

ORDER SHEET  
HIGH COURT OF SINDH, KARACHI

Suit No.1056 of 2010

Date

Order with signature of Judge

For hearing of CMA No.5758/12 (u/s 34 of the Arbitration Act)

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BOC Pakistan Limited.....Plaintiff

Versus

National Gases (Pvt.) Limited.....Defendant

Date of hearing 11.12.2012

Mr. Atif Choudhry, Advocate for the plaintiff.

Mr. Abdul Qadir, Advocate for the defendant.

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**Muhammad Ali Mazhar, J:** This order will dispose of CMA No.5758/2012 filed by the defendant under Section 34 of the Arbitration Act, 1940.

2. The brief facts of the case are that the plaintiff has filed this suit under Order XXXVII Rule 1 & 2 CPC for recovery of Rs.65,76,233/-. It is averred in the plaint that the plaintiff is a public limited company, engaged in the business of manufacturing, selling and distribution of oxygen, nitrogen, dissolve acetylene and industrial and medical gases etc. It is further contended that the gases supplied by the plaintiff to its customers are of a peculiar nature. The plaintiff while entering into agreements for supply of gases with its customers, also provides certain machinery to the customers as and when required till expiry of contract so that the gases supplied by the plaintiff can be managed and kept in a secured manner.

3. The plaintiff entered into four agreements with the defendant for supply of liquid oxygen, liquid nitrogen, liquid carbon dioxide and liquid argon. The copies of the agreements are attached

with the plaint. The plaintiff in terms of agreements, continued to supply gases without any fail. The defendant was making payments against the supplies but in March, 2009, the defendant stopped the payments. However, on assurance of the directors of the defendant, the plaintiff continued its supplies even though no payments were being made. The plaintiff also referred to Clause 5.1 of General Terms and Conditions of the agreement under which the defendant was under obligation to make advance payments.

4. On demands of the plaintiff for outstanding dues/amount, the defendant during the period of March, 2009 to July, 2009, issued ten post dated cheques starting from September, 2009 onwards for a sum of Rs.65,76,233/- on the assurance that as and when the cheques will be presented on its due date, the same will be honoured and encashed. In Paragraph No.4 of the plaint, the plaintiff has mentioned the cheques numbers, dates and amount. The case of the plaintiff is that when aforesaid cheques were presented on its due dates, the cheques were dishonoured due to non-availability of the funds for which besides filing this suit in this court under summary chapter, the plaintiff has also lodged an FIR No.187/2010 under Section 489-F P.P.C at PS Jackson on 29.01.2010.

5. The suit was fixed before the Additional Registrar of this court on 19.06.2010 when summons were issued and for return of process, he fixed the case on 13.08.2010. The diary of 13.08.2010 shows that the defendant was served and since the statutory period

for filing leave to defend application was expired, the Additional Registrar fixed the suit in court for final disposal. On 08.12.2010 the matter was fixed in court for final disposal but learned Single Judge again issued notice to the defendant. The order sheet dated 26.09.2011 shows that notice issued by this court through courier service was also delivered to the defendant on 19.01.2011 but despite service of notice twice, the defendant failed to cause its appearance hence it was ordered that let the suit be proceeded exparte against the defendant. Again this matter was fixed in court for final disposal on 22.03.2012 when Mr.Nawab Mirza advocate undertook to file power on behalf of the defendant and on 25.10.2012 the defendant filed application under section 34 of the Arbitration Act for staying proceedings on the ground that in the agreement there is an Arbitration Clause 11.2 which provides that the parties shall first attempt to settle any dispute (including any disputed claim) in connection with the agreement amicably between the parties and if the parties will be unable to resolve the dispute amicably within sixty days, either party may refer the dispute for arbitration to be conducted in accordance with the Arbitration Act, 1940.

6. Learned counsel for the defendant argued that though the defendant has been declared exparte even then in view of the Arbitration Clause provided in the agreement, the suit is liable to be stayed and instead of filing this suit directly in this court, the course should have been made to invoke the Arbitration Clause provided in all agreements separately and since the plaintiff failed

to refer to the matter for resolution of dispute to the Arbitrator hence the suit is liable to be stayed with the direction to the parties to resolve the dispute through arbitration. Learned counsel further argued that though this is a suit in summary chapter but application under Section 34 of the Arbitration Act is maintainable. Learned counsel further argued that the defendant has not admitted claim of the plaintiff and he has yet to defend the suit on merits. It was further averred that as per agreements, minimum supply period was for 10 years commencing from May, 2008 but before expiry of that period, the plaintiff terminated the agreement which is in conflict with various clauses of the agreement. He further argued that Arbitration Clause will prevail in case of any dispute. In support of his arguments, learned counsel relied upon following case-laws:-

(1) **PLD 1993 Karachi 459 (Associated Agencies Ltd., and another v. Industrija Masina/Tractora)**. In this case, learned Division Bench of this court was of the view that application under Section 34 of the Arbitration Act is maintainable in suit filed under Order XXXVII C.P.C., and it was held that where the defendant in a suit in summary jurisdiction had filed application for permission to appear and defend the suit specifically stating therein that there was Arbitration Clause between the parties and disputes having arisen between them, the suit be stayed under Section 34 of the Arbitration Act, the defendants would be deemed to have availed of their rights to apply under Section 34 of the Arbitration Act before taking any step in the suit.

(2) **1990 MLD 2027 (M/s. Cepcon (Pvt) Ltd., v. M/s. Rizwan Builders Ltd.)** In this case it was held that Section 34 of the Arbitration Act enables a party to an Arbitration Agreement to apply to the judicial authority for stay of suit

before filing written statement or taking any step in the proceedings so that dispute between the parties may be resolved through Arbitration instead of court. The applications one under Order XXXVII Rule 3 C.P.C for leave to defend the suit and other under Section 34 of the Arbitration Act for stay of legal proceedings are mutually destructive. The very fact that the defendant had filed an application under Section 34 of the Arbitration Act simultaneously with his application under Order XXXVII rule 3 C.P.C., established his unequivocal intention not to submit to the jurisdiction of the court. The provision of Section 34 of the Arbitration Act is an overriding provision of law and cannot be allowed to strike off when confronted face to face with the provisions relating to leave to appear and defend the suit under Order XXXVII Rule 3 C.P.C.

(3) **2010 YLR 3331 (Mrs. Rubby Hameedullah and 3 others v. Dr. Arif and 4 others)** This judgment was authored by me in which it was held that if in a contract there is provision of resolution of dispute to the parties by way of Arbitration and the parties have agreed to such forum then such forum is to be resorted and given preference before filing the suit. Exception has been created under Section 34 of the Arbitration Act to the general law relating to procedure and empowers the court with jurisdiction to decide the dispute or to refuse to do so in case of existence of an Arbitration Agreement.

(4) **1997 SCMR 988 (Director Housing, A.G.'s Branch Rawalpindi v. M/s. Makhdam Consultants Engineers and Architects)** In this case, Hon'ble Supreme Court held that no allegation was that agreement containing Arbitration Clause was executed under duress, undue influence or on account of any misrepresentation of its execution. Arbitration Clause in the agreement clearly and unequivocally provided that all disputes between the parties were to be referred to a certain official or a person so nominated by him who was to be the sole Arbitrator and his decision would be final and binding on the parties. The party approaching to the Arbitrator having entered into the agreement voluntarily which contained the

Arbitration Clause in question could not be allowed to avoid the arbitration agreement lightly.

7. Learned counsel for the plaintiff argued that there is no question of staying the suit. The defendant was given ample opportunity by the Additional Registrar of this court and even fixing this case for final disposal, this court in order to provide fair opportunity again issued notice to the defendant to come forward and defend the suit but despite service the defendant failed to file application for leave to defend the suit and at belated stage when it was declared *ex parte*, the defendant filed application under Section 34 of the Arbitration Act on the pretext that suit be stayed in view of the Arbitration Clause provided in the agreements. Learned counsel further argued that this is a clear cut case in which the defendant voluntarily issued post dated cheques and when these cheques were presented in the bank on due dates, the cheques were dishonoured due to insufficiency of funds. He further argued that in this regard, the plaintiff has also lodged an FIR under Section 489-F P.P.C. He further argued that there is no dispute between the parties so there is no question of staying the suit and referring the matter to the Arbitrator for any resolution of dispute. In support of his arguments, learned counsel referred to following case-laws:-

(1) **1995 CLC 1024 (Cotton Export Corporation of Pakistan (Pvt.) Ltd., v. M/s. Asif Cotton Ginners and 5 others)** In this case, learned Division Bench of this court held that the court while deciding the application under Section 34 of the Arbitration Act would be bound to look into the pleadings in plaint and no statement in the application for determining whether Section 34 of the Arbitration Act was

applicable in the matter. Where suit is based on promissory note for recovery of amount claimed against the defendant in summary manner, no dispute between the parties could be assumed which could be referred to Arbitrator in terms of agreement between the parties. Application for stay of the suit was thus not maintainable and proceedings of suit in question could not have been stayed in terms of Section 34 of the Arbitration Act.

(2) **2002 CLD 624 (Mrs. Suriya Waseem Usmani v. L&M International (Pvt) Ltd)** In this case, learned Single Judge of this court being fortified by the decision rendered in the case of Cotton Export Corporation of Pakistan reported in 1995 CLC 1024, held that where the suit is based on promissory note for recovery in summary manner, no dispute between the parties could be assumed which can be referred to arbitration in terms of agreement executed between the parties. In this case on the aforesaid reason, the application under Section 34 of the Arbitration Act was dismissed by this court.

8. Heard the counsel. In the application under Section 34 of the Arbitration Act, the defendant only relied upon the Arbitration Clause 11.2 contained in the general terms and conditions of the agreement but failed to point out any dispute. Nothing has been said in the application or its supporting affidavit that the defendant did not issue cheques nor it is stated that cheques were issued under any duress nor dishonouring of cheques is disputed. The conduct of the defendant unequivocally shows that post dated cheques were issued against payment of supplies and the plaintiff presented the cheques in the bank which were dishonoured due to insufficiency of fund in the defendant's bank account. It is also a fact that the defendant has been declared *exparte* due to non-filing



of application for leave to defend. Learned counsel in support of his arguments, referred to PLD 1993 Karachi 459 in which suit was stayed due to an arbitration clause in the agreement. The facts and circumstances of the aforesaid case are distinguishable and not attracted. In the case referred to above, Arbitration Clause was available in the original contract for manufacturing and supply of Tractors and there was no substitution of original agreement by a new contract but there was a modification in respect of outstanding dues. The respondent supplied Tractors against the Letter of Credit. The appellant defaulted in the payments under the Letter of Credit thereafter it was mutually agreed that payment would be made in a protocol dated 3<sup>rd</sup> October, 1985. In the case in hand, the cheques were issued but the same were dishonoured by the bank. The defendant has failed to make out or to show any dispute. In the case of Cotton Export Corporation reported in 1995 CLC 1024, learned Divisional Bench of this court in a suit based on promissory note for recovery of amount in a summary manner held that since there was no dispute which could have been referred to Arbitrator in terms of agreement between the parties hence the application moved under Section 34 of the Arbitration Act was dismissed. In two more suits in a summary chapter, similar applications were filed under Section 34 of the Arbitration Act, but the applications were dismissed. Reference can be made to 2001 CLC 1156 and 1999 CLC 1841. Dishonouring of cheque is an independent cause of action and Section 34 of Arbitration Act does not apply to stay the suit. Learned counsel for the defendant also referred to my own

judgment reported in 2010 YLR 331. In this case in earlier suit, arbitration proceedings were already going on and in the subsequent suit certain issues were raised, decision of which could not be possible before an Award of arbitration, therefore, on an application under Section 34 of the Arbitration Act, I stayed the suit. The facts and circumstances of the case referred to above are distinguishable. Another case reported in 1997 SMCR 988, hon'ble Supreme Court held that arbitration clause in the agreement clearly and unequivocally provided that all disputes between the parties were to be referred to for arbitration. Again this was not the case based on negotiable instrument in which the cheques were issued voluntarily and subsequently same were dishonoured by the bank. Learned counsel also relied upon the case of M/s. Cepcon (Pvt) Ltd., reported in 1990 MLD 2027 in which besides filing of application under section 34 of Arbitration Act, the defendant also moved an application for leave to appear and defend. Learned Single Judge of this court held that the two applications one under Order XXXVII Rule 3 C.P.C for leave to defend the suit and other under Section 34 of the Arbitration Act for stay of legal proceedings are mutually destructive. The very fact that the defendant had filed an application under Section 34 of the Arbitration Act simultaneously with his application under Order XXXVII rule 3 C.P.C., established his unequivocal intention not to submit to the jurisdiction of the court. In the case in hand, no application for leave to appear and defend the suit has been filed but the defendant wants to stay the suit/legal proceedings merely on the ground that there was an

arbitration clause in the agreement but the fact remains that from the over all facts and circumstances, no dispute is available on the face of it and apparently there was no dispute which can be referred to the arbitrator after staying the suit.

9. For the forgoing reasons, the application under Section 34 of the Arbitration Act is dismissed.

JUDGE