sections 25 and 8 of the Act and provided an interpretation stating that an application under Section 25 of the Act was to be invoked in order for the Court to supersede the arbitration agreement, which as per the learned Single Judge was not done. The Impugned Judgement holds that the application under section 151 C.P.C. was filed instead, which according to the learned Single Judge was under an incorrect provision of law, and therefore could not have been allowed, and order dated 15.09.2008 passed on the said application was void. The learned Single Judge has also held the Appellant was duty bound to follow Section 8 (c) of the Act, which as per the Impugned Judgment, the Appellant failed to do. The learned Single Judge held (in Para 5 of the Impugned Judgment) that all the

proceedings in the Trial Court post 25.11.2002 (the referral date) were *coram non-judice*, as the learned Single Judge has stated that once the section 34 application under the Act was allowed, the Suit was stayed 'forever', and the Court cannot intervene in the proceedings. The learned Single Judge has further opined that the Appellant (Plaintiff in the Suit) was bound to file a Suit under Section 20 of the Arbitration Act, 1940 but instead it opted to file a Suit under Section 9 of the C.P.C., 1908, which as per the learned Single Judge was contrary to its statutory obligations. The learned Single Judge also concluded that the Suit was barred under section 32 of the Act.

10. We respectfully tend to disagree with the findings in the Impugned Judgment based on the following reasons: The first contention in the Impugned Judgement that we will address is whether the learned Trial Court was correct in holding that the jurisdiction of the Trial Court was ousted on 25.11.2002 when the order referring the matter to arbitration was passed? We find this to be entirely incorrect. It is trite law that jurisdiction of a Civil Court cannot be ousted, unless expressly done so by statute, which is not the case under the Arbitration Act, 1940. In fact and to the contrary, various provisions of the Act such as sections 8, 9, 11, 12, 15, 17, 18, 19, 20, 23, 24, 25, 26-A, 28, 29, 31, 34, 36, 38, 39, 41, 43 & 44 all relate to powers specifically given to the Court by the said Act, and therefore it cannot in any manner be held that powers of the Trial / Civil Court have been ousted. We find this line of reasoning in the Impugned Judgment to be without merit. Furthermore, this view has even been bolstered by the Hon'ble Supreme Court of Pakistan, for which *Director Housing, A.G's Branch, Rawalpindi V. M/s. Makhdum Consultants Engineers & Architect*s (1997 SCMR 988) may be referred, where it was held that existence of an arbitration agreement between the parties does not cease jurisdiction of the Court. In the said Judgment, the Apex Court (in Para 7) has observed that there can also be no cavil with the proposition that the existence of an agreement between the parties to refer for a decision any dispute between them to the arbitrator neither ousts the jurisdiction of ordinary Court in the matter nor the party pleading existence of an arbitration agreement has an absolute right to obtain stay of legal proceedings filed, ignoring the arbitration agreement. The Court in such cases has a discretion either to stay or refuse to stay the legal proceedings. However, in exercise of this discretion the Court is always guided by the paramount consideration that a party is bound by the terms of a lawful agreement which it enters into with another party, and it cannot be relieved lightly from the obligation arising under the agreement except in very exceptional circumstances which make the enforcement of the

terms of agreement unlawful or highly inequitable. Therefore, where a party enters into an agreement with another party to refer any future dispute arising between them under the agreement to the arbitration for its resolution, the Court will not generally allow continuation of any legal proceeding initiated by a party to such an agreement, ignoring the arbitration agreement, and direct the party to have recourse to the agreed forum for decision of the dispute. The Apex Court observed "However, where the Court has material before it to reach a definite conclusion that the private forum selected by the parties for resolution of their dispute is not likely to decide the dispute fairly and justly, it may allow continuation of proceedings initiated in Court notwithstanding the agreement between the parties to refer the dispute to arbitration of a named arbitrator" (*emphasis supplied*).

11. This view was also previously taken by Mr. Saleem Akhtar, J. in the case of *Muhammad Hanif V. Eckhard and Co. Marine GMBH & 2 others* (PLD 1983 Karachi 613); as well as in 2002 CLD 671, and by the Peshawar High Court in 2009 MLD 1396, which have all held that an arbitration clause in any agreement cannot oust jurisdiction of the Court. In the case of *Wapda V. Naeem Trading Co.* (1982 CLC 353) (in Para 8) the following was held:

> "8. The stand taken by the learned is untenable. When the authority of an arbitrator has been revoked with the leave of the Court or he is otherwise removed, the Court has to proceed under Section 12 of the Act and it may either supersede the arbitration agreement or appoint a sole arbitrator in place of the person displaced. There is no fetter on the powers of the Court to abide by the provisions of arbitration agreement and leave the appointment of an arbitrator to the authority named therein."

12. There is an abundance of case law holding that jurisdiction of a civil court cannot generally be barred, as the civil court is competent to try all suits, for which reliance is hereby placed on the case of *Abbasia Cooperative Bank* (reported as PLD 1997 SC 3).

13. The matter in the Suit was referred to arbitration vide an application filed by Respondent No. 1 under section 34 of the Arbitration Act, 1940, which is reproduced below:

> "34. Power to stay legal proceedings where there is an arbitration agreement. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in

> accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority may make an order staying the proceedings" (*emphasis supplied*).

14. Section 34 of the Act shows that an applicant for arbitration (who was Respondent No.1 in the Suit) must remain ready and willing to properly partake in the arbitration proceedings. The record clearly demonstrates that Respondent No. 1 did not remain ready nor willing to pursue arbitration proceedings, as can be evidenced by its failing to pay its own nominated arbitrator his fees. A further perusal of the said section shows use of the word "may" when deciding whether or not to stay proceedings before the court, showing that it is not a mandatory provision but discretion of the same remains with the Court. This can be compared to section of the 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (**"the 2011 Act"**) which reads:

> "4. Enforcement of arbitration agreements. (1) A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter.
> (2) On an application under sub-section (1), the court **shall** refer this parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed" (*emphasis supplied*).

which shows that under the 2011 Act there is a mandatory requirement to refer the matter to arbitration by use of the word "shall", whereas under section 34 of 1940 Act the word "may" has been used, showing a discretionary option.

15. The learned Single Judge in the Impugned Judgement has not provided any cogent legal foundations for his observations in this regard, and hence we find the same to be devoid of merit for reasons above-stated.

16. The Impugned Judgment further held the Suit to be barred under provisions of section 32 of the 1940 Act. We again hold this finding to be the misinterpretation of section 32 of the Act, as the said section only provides a bar if someone files a suit contesting the arbitration agreement or award itself, which was not done in the said Suit (as that was a Suit for

recovery), and therefore this finding of the learned Single Judge in the Impugned Judgement is misconceived and resisted.

17. Next, we turn to a major crux of the reasoning provided in the Impugned Judgment, which is based upon the order dated 15.09.2008 passed on CMA No.2885/2007, vide which the Trial Court restored / revived the legal proceedings. The learned Single Judge in the Impugned Judgement, *post-facto*, has held the said order dated 15.09.2008 to be void. The Impugned Judgement has based much of its rationale for dismissing the Suit on this ground, with which we cannot find ourselves in agreement, as the learned trial Judge has re-agitated a previously disposed / decided application. The Trial Court, at the time of Final Arguments, by holding this previous order (dated 15.09.2008 on CMA No. 2885/2007 passed by the Trial Court itself) to be void, in our opinion is entirely contrary to law and due process. By doing so, the learned Single Judge when passing the Impugned Judgement has in essence acted as an appellate court over its own previous order, which of course is impermissible in law. The said order dated 15.09.2008 whereby the Court superseded the arbitration agreement, was an appealable order under section 39 of the Arbitration Act, 1940, yet the Respondents did not opt to appeal against the same, and hence the said order had attained finality. It is an established principle of law that a court cannot sit in appeal over its own order, as was done in the Impugned Judgement.

18. That another facet shows no counter-affidavit / reply was filed by Respondent No. 1 against the said application for restoration of the Suit, and hence it is to be taken that the Respondents did not oppose the application, and in essence had acquiesced to the same.

19. As per directions of the Court, the Suit proceeded and reached the Final Arguments stage, at which point the Impugned Judgment was passed dismissing the Suit on, *inter alia*, the basis that the Court's own previous order dated 15.09.2008 was void (despite the said order attaining finality). This has caused undue hardship to the Appellant, as they are left remediless at such a belated stage through no fault of their own. The Appellant was merely following orders of the Court, for which it cannot be penalized. The fundamental legal doctrine "*actus curiae neminem gravabit*" meaning an act of court should prejudice no man would also be attracted in the circumstances (for which reliance can be placed on *Abid*

Jan V. Ministry of Defence 2023 SCMR 1451), and if the Impugned Judgement were to be upheld, the Appellant, through no fault of its own, would be unjustly left without any remedy by following orders of the Court, which cannot be ignored. This aspect of the Impugned Judgement is therefore also found to be contrary to settled law, and these findings by the learned Single Judge in the Impugned Judgement in this regard are void, and accordingly are also repelled.

20. The next observations in the Impugned Judgment are that the learned Single Judge repeatedly stated that delay in the arbitration and other proceedings were caused by the Appellant, but the Impugned Judgement has completely failed in addressing the issue that Respondent No.1's behavior towards the arbitration proceedings and afterwards showed a complete disregard for Judicial Authority and process of law. Respondent No.1 has admittedly, including by a Statement filed by their own Counsel, willfully chosen not to appear before any of the forums, and had attempted to block the entire process by first having the matter referred to arbitration and then not proceeding with the arbitration (by not paying the arbitrator's fee), and then by not appearing before the Trial Court either, which we find to be abuse of process. This remains a fundamental issue which was unaddressed by the learned Single Judge. If such behavior is to be condoned, the same would lead to complete procedural chaos and impropriety. Any party to an arbitration agreement would simply have to file an application to refer the matter to arbitration, and not proceed any further. If the reasoning relied upon in the Impugned Judgement was followed, the Court would not have any further jurisdiction to adjudicate upon the matter, effectively leaving the dispute in limbo forever, and permanently preventing a party from obtaining any relief or remedy. This view cannot be considered sustainable. Even a reading of section 34 of the Act (*Supra*) would show that the matter is to be referred to arbitrator only if the applicant remains ready and willing to do all things necessary to ensure a proper arbitration process is conducted, which throughout had clearly not been followed by Respondent No.1.

21. That under section 12(2) read with section 25 of the Arbitration Act, 1940, along with observing the conduct of Respondent No.1 at the time, we find that the Trial Court had complete authority to pass earlier order dated 15.09.2008 on CMA No. 2885/2007, which was never opposed or appealed by the Respondents, and hence had attained finality.

The learned Single Judge in the Impugned Judgment could not sit as an Appellate Court over the said order and reverse the same, particularly at such time of Final Arguments. The inherent powers of the Court cannot be curtailed, as in our opinion, has erroneously been done in the Impugned Judgment. Even under section 41 of the Arbitration Act, 1940, the Court retains its powers under the Code of Civil Procedure, 1908, which would also provide the Court with inherent powers, as was executed by them when superseding the arbitration proceedings. It is further observed the proposed arbitration proceedings had not even commenced, a pertinent fact which remained undeliberated in the Impugned Judgement. Additionally, a perusal of section 30(b) of the Act would show that an award which has been made after the issuance of a supersession order passed by the Court would be liable to be set-aside, meaning that after order dated 15.09.2008 was passed by Trial Court, by virtue of law, an award could not have been made by an arbitrator even if the matter had been referred back and (theoretically) decided in arbitration. Therefore and on these grounds, we find the learned Single Judge's insistence on the matter only being able to be decided through arbitration proceedings, to legally be on weak footing, and we cannot sustain the same.

22. We also observe the finding in the Impugned Order that a grave illegality was committed when CMA No.2885/2007 was filed by the Appellant under a wrong the provision of law, i.e. by under section 151 C.P.C. as opposed to following section 8 of the 1940 Act (per the learned Single Judge), and therefore the said application could not be entertained by the Court (per the learned Single Judge), to be completely devoid of legal merit. As already mentioned (*supra*), the Trial Court itself retains its inherent powers to pass appropriate orders in the interest of justice, which they exercised in the aforementioned CMA No. 2885/2007. Furthermore, technicalities cannot thwart justice. Our view is fortified by a plethora of case law holding that filing an application under a wrong provision of law has no bearing on the outcome (subject to the Court otherwise having jurisdiction to decide the same), for which reference can be made to PLD 2018 SC 40; PLD 2002 SC 1111; 1994 SCMR 1555; 1982 SCMR 494, Hence was also find this observation in the Impugned Judgment to be baseless and without merit.

23. In light of the foregoing reasons, we hereby allow this Appeal and set aside the Impugned Judgment and Decree dated 26.04.2018 and 16.05.2018, and remand the matter back to the Trial Court to be heard at the stage of Final Arguments where it can be decided on its own merits.

The Appeal stands allowed in the above terms. The above are the reasons for our short order dated 06.02.2025.

JUDGE

JUDGE

M. Khan