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Judgment Sheet

LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

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F.A.O. NO.90 of 2023

NATIONAL COMMAND AUTHORITY FOUNDATION (NCAF)
Through its authorized officer Col (R) Muhammad Sabir

Versus

SHEIKH SAROSH IFTIKHAR and others

JUDGMENT

Date(s) of hearing:	29.01.2024 & 13.05.2024
Appellant by:	M/s Usman Jillani and Waseem Sultan Doga, Advocate.
Respondent No.1 by:	M/s Muhammad Ilyas Sheikh and Sh. Danyal Iftikhar, Advocates.
Respondents No.2(a) to 2(k) by:	Mr. Imran Shaukat Rao, Assistant Advocate General Punjab.

MIRZA VIQAS RAUF, J. This single judgment shall govern the instant appeal (F.A.O. No.90 of 2023) as well as Civil Revision No.670 of 2023, as both are arising from a common order dated 19th July, 2023, whereby on the one hand learned Civil Judge Class-I, Rawalpindi allowed petition under Section 20 of the Arbitration Act, 1940 (hereinafter referred to as "Act, 1940") and on the other accepted application under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as "C.P.C.") moved by respondent No.1 (hereinafter referred to as "respondent"). It would not be out of context to mention here that appeal stems from the first part of the order whereas the revision petition ensues from second part.

2. Facts forming background of the appeal as well as revision petition are that the appellant/petitioner being a charitable organization registered under the Charitable Endowment Act, 1980 was created with the aim and object to provide accommodation, extend loans, provide incentives on no profit no loss basis and provide any other facility or help from time to time, for the welfare of the employees in the service of the National Command Authority (NCA). The "respondent" on the other hand is a business concern dealing with the business of land developing with whom the appellant/petitioner entered into an agreement dated 09th February, 2021 for the purchase of land measuring 751 Kanal and 77 square feet (hereinafter referred to as "land in question") against total sale consideration of Rs.550 million out of which an amount of Rs.50 million was paid by the "respondent" as earnest money through pay order No.24407515 dated 08th February, 2021. In addition, the "respondent" also handed over post-dated cheques Nos.00000072 of PKR.25,00,00,000/- with maturity date of the first instalment i.e. 09th June, 2021 and 00000073 of PKR.25,00,00,000/- with maturity date 09th August, 2022 as second instalment. The "respondent", however, served a notice of force majeure dated 11th June, 2021 to the appellant/petitioner on account of COVID-19 pandemic and offered to make payment under the first instalment amounting to Rs.150 million on or before 12th August, 2021 and remaining amount of Rs.100 million on or before 12th February, 2022 and also requested for return of post-dated cheque amounting to Rs.250 million in respect of first instalment, which was earlier handed over to the appellant/petitioner at the time of execution of agreement. The appellant/petitioner, however, while invoking clause 20 of the agreement terminated the contract on 23rd August, 2021. In this backdrop the "respondent" moved an application under Section 20 of the "Act, 1940" for appointment of arbitrator through the intervention of the court. The application was also accompanying an application under Order XXXIX Rules 1 & 2 of the "C.P.C." for the grant of temporary injunction. The appellant/petitioner submitted his replies to both the applications raising multiple preliminary

objections and controverting the facts contained therein. By way of order dated 19th July, 2023 the learned Civil Judge Class-I, Rawalpindi proceeded to allow both the applications, which order is now under challenge.

3. Learned counsel for the appellant/petitioner contended that though an arbitration agreement was executed between the appellant/petitioner and "respondent" but while moving the application under Section 20 of the "Act, 1940" no cause was shown by the "respondent", sufficient to proceed with the said application. It is contended with vehemence that default in payment of instalments is admitted by the "respondent" himself in the application, which leaves no room to further proceed with the application under Section 20 of the "Act, 1940". Learned counsel argued that invocation of force majeure clause rendered the agreement void. In support thereof, learned counsel made reference to Section 36 & 65 of the Contract Act, 1872. Learned counsel emphatically contended that there was no occasion for the trial court to grant the temporary injunction in the circumstances. In order to supplement his contentions, learned counsel placed reliance on *INDUSTRIAL FABRICATION COMPANY through M.D. versus MANAGING DIRECTOR, PAK AMERICAN FERTILIZER LIMITED* **(PLD 2015 Supreme Court 154),** *ABDUL WAHEED versus ADDITIONAL DISTRICT JUDGE and others* **(PLD 2021 Lahore 453)** and *SAMSONS GROUP OF COMPANIES versus PANTHER DEVELOPERS and others* **(2022 CLD 932).**

4. Conversely, learned counsel for "respondent" while making reference to Section 20 of the "Act, 1940" submitted that for the said purpose the "respondent" has to show the existence of sufficient cause only. He added that the contents of application are clearly disclosing sufficient cause for proceeding with the matter. It is argued with vehemence that in terms of arbitration clause of the agreement any difference or dispute between the parties on any matter can be referred to the arbitrator as per the provisions of the "Act, 1940". Learned counsel submitted that through impugned order, learned Civil Judge has only referred the matter to the

arbitrator as per clause 24 of the agreement and this appeal is only to circumvent the proceedings. Learned counsel argued that temporary injunction was granted in favour of the "respondent" subject to deposit of remaining sale consideration and as such trial court committed no illegality under the law. In support of his contentions, learned counsel placed reliance on *LAHORE STOCK EXCHANGE LIMITED versus FREDRICK J. WHYTE GROUP (PAKISTAN) LTD. and others* **(PLD 1990 Supreme Court 48)**, *SEZAI TURKES FEYZI AKKAYA CONSTRUCTION COMPANY, LAHORE through Project Director versus Messrs CRESCENT SERVICES, LAHORE and another* **(1997 SCMR 1928),** *Messrs SADAT BUSINESS GROUP LTD. versus FEDERATION OF PAKISTAN through Secretary and another* **(2013 CLD 1451)** and *BNP (PVT.) LIMITED versus COLLIER INTERNATIONAL PAKISTAN (PVT.) LIMITED* **(2016 CLC 1772).**

5. Heard. Record perused.

6. The appellant/petitioner, being owner in possession of "land in question" categorized as entrance land and main land, duly described in attached schedule (annexures A, B, C and D with the agreement), entered into the agreement to sell with the "respondent" in lieu of sale consideration of Rs.550 million out of which the "respondent" being vendee paid an amount of Rs.50 million as earnest money on the date of execution of agreement through pay order No.24407515 dated 08th February, 2021 issued by Habib Bank Limited, Satellite Town Branch, Rawalpindi. Both the parties mutually agreed on the following rate under which the land in question is to be proportionately transferred from both categories upon receipt of payment under the instalments provided herein :-

> **"**(5) The remaining consideration amount that is Rs. 500,000,000/- (Rupees 500 Million) shall be paid in two instalments. The details of the instalments are provided in the following clauses.
>
> (6) The First instalment constitutes of amount that is Rs.250,000,000/- (Rupees 250 Million). The first instalment shall be paid by the Vendee upon completion of four (04) months from the date of execution of this Agreement. The Vendee shall provide a postdated cheque, bearing the above-mentioned amount, on the date of execution of this Agreement, which shall mature on the due date of the first Instalment

(subject to clause 12). The Vendor shall transfer the title of the Land proportionately from both categorizes (in case of transfer of Forty Six percent of the category A and Forty Six percent of category B shall be transferred keeping in view the compactness with already land owned by Vendee) detail description is given in Annex C and D as agreed among the parties as per clause (4) of this Agreement, in the name of the Vendee or his nominee, either through sanctioned mutation(s) or registered sale deed(s), upon the receipt of such payment. However, in case vendee make the payment of this instalment through pay order upon maturity of this period of 4 months then vendor shall be liable to transfer forty six percent of the land in favour of second party through the above said modes and shall also return the post-dated cheques to vendee upon receipt of payment.

7) The Vendee may pay any amount under the first instalment before the requisite period stated therein, though not later than the said period, except as for the instance provided in clause (12). If any amount under the first instalment is paid before the stated period, then the Vendee shall notify in writing to the Vendor. The said payment shall be paid immediately by the Vendee, upon duly notifying the Vendor. While at the time of the said payment, the Vendee shall further provide a revised post-dated cheque bearing the remaining amount of the first instalment and Vendor shall return the post-dated cheques given earlier to vendee. The revised post-dated cheque shall mature on the due date of the first instalment subject to clause 12.

(8) If the Vendee pays any amount under clause (7) before the requisite period, the Vendor shall transfer the title of Land proportionately from both categories, as agreed among the parties as per clause (4) of this Agreement, in the name of the Vendor or his nominee (as per clause 2) either through sanctioned mutation(s) on registered sale deed upon receipt of payment.

(9) The Second instalment shall constitute of amount that is Rs. 250,000,000/- (Rupees 250 Million). The amount of Rs. 50,000,000/- (Rupees 50 Million) provided as earnest money as per clause (3), shall also be adjusted with the second instalment. The second instalment will be paid by the Vendee upon completion of eighteen (18) months from the date of execution of this Agreement. The Vendee shall provide a post-dated cheque bearing the above-mentioned amount, on the date of execution of this Agreement, which shall mature on the due date of the second instalment subject to clause 12. The Vendor shall transfer the title of the remaining Land in the name of the Vendee or his nominee, either through sanctioned mutation(s) or registered sale deed(s) upon receipt of said payment.

(10) The Vendee may pay any amount under the second instalment before the requisite period stated herein, though not later than the said period, except as for the instance provided in clause (12). If any amount under the second instalment is paid before the stated period, then the Vendee shall notify in writing to the Vendor. The said payment shall be paid immediately by the Vendee, upon duly notifying the Vendor. While at the time of the said payment, the Vendee shall also provide a revised post- dated cheque bearing the remaining amount of the second

> instalment and Vendor shall return the post-dated cheques given earlier to vendee. The revised post-dated cheque shall mature on the due date of the second instalment (subject to clause 12).
>
> (11) If the Vendee pays any amount under clause (10) before the requisite period, the Vendor shall transfer the title of Land proportionately as agreed among the parties as per clause (4) of this Agreement, in the name of the Vendee, either through sanctioned mutation(s) or registered sale deed (s), upon receipt of payment.**"**

7. Since the matter in issue is primarily arising out of application under Section 20 of the "Act, 1940", so it would be apposite not to delve into rigmarole of facts and only ponder upon the question interse parties canvassed herein. Clause 24 is the arbitration clause of the agreement which reads as under :-

> **"**(24) If any difference or dispute between the parties on any matter arises hereunder, the same shall be referred to arbitration as per the provisions of the Arbitration Act, 1940. The Director General Strategic Plans Division (DG SPD) or a person nominated by him and person nominated by Vendee shall be the Arbitrators. The place of Arbitration shall be Rawalpindi/Islamabad, Pakistan and the language of the award shall be English. Subject to the Arbitration Act, 1940, the award of the Arbitrators shall be final and binding on the Parties.**"**
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> (Underlining supplied for emphasis)

8. In order to consolidate and amend the law relating to Arbitration, "Act, 1940" was passed by the Governor-General of India-in Council on 11th March, 1940 which was adopted in Pakistan through the Central Laws (Statute Reform) Ordinance (XXI of 1960). Section 2(a) of the "Act, 1940" defines "arbitration agreement" as under :-

> **"**(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not**"**

Chapter III deals with arbitration with intervention of a court where there is no suit pending. Section 20 of the "Act, 1940" gives a choice to any persons who 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 court. The "respondent" being privy to the arbitration agreement moved the application invoking Section 20 of the "Act, 1940". It is an admitted position on all hands that there exists an arbitration agreement between the appellant/petitioner and the "respondent". The resistance to the application under Section 20 of the "Act, 1940" is two fold on behalf of the appellant/petitioner; firstly that in the light of admission of the "respondent" that he has committed default in payment of instalment, there remains no sufficient cause for referring the matter to the arbitrator(s) and secondly with the invocation of force majeure, claim of the "respondent" has become void on the touchstone of Section 36 read with Section 65 of the Contract Act, 1872.

9. Sub-section (4) of Section 20 of the "Act, 1940" ordains that 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. It was thus obligatory for the appellant/petitioner to demonstrate some sufficient cause, so as to persuade the court not to proceed in terms of Section 20 of the "Act, 1940". In other words, it can easily be inferred from the plane reading of sub-section (4) that there should be some extraordinary circumstances in which the court desist from passing an order that the agreement to be filed and matter should be referred to the arbitrator(s). Clause 24 of the agreement stipulates that any difference or dispute between the parties on any matter arises thereunder shall be referred to the arbitration which is clearly in the vast term.

10. The question as to whether the "respondent" committed default in payment of instalments and as to whether the reasons for such default are justifiable; are the questions which could be raised before and determined by the arbitrator(s) appointed in accord with

the arbitration clause embodied in the agreement. For referring the matter to the arbitrator(s) in terms of the "Act, 1940" the court cannot embark upon the fate of dispute, which ultimately be the outcome of proceedings conducted by the arbitrator(s). The terms "sufficient cause" used in sub-section (4) of Section 20 of the "Act, 1940" is alike and akin to the phrase *"where it does not disclose a cause of action"* used in Rule 11(a) of Order VII of the "C.P.C." which is one of the grounds for rejection of plaint recognized by the said provision of law. Needless to observe that proceedings in terms of Section 20 of the "Act, 1940" are though in the nature of proceedings in a suit but in strict sense it is not a suit. When such application is moved a show cause notice is to be issued to all the parties to the agreement requiring them to explain why agreement should not be filed. If sufficient cause is not shown to the contrary, the agreement is ordered to be filed. Guidance to this effect can be sought from *LAHORE STOCK EXCHANGE LIMITED versus FREDRICK J. WHYTE GROUP (PAKISTAN) LTD. and others* **(PLD 1990 Supreme Court 48).**

11. So far judgment in the case of ***Industrial Fabrication Company*** *supra* heavily relied upon by learned counsel for the appellant/petitioner is concerned, it is *inter-alia* observed that in the said case application under Section 20 of the "Act, 1940" was resisted by taking up the plea that the entire dispute interse parties was previously settled, therefore, no dispute was outstanding which could be referred to the arbitrator and in that backdrop the application under Section 20 of the "Act, 1940" was not acceded to; thus on account of dissimilarity of facts the judgment is not applicable to the present case. Similarly, the principles laid down in the case of ***Samsons Group of Companies*** *supra* are hardly attached to the case of the appellant/petitioner.

12. So far contention of learned counsel for the appellant/petitioner that by invoking force majeure clause, the "respondent" has rendered the agreement void, it is observed that no such ground was taken in the reply to the application under Section

20 of the "Act, 1940". Even otherwise such question can be agitated before the arbitrator(s). An application under Section 20 of the "Act, 1940" cannot be resisted on the ground that agreement has become void as it would be a premature step to stifle the arbitration clause and as such the judgment in the case of ***Abdul Waheed*** *supra* relied by learned counsel for the appellant/petitioner to this effect is not at all attracted to the present case as that runs on altogether different facts.

13. It is also one of the contentions of learned counsel for the appellant/petitioner that agreement was terminated while invoking clause 20 of the agreement, suffice to observe that termination of contract by itself does not render the arbitration clause redundant. Even in case of termination of contract by one of the parties, matter can still be referred to the arbitrator(s) by the court in terms of Section 20 of the "Act, 1940". Reliance in this respect can be placed on *Messrs SADAT BUSINESS GROUP LTD. versus FEDERATION OF PAKISTAN through Secretary and another* **(2013 CLD 1451)** wherein the Sindh High Court observed as under :-

> **"**12…… I do not find any strength nor persuaded with the arguments that in case a contract is terminated the arbitration clause does not survive. The termination/cancellation may occur due to breach in the contractual obligations by any of the parties to the contract which in fact leads towards a dispute and in order to resolve the dispute between the parties and even for the determination of their rights and liabilities and even a wrongful termination can also be made the subject matter of arbitration proceedings otherwise, the whole purpose and Scheme of incorporating an arbitration clause in the contract will become redundant and superfluous and it would be very easy for any party to terminate and or frustrate the contract out rightly in order to avoid arbitration proceedings and claims if any. The cancellation of contract or invoking arbitration proceedings both are two distinct situations, the termination clause cannot be given overriding effect on arbitration proceedings or the provision made for arbitration in the contract.**"**

Reference to above effect can also be made to *BNP (PVT.) LIMITED versus COLLIER INTERNATIONAL PAKISTAN (PVT.) LIMITED* **(2016 CLC 1772).**

14. Adverting to the application for the grant of temporary injunction it is noticed that the "respondent" moved said application

alongwith application under Section 20 of the "Act, 1940", seeking temporary injunction pending proceedings and since he succeeded in establishing that sufficient cause exists to refer the matter to the arbitrator(s) so withholding the relief of temporary injunction would amount to circumvent and thwart the proceedings before the arbitrator(s). Even otherwise temporary injunction is granted in favour of the "respondent" subject to deposit of remaining sale consideration in toto in the court, which the "respondent" already deposited in terms thereof. Needless to reiterate that for the grant of temporary injunction one has to show the existence of prima-facie case, balance of convenience and irreparable loss. The "respondent" remained successful in the said test. In somewhat similar circumstances this Court in the case of *Messrs PETROSIN PRODUCTS (PVT.) LIMITED through Representative and others versus GOVERNMENT OF PAKISTAN through Secretary, Privatization Commission of Pakistan, Ministry of Finance Government of Pakistan, Islamabad and 3 others* **(2000 MLD 785)** held as under :-

> "10……..The acceptance of the plea of the petitioner for referring the matter to the Arbitrator prima facie proves that a dispute had arisen between the parties which required determination through arbitration. It was, therefore, not justified for the learned Civil Judge to deny the relief of temporary injunction after he had referred the dispute between the parties to the Arbitrator for determination. It is also admitted fact that till this date the Guarantee submitted by the petitioner has not been encashed because of the earlier stay order issued by the Civil Court and then by this Court. Hence, at this belated stage when even the arbitration award has been filed in the Court, it would not be in the interest of justice to deny the interim relief prayed by the petitioner as the same would render the whole proceedings as infructuous.**"**

15. For the foregoing reasons, appeal as well as revision petition being bereft of any merits are **dismissed** with no order as to costs.

(MIRZA VIQAS RAUF)
JUDGE

APPROVED FOR REPORTING

JUDGE

Shahbaz Ali*