JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.140/2017
Ovex Technologies (Private) Limited
Versus
PCM PK (Private) Limited and others

Date of Hearing: 27.09.2019
Appellant by: Syed Ahmed Hassan Shah and Badar Iqbal, Advocates
Respondents by: M/s Khurram M. Hashmi and Ramsha Noshab, Advocates

---

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellant/Ovex Technologies (Pvt.) Ltd. ("**Ovex**") impugns the order dated 10.10.2017 passed by the Court of the learned Civil Judge, Islamabad, whereby the plaint in Ovex's suit for declaration and permanent injunction etc. was returned under the provisions of Order VII, Rule 10 of the Code of Civil Procedure, 1908 ("**C.P.C.**").

2. The record shows that on 02.04.2014, Ovex and En Pointe Technologies Sales, Inc., ("**En Pointe Inc.**") entered into an agreement for *"Services & Statement of Work"* ("**the Agreement**"). The Agreement was to become effective on 01.07.2014 and was to continue in effect for a period of three years, i.e. up to 30.06.2017. The services that were to be performed by Ovex under the Agreement were set out in Section 3 thereof. It is not disputed that En Pointe Inc.'s rights and obligations under the Agreement were assigned to respondent No.2 /En Pointe Technologies Sales LLC ("**En Pointe**").

3. Ovex and En Pointe had agreed that the Agreement would be governed by and construed in accordance with the laws of the State of California. The said parties had also consented to the jurisdiction and venue in the State of California.

4. Section 8.07 of the Agreement is an arbitration clause providing for the disputes between Ovex and En Pointe arising from and related to the Agreement to be referred to arbitration by a retired United States judge. Matters pertaining to injunctive relief, including temporary restraining orders, preliminary injunctions and

permanent injunctions were agreed not to be arbitrable. For the purposes of clarity, Section 8.07 of the Agreement is reproduced herein below:-

> ***"Section 8.07. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, other than matters pertaining to injunctive relief including, without limitation, temporary restraining orders, preliminary injunctions and permanent injunctions shall be determined by a retired United States judge who is deemed mutually acceptable to the parties involved in the claim. If the parties are unable to agree on a judge, the Judicial Arbitration and Mediation Services of the United States of America shall select a judge. The parties hereby waive the right to trial by jury. The parties agree to be bound by the decision of said judge. Judgment upon the award rendered by the judge shall be and may be entered in any United States court having jurisdiction thereof, provided that no awards for punitive damages may be rendered or entered as judgments. It is hereby agreed that the parties shall be permitted to conduct discovery as the judge shall deem appropriate. Such resolution shall take place in Los Angeles, California unless otherwise agreed to by the parties in writing."***
>
> **(Emphasis added)**

5. Section 1.01 of the Agreement provided *inter alia* that it would continue in effect for a period of three years, i.e. up to 30.06.2017 unless terminated earlier in accordance with its provisions. Section 1.01 also provided that the Agreement would be renewed annually for successive one year terms by En Pointe, giving Ovex written notice of its intention to renew the Agreement, which notice was to be given at least 90 days prior to the scheduled expiration of the term of the Agreement.

6. The three-year term of the Agreement was to expire on 30.06.2017. Vide letter dated 20.03.2017, En Pointe informed Ovex that the former intended to renew the Agreement for a period of one year. Ovex's response through its letter dated 27.03.2017 was that it wanted to re-negotiate certain terms of the Agreement. This request of Ovex was rejected by En Pointe vide letter dated 18.04.2017. Between 18.04.2017 and 31.05.2017, the relationship between Ovex and En Pointe deteriorated. Ovex alleged that En Pointe was taking steps to set up a similar base of operations to serve its customers whereas En Pointe took the position that Ovex was encouraging its employees servicing En Pointe's customers to resign and join a different service provider to compete with En Pointe. This deterioration in their relationship is reflected in Ovex's letters dated

27.03.2017, 11.05.2017 and 24.05.2017 and En Pointe's letters dated 18.04.2017 and 26.05.2017.

7. Section 7.02 of the Agreement provided *inter alia* that should Ovex default in the performance of the Agreement or materially breach any of its provisions, En Pointe may terminate the Agreement by giving written notice to Ovex. Furthermore, Section 7.02 provided that material breach of the Agreement shall include failure to meet terms of the Agreement and/or its Statement of Work; failure to meet initial or revised mutually agreed-to deadlines; destruction of En Pointe's property dishonestly; and theft.

8. Vide letter dated 31.05.2017, En Pointe issued a notice to Ovex that the Agreement was being terminated pursuant to Section 7.02 thereof, and that the said termination will be effective 30 days from the date of the issuance of the said notice. In the said letter, Ovex was alleged to have committed serious breaches of the said Agreement. Furthermore, Ovex was required to permit En Pointe to hire any of Ovex's employees and to provide En Pointe reasonable access to such employees for interviews and recruitment. Ovex was also informed that En Pointe had invoked the dispute resolution procedure under Section 8.06 of the Agreement.

9. On 03.06.2017, Ovex instituted a suit for declaration, temporary and permanent injunction against the respondents before the Court of the learned Civil Judge, Islamabad. In the said suit, Ovex prayed for *inter alia* a declaration to the effect that the Agreement dated 02.04.2014 subsisted and was valid up to 30.06.2018, and that the termination notice dated 31.05.2017 was ill-conceived, *malafide* and *void-ab-initio*. More importantly, Ovex, in its suit, had prayed for a declaration that the arbitration agreement embedded in Section 8.07 of the said Agreement stood repudiated by En Pointe.

10. Along with the said suit, Ovex had also filed an application for interim injunction. Vide ad interim order dated 03.06.2017, the learned Civil Court suspended the operation of En Pointe's letter dated 31.05.2017. On 18.07.2017, respondents No.1 to 5 (including En Pointe) filed an application under Order XXXIX, Rule 4 C.P.C. for the vacation of the said order. On the very same day, the said

respondents also filed an application under Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("the 2011 Act") praying for the proceedings in Ovex's suit to be stayed and Ovex be directed to refer its disputes to arbitration in the State of California, U.S.A. On 26.07.2017, Ovex filed its replies to the said applications for the vacation of the ad interim injunctive order and stay of proceedings in the suit.

11. Vide order dated 10.10.2017, the learned Civil Court returned the plaint in Ovex's suit by invoking the provisions of Order VII, Rule 10 C.P.C. It was held that due to the dispute resolution clause in the Agreement, the learned Civil Court had no jurisdiction to adjudicate upon the matter. Ovex has assailed the said order dated 10.10.2017 in the instant appeal.

12. It may be mentioned that on 22.02.2017, En Pointe had filed an action before the Superior Court of the State of California, Orange County, against one Imran Yunus, a former employee of PCM, said to be an affiliate of En Pointe. On 31.05.2017, the said action was amended to include Ovex in the array of the respondents/defendants in the said action. En Pointe had sought injunctive relief in the form of a temporary restraining order to prohibit Ovex from (i) assisting a third party that was allegedly seeking to hire Ovex's employees who had worked on En Pointe's matters, and (ii) using or disclosing En Pointe's confidential information. Vide order dated 13.07.2017, the said Court denied En Pointe's request for preliminary injunction and an earlier temporary restraining order dated 06.06.2017 was dissolved. Perusal of the order dated 13.07.2017 passed by Judge Peter J. Wilson shows that En Pointe had alleged breach of contract against Ovex, but had failed to submit any competent evidence of Ovex's alleged misappropriation of its confidential information or competition with En Pointe or that Ovex had usurped En Pointe's business opportunity. Subsequently, the said action was withdrawn by En Pointe.

13. On 06.06.2017, En Pointe commenced arbitration proceedings against Ovex before the Judicial Administration and Mediation

Services of the United States ("J.A.M.S.") by filing a request for arbitration pursuant to Section 8.07 of the Agreement. Along with the said request, En Pointe also filed its statement of claim. Vide letter dated 19.06.2017, En Pointe applied to J.A.M.S. for the appointment of an emergency arbitrator and for the award of emergency relief. J.A.M.S. appointed Mr. Frank Maas as the emergency arbitrator who issued notices to the parties. Despite notice, Ovex failed to participate in the hearing. On 07.07.2017, the emergency arbitrator declared that any dispute or claim arising out of the performance or breach of the Agreement, other than matters involving injunctive relief, must be resolved through an arbitration before J.A.M.S. in Los Angeles, California which is the sole forum with jurisdiction to entertain such disputes/claims. It was also declared that the Agreement between Ovex and En Pointe will terminate, at the latest, on 18.08.2017. The emergency arbitrator refrained from expressing an opinion on whether En Pointe had terminated the Agreement due to Ovex's material breach of the Agreement or the non-renewal of the Agreement. These matters, according to the emergency arbitrator, were to be decided during an arbitration by a retired United States judge in California.

14. On 03.08.2017, J.A.M.S. appointed retired U.S. Magistrate Judge Stephen E. Haberfeld as the sole arbitrator for resolving the disputes between Ovex and En Pointe. Ovex did not participate in the hearings before the sole arbitrator. On 09.03.2018, Judge Haberfeld issued a *"partial final award."* In the said award, it was declared *inter alia* that Ovex had materially breached the Agreement before 31.05.2017, and that En Pointe was thus justified in terminating the Agreement. The award ordered Ovex to pay damages amounting to $990,586.00.

15. On 17.08.2018, the United States District Court, Central District of California, Western Division, allowed En Pointe's petition to confirm, recognize and enforce the arbitral award dated 09.03.2018 against Ovex.

16. Apparently, En Pointe had filed an application before the United States District Court, Central District of California, Western Division, against Ovex to compel arbitration and for anti-suit

injunction. Vide order dated 15.09.2017, the said relief was granted to En Pointe. Thereafter, on 03.04.2018, Sheikh Khawar Latif, the sole beneficial shareholder of Ovex, filed a suit for damages and permanent injunction before the Court of the learned Civil Judge, Lahore against *inter alia* En Pointe's employees. Vide ad interim order 03.04.2018, the learned Civil Court restrained the defendants in the said suit from interfering in Sheikh Khawar Latif's business. This caused En Pointe to file an application before the United States District Court, Central District of California, Western Division, for an order to show cause why Ovex and its shareholder Sheikh Khawar Latif should not be held in contempt of the order granting En Pointe's application to compel arbitration and for an anti-suit injunction. Vide order dated 05.07.2018, the United States District Court, Central District of California, Western Division, held that the suit instituted by Sheikh Khawar Latif at Lahore against the officers and directors of En Pointe and their affiliates was barred by the anti-suit injunction as well as the arbitration provisions contained in the Agreement. Furthermore, it was ordered that Sheikh Khawar Latif must immediately take steps to dismiss his suit. On 17.08.2018, the United States District Court, Central District of California, Western Division, ordered that Ovex and Sheikh Khawar Latif were each found in contempt of Court for violating the anti-suit injunction order dated 15.09.2017 and the subsequent order dated 05.07.2018. They were also ordered to pay a non-penal coercive fine of US $1,000 per day for each day that they failed to comply with the anti-suit injunction order and the subsequent order dated 05.07.2018. Ovex and Sheikh Khawar Latif were once again directed to immediately discontinue *"any litigation proceedings in Pakistan"* against En Pointe or its officers, directors, employees or agents.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANT:-

17. Syed Ahmed Hassan Shah, Advocate, learned counsel for the appellant/Ovex, after narrating the facts leading to the filing of the instant appeal, submitted that the learned Civil Court erred by returning the plaint under Order VII, Rule 10 C.P.C. when respondents No.1 to 5 had not even sought such a relief in their

application under Section 4 of the 2011 Act; that at best, the learned Civil Court could have stayed the proceedings in Ovex's suit, but could not have *suo moto* returned the plaint; that although Section 8.08 of the Agreement provided that the Agreement was to be governed in accordance with laws of the State of California, and that the parties to the said Agreement had agreed to the jurisdiction and venue in the State of California this did not oust the jurisdiction of the Courts in Pakistan to adjudicate upon Ovex's suit which was not just against En Pointe but also other defendants who were not parties to the Agreement; that Ovex had independent grievances against the other defendants; that the learned Civil Court erred by not appreciating that the Agreement was executed at Islamabad as well as at Los Angeles; that the Agreement was fully performed at Islamabad; that the requirements of Section 20 C.P.C. were fully satisfied for the suit to have been instituted by Ovex before the learned Civil Court at Islamabad; that by filing an action before the Superior Court of the State of California, En Pointe had impliedly repudiated the arbitration clause in the Agreement; that by filing the said action, En Pointe 'tested the waters before taking the swim' and that after En Pointe was unable to have an injunction confirmed against Ovex, it decided to abandon the said action and initiate arbitration proceedings against Ovex; that the learned Civil Court ought to have decided whether after the filing of the said action by En Pointe, there existed any valid arbitration agreement between the parties to the Agreement; and that even though the said action had been withdrawn against Ovex, such withdrawal did not place En Pointe on a better footing in seeking to stay the proceedings in the suit before the learned Civil Court at Islamabad.

18. Learned counsel for Ovex further submitted that Section 2(5) C.P.C. defines a *"foreign Court"* as a Court situated beyond the limits of Pakistan which has no authority in Pakistan and is not established or continued by the Federal Government; that Section 3 C.P.C. provides that for the purposes of the C.P.C., the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of small causes is subordinate to the High Court and District Court; that

Order VII, Rule 10(1) C.P.C. provides that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted; that since the term *"foreign Court"* has been separately defined in the C.P.C., the term *"the Court"* mentioned in Order VII, Rule 10(1) C.P.C. is with reference to a Court in Pakistan and not a foreign Court; and that the mere fact that the Agreement contained an arbitration clause providing for the venue of arbitration to be in a foreign jurisdiction and for the governing law of the Agreement to be a foreign law could not have caused the learned Civil Court at Islamabad to have returned the plaint in Ovex's suit.

19. Furthermore, learned counsel for Ovex, after going through several Sections of the Agreement, in particular Sections 1.01, 3.04, 3.06, 4.01, 4.02, 7.02, 7.07 and 8.08 thereof, submitted that the defendants in the suit had breached the terms of the Agreement; that prior to the expiry of the Agreement's three-year term, En Pointe had given the appellant on 20.03.2017 notice for its renewal; that on 27.03.2017, Ovex accepted the said notice, but wanted to re-negotiate certain terms of the Agreement; that on 18.04.2017, En Pointe re-confirmed its intention to renew the Agreement but was in fact taking steps to terminate the same; that En Pointe started poaching Ovex's employees; that Ovex does not want to enslave any of its employees, but the Agreement provides a process for Ovex's employees to be taken over by En Pointe; that it was En Pointe's desire to take over Ovex's employees which prompted it to terminate the Agreement on 31.05.2017; that on 31.05.2017, En Pointe also impleaded Ovex as a party in an action before the Court in California; and that on 03.06.2017, when Ovex filed the suit before the learned Civil Court at Islamabad, the arbitration clause in the Agreement had been repudiated by En Pointe by instituting an action against Ovex before the Court in California.

20. Learned counsel for Ovex also submitted that the instant case was a fit one for a remand to the learned Civil Court; that although an appeal is a continuation of proceedings before the original forum, but a right of appeal cannot be taken away in any adversarial set-up; that a remand is always considered appropriate in order to avoid a

party from being deprived of a right of appeal; that in the instant case the learned Civil Court, while returning the plaint, had also vacated the ad interim injunction granted to Ovex on 03.06.2017; that an ad interim injunction could not be vacated in exercise of jurisdiction under Order XXXIX, Rule 4 C.P.C.; that the ad interim injunction could not be termed as *ex parte* after the defendants in the suit entered appearance; that before vacating the ad interim injunction, the learned Civil Court ought to have heard *inter parte* arguments on Ovex's application under Order XXXIX, Rules 1 and 2 C.P.C.; that in the impugned order dated 10.10.2017, the learned Civil Court did not decide whether Ovex had a *prima facie* arguable case for the grant of an injunction or whether the balance of convenience was in Ovex's favour or whether Ovex would suffer irreparably if the injunction was to be denied; and that this is yet another reason why the matter ought to be remanded to the learned Civil Court. Learned counsel for Ovex prayed for the impugned order dated 10.10.2017 to be set-aside and for the matter to be remanded to the learned Civil Court with the direction to decide the pending applications in accordance with the law.

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENTS NO.1 TO 5:-

21. On the other hand, learned counsel for respondents No.1 to 5 submitted that the impugned order dated 10.10.2017 does not suffer from any legal infirmity; that Section 8.07 of the Agreement contains an arbitration clause between Ovex and En Pointe; that the said Section 8.07 makes matters other than those *"pertaining to injunctive relief including, without limitation temporary restraining orders, preliminary injunctions and permanent injunctions"* arbitrable by a retired United States judge; that the action started by En Pointe against Ovex before the Superior Court of the State of California was only for the grant of an injunction; that vide order dated 13.07.2017, passed by the said Court, the preliminary injunction sought by En Pointe against Ovex was denied; that subsequently the said action filed by En Pointe was withdrawn against Ovex; that the filing of the said action only for the purpose of obtaining an injunction did not, in any manner, prevent En Pointe

from commencing arbitration proceedings against Ovex in accordance with Section 8.07 of the Agreement; that En Pointe had not repudiated the arbitration Agreement at any material stage; that the other proceedings instituted by En Pointe before the Courts in the United States were only in aid of arbitration; that since Ovex had explicitly agreed to resolve its contractual disputes with En Pointe through the dispute resolution mechanism enshrined in Section 8.07 of the Agreement, the proceedings in the suit were liable to be stayed by the learned Civil Court; that the learned counsel for Ovex was correct in his submission that the learned Civil Court should not have *suo moto* returned the plaint in Ovex's suit; and that since an appeal is a continuation of the proceedings, this Court has the jurisdiction to modify the impugned order dated 10.10.2017 by staying the proceedings in Ovex's suit.

22. Learned counsel for respondents No.1 to 5 further submitted that indeed En Pointe was considering renewal of the Agreement but Ovex wanted to re-negotiate its terms; that En Pointe terminated the Agreement pursuant to Section 7.02 thereto; that the civil suit instituted by Ovex on 03.06.2017 was not proceedable due to the arbitration and foreign jurisdiction clauses in the Agreement; that the proceedings before the learned Civil Court were liable to be stayed under Section 4 of the 2011 Act; that while the proceedings were pending before the learned Civil Court, En Pointe commenced arbitration proceedings against Ovex in the United States; that on 07.07.2017, the emergency arbitrator passed an emergency arbitral award declaring that the disputes between the parties to the Agreement must be resolved through arbitration before J.A.M.S. in Los Angeles, California; that on 03.08.2017, J.A.M.S. appointed a sole arbitrator; that on 09.03.2018, the sole arbitrator passed the partial final arbitration award in En Pointe's favour; that the sole arbitrator still retains jurisdiction over the matter; that on 17.08.2018, En Pointe's petition to confirm the award was allowed by the United States District Court, Central District of California; that on 17.08.2018, the said Court passed an order holding Ovex and its officers in contempt of its anti-suit injunction order; and that the arbitration proceedings in the United States were strictly in

conformity with Section 8.07 of the Agreement whereas the suit instituted by Ovex is in derogation of the express Agreement between the parties to refer their disputes to arbitration.

23. Learned counsel for respondents No.1 to 5 further submitted that the suit instituted by Ovex is an abuse of the process of the Court; that Ovex has tried to protract the proceedings before the learned Civil Court by filing frivolous applications; that vide order dated 29.07.2017, the learned Civil Court had dismissed Ovex's application under Order XVII, Rule 3 C.P.C.; that civil revision petition No.305/2017 filed by Ovex against the said order dated 29.07.2017 was dismissed by this Court vide order dated 31.10.2017; and that Ovex's endeavor is to keep En Pointe embroiled in litigation in Pakistan and to obtain an injunctive order against En Pointe. Learned counsel for respondents No.1 to 5 prayed for the impugned order dated 10.10.2017 to be modified and for the proceedings in Ovex's suit before the learned Civil Court to be stayed.

24. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The case law relied upon by the learned counsel for the contesting parties has been referred to herein below.

25. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 16 above and need not be recapitulated.

WHETHER EN POINTE HAD REPUDIATED THE ARBITRATION AGREEMENT:-

26. I propose, in the first instance, to determine the question whether En Pointe, by initiating an action (Case No.30-2017-00904563-CU-BT-CJC) against *inter alia* Ovex before the Superior Court of the State of California, had impliedly repudiated the arbitration agreement contained in Section 8.07 of the Agreement and had waived or abandoned its right to initiate arbitration proceedings against Ovex. As mentioned above, on 13.07.2017, Judge Peter J. Wilson of the Superior Court of the State of California gave a ruling denying En Pointe's request for a preliminary injunction, and had dissolved the temporary restraining order

passed on 06.06.2017. The said Court also noted that its ruling did not prejudice En Pointe from seeking a preliminary injunction in the future based on newly discovered evidence.

27. An arbitration agreement is said to be the contractual basis for the resolution of disputes through an arbitration process. An arbitration agreement or an arbitration clause in an agreement can define the disputes or the types of disputes which are agreed to be referred to arbitration by the parties thereto. It is for the parties to make their own contract and not for the Court to make one for them. A Court is only to interpret the contract. The question of what disputes fall within the terms or scope of a particular arbitration agreement is a matter of interpretation of such an agreement. As the parties are free to make their own contracts, they are also free to agree as to what matters would be referred to arbitration. The words of the arbitration clause which take within its sweep any claim, right or matter in any way arising out of or relating to the contract have been held by the Courts to take in all claims which arise out of or pertain to the contract. However, parties have a contractual freedom to select the matters or disputes which are to be resolved through arbitration, leaving the others to be decided by the Courts. If an arbitration clause excludes certain matters in express terms and leaves them to be decided by the Courts, no arbitration can arise in respect of such matters. If it is found that the arbitration clause does not encompass a dispute raised in a suit, the party filing the suit cannot be held to have abandoned its right to seek arbitration on matters encompassed by the arbitration clause. Reference in this regard may be made to the following case law:-

(i) In the case of *"Government of N.W.F.P. through Secretary Forests, Peshawar Vs. The Devli Kund Forests and Multipurposes Cooperative Housing Society Limited" (1994 SCMR 1829),* the Hon'ble Supreme Court upheld the concurrent orders dismissing an application seeking the proceedings in the suit to be stayed under Section 34 of the 1940 Act on the ground that the arbitration clause in the agreement had expressly excluded certain matters with respect to which the suit had been filed.

(ii) In the case of *M/s Harsha Construction Vs. Union of India (AIR 2015 SC 270),* the arbitration clause in the agreement between the parties *"excepted"* certain matters for which provision had been made in different clauses of the agreement. It was held that it was not open to the arbitrator to arbitrate upon the disputes which had been *"excepted".* Furthermore, it was held that an award on issues which were not arbitrable was bad in law.

28. It is not unusual for arbitration agreements or rules governing arbitrations to provide for a party of such an agreement to institute proceedings before a Court for conservatory or interlocutory measures. For instance Article 28(2) of the Rules of Arbitration of the International Chamber of Commerce permits a party to an arbitration agreement to *"apply to any competent judicial authority for interim or conservatory measures".* Furthermore, it provides that *"[t]he application of a party to a judicial authority for such measures ... shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal."* Under the regime of the 1940 Act, parties to arbitration agreements are permitted to invoke the jurisdiction of the Court under Section 41(b) read with paragraph 4 of the Second Schedule to the said Act to apply for an injunction. This right can be exercised either before the commencement of the arbitration proceedings or during the pendency of such proceedings, or even after the arbitration award has been rendered. The invocation of such a right to obtain interim or conservatory measures does not disentitle a party to an arbitration agreement from enforcing the arbitration agreement. The rationale for this is well explained in the 21st Edition of Russell on Arbitration in the following terms:-

> ***"6-130.... Assuming the tribunal does have power to make an award granting an interim injunction, how useful will this be in practice? Interim injunctions are often required urgently in order to preserve the status quo. Even if it exercised its power to order such an injunction, the tribunal does not have the coercive powers of the court to deal with any breach. A tribunal may take a very dim view of one of the parties to the reference ignoring an injunction it has granted, but there is little the tribunal can do in practice to require compliance. It is of course possible to make use of the court's***

coercive powers by enforcing the award through the courts, but that takes time."

*"6-131. **Court's power to grant injunctions.** The urgency with which an interim injunction is often required and the inevitable delay in first establishing a tribunal and then enforcing an award giving injunctive relief means that, even if the tribunal has been empowered to grant injunctions, it is usually better to apply to the court for an interim injunction under section 44(2) of the Arbitration Act 1996."*

29. In the case of M/s. Uzin Export & Import Enterprises for Foreign Trade Vs. M/s. M. Iftikhar & Company Limited (1993 SCMR 866), the appellants had filed a suit for an injunction against the respondents before the Hon'ble High Court of Sindh. The respondents filed a written statement as well as a counter claim. The appellants filed an application under Section 34 of the Arbitration Act, 1940 ("the 1940 Act") praying for a stay of proceedings in respect of the respondents' counter claim on the ground that the dispute raised in the counter claim was covered by an arbitration clause providing for the disputes between the parties to be settled in accordance with the Rules of Arbitration of the International Chamber of Commerce, Paris. Subsequently, the appellants withdrew their suit. The respondent's counter claim was renumbered as a suit. The appellants' application under Section 34 of the 1940 Act was dismissed by the learned Judge-in-Chambers on the ground that the appellants had taken *"a step in the proceedings"* within the meaning of Section 34 of the 1940 Act. The appellants' appeal before the Division Bench of the Hon'ble High Court was also dismissed. The said concurrent orders were assailed by the appellants before the Hon'ble Supreme Court. The Hon'ble Supreme Court held that since the appellants had filed a suit seeking the relief of injunction in emergent circumstances, this did not disentitle the appellants from seeking a stay of the proceedings in the respondents' counter claim due to an arbitration clause contained in the agreement. The Hon'ble Supreme Court observed that *"stay should have been granted to allow the parties to have their dispute as mentioned in the counter claim decided by the forum of arbitration."* It is pertinent to reproduce herein below paragraph 11 and the relevant portions of paragraph 14 of the said report:-

> ***"11. In the ordinary course plaintiff in the suit does not apply for stay of proceedings under section 34 of the Arbitration Act for the reason that this facility is available and meant for defendant only. In the instant case, counter claim was made in the written statement, which could be equated with separate counter suit. In the counter claim/suit status of plaintiffs changed and they became defendants and in such circumstances they could file application for stay under section 34 of the Arbitration Act. Appellants as plaintiffs in the main suit cannot be blamed for filing the suit in the first instance without invoking arbitration clause for the reason that it is explained that suit was only for injunction and there was urgent need for such relief from the Court which was not obtainable from Arbitrator as machinery was being removed from the site, which was to be prevented. When written statement-cum-counter claim was filed, it was divulged that defendants in the suit were raising dispute of the nature which could be settled by arbitration, application was filed immediately for stay of suit proceedings on 8-11-1983. In this regard, action of plaintiffs in the suit for filing suit in the first instance and not resorting to arbitration, cannot be held against them as reflection on their conduct in the counter claim/suit."***
>
> ***"14. As stated above, under section 34 of the Arbitration Act the Court has to satisfy itself whether stay of suit could be granted or not. Each case has different facts and peculiarities. In the instant case peculiar facts are that appellants filed suit for injunction only which was urgently required. In the written statement, counter claim was made on 3-10-1983 and on 8-11-1983 application was filed under section 34 of the Arbitration Act. ... It appears from the facts of the case that appellants were very anxious for compromise and since efforts failed, application was filed for stay, of suit proceedings on 8-11-1983. Even unilateral withdrawal of suit by the appellants cannot be anything else but part of compromise to encourage withdrawal of counter claim. In very peculiar facts and circumstances of this case as stated above, steps taken as mentioned above by the appellants should not be considered as amounting to taking steps in the proceedings within the meaning of section 34 of the Arbitration Act."***

30. Whether a given dispute comes within the scope of an arbitration clause or not depends primarily upon the terms of the clause itself. The arbitration clause in this case (i.e. Section 8.07 of the Agreement) excluded from its purview *"matters pertaining to injunctive relief including, without limitation, temporary restraining orders, preliminary injunctions and permanent injunctions".* The matter raised by En Pointe in its action before the Superior Court of the State of California was, in my view, within the words of exclusion in Section 8.07 *ibid*, and hence the said arbitration clause was not attracted thereto.

31. The right to arbitration, like any other contractual right, can be waived. Waiver of a contractual right to arbitration is ordinarily a

question of fact. A waiver of the right to arbitrate may properly be implied from any conduct which is inconsistent with the exercise of that right. Acquiescence to the jurisdiction of a Court may amount to waiver of the right to claim arbitration. There are countless examples of Courts refusing to stay legal proceedings at the instance of a party which had conducted itself in a manner as to constitute a waiver of its right to arbitrate. Reference in this regard may be made to the following case law:-

(i) **In the case of *"Lakhra Power Generation Company Limited (LPGCL) Vs. Karadeniz Powership Kaya Bey (2014 CLD 337),* the Hon'ble High Court of Sindh dismissed an application under Section 4 of the 2011 Act primarily on the ground that the arbitration agreement between the parties was incapable of being performed for the reason that the defendant had already initiated proceedings before the International Centre for the Settlement of Investment Dispute and had itself created a situation where recourse to the arbitration clause between the parties would not be possible or feasible.**

(ii) **In the case of *"Mc Connell Vs. Merrill Lynch, Pierce, Fenner, & Smith, Inc,"* Hastings, J. of the Court of Appeals of California, held that partial or piecemeal litigation of issues in disputes, through pretrial procedure, may in many instances justify a finding of waiver and would be consistent with the law as spelled out in *Doers Vs. Golden Gate Bridge, etc.(1979) 23 Cal. 3d 180).***

(iii) **In the case of *De Sapio Vs. Kohlmeyer (1974) 35 N.Y.2d 402,* it was held that *"the courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration".***

(iv) **In the case of *"United States of America Vs. Park Place Associates, Ltd.,"* the United States Court of Appeals, Ninth Circuit, in its judgment dated 22.04.2009, held that waiver of the right to arbitration is disfavoured because it is a contractual right, and thus any party arguing waiver of arbitration bears a heavy burden of proof. Furthermore, it was held that to demonstrate waiver of a right to arbitrate, a party**

must show: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.

(v) In the case of *"Christensen Vs. Dewor Developments ((1983) 33 Cal.3d 778),* Grodin, J. of the Supreme Court of California, held as follows:-

> ***"Among the principal reasons motivating persons to agree to arbitrate their differences is likely to be the avoidance of the courtroom with its attendant delays, costs, and publicity, and the avoidance of procedures associated with the formal litigation of causes. For a party to file a lawsuit in order to discover his opponent's theories thus tends to defeat the expectations of the parties, in addition to imposing unnecessary and inappropriate burdens upon already congested court calendars. Such procedural gamesmanship provides ample support for the trial judgment's conclusion that plaintiffs filed their action in bad faith, and by doing so waived their right to arbitrate".***

32. Had Section 8.07 of the Agreement not taken out from the ambit of the arbitration clause *"matters pertaining to injunctive relief including, without limitation, temporary restraining orders, preliminary injunction and permanent injunction"* the argument of the learned counsel for Ovex that En Pointe, by filing an action before the Superior Court of the State of California against Ovex on matters related to the Agreement, had conducted itself in a manner as to constitute a waiver of the right to arbitrate, would have been worth pondering over. However, since the matters pertaining to injunctive relief were not covered by the arbitration clause in the Agreement, I see no gamesmanship or bad faith in En Pointe invoking the jurisdiction of the Superior Court of the State of California in order to obtain an injunction. By filing the said action, En Pointe cannot be said to have acted in a manner inconsistent with Section 8.07 of the Agreement or waived, relinquished or abandoned its right to arbitrate. Hence, En Pointe was well within its rights to have sought stay of the proceedings in the suit instituted by Ovex before the learned Civil Court at Islamabad, and lost no time in doing so.

WHETHER THE IMPLEADMENT OF DEFENDANTS WHO ARE NOT PARTIES TO THE ARBITRATION AGREEMENT IS VALID GROUND

TO REJECT THE APPLICATION SEEKING THE PROCEEDINGS IN THE SUIT TO BE STAYED:-

33. As regards the contention of the learned counsel for Ovex that since Ovex had independent causes of action in its suit against En Pointe and the other defendants in the suit, neither could the plaint be returned due to the arbitration clause in the Agreement nor could the learned Civil Court stay the proceedings in the suit against the other defendants, suffice it to say that the right to seek stay of judicial proceedings vests in a party on account of being a party to an arbitration agreement. Merely because a plaintiff has impleaded other parties (with whom the plaintiff does not have an arbitration agreement) as defendants in a suit and also sought relief against them does not deprive the defendant (with whom the plaintiff has entered into an arbitration agreement) of his right vested in him under Section 34 of the 1940 Act or Section 4 of the 2011 Act, as the case may be, to seek stay of the proceedings in the suit to his extent.

34. It has become commonplace for unscrupulous litigants to rope in other parties in addition to the party with whom they have an arbitration agreement as defendants in a suit in order to avoid the proceedings in the suit being stayed on account of such an arbitration clause. More often than not, when proceedings in a suit are stayed under Section 34 of the 1940 Act or Section 4 of the 2011 Act to the extent of the defendant who is party to an arbitration agreement, the plaintiff loses interest in the suit against the other defendants or withdraws the suit. Courts ought to be vigilant as to such an abuse of its process and visit the dismissal or withdrawal of such cases with exemplary costs.

35. It has consistently been held that where a certain party who is a stranger to the arbitration agreement is joined as a co-defendant, and a Court finds that the said party was made a co-defendant in the suit only for the purpose of escaping from the arbitration agreement, the Court would not reject the application for stay and would hold that the suit as against the co-defendant was frivolous and vexatious. However, there are a few instances where Courts in such circumstances have turned down applications for stay on the

ground that to stay the suit and permit arbitration would result in splitting up of the action and to avoid the possibility of conflicting decisions in the arbitration proceedings and in the Court.

36. In the case at hand, Ovex has arrayed a number of other defendants along with En Pointe in the suit. Whether Ovex had joined parties other than En Pointe and its employees (i.e. respondents No.4 and 5) as defendants in the suit with a view to escape or resile from the arbitration agreement would be for the learned Civil Court to determine while deciding whether Ovex's suit was proceedable sans En Pointe. For the present purposes, it is held that since there does exist a valid and subsisting arbitration agreement between Ovex and En Pointe, and since Ovex, in its suit, had raised a claim arising from and related to the Agreement, the impleadment of strangers to the arbitration agreement in the suit would pose no impediment in staying the proceedings in the suit as against En Pointe under Section 4 of the 2011 Act. In holding so, I derive guidance from the law laid down in the following cases and treaties:-

(i) In the case of Lithuanian Airlines Vs. Bhoja Airlines (Pvt.) Ltd. (2004 CLC 544), a suit was filed against three defendants, out of whom one defendant filed an application under Section 34 of the 1940 Act praying for the proceedings in the suit to be stayed on the ground that it was a party to an arbitration agreement executed with the plaintiff. The plaintiff's plea, while opposing the application, was that if the suit proceeded against the defendants who were not parties to the arbitration agreement, conflicting decisions might ensue. This objection was rejected by the Hon'ble High Court of Sindh and the proceedings in the suit were stayed so that the disputes between the parties could be resolved through arbitration in accordance with the International Arbitration Association Rules and Procedures in a hearing before the Stockholm or London International Arbitrage.

(ii) In the case of Haji Muhammad Ibrahim Vs. Karachi Municipal Corporation (PLD 1960 Karachi 916), the Hon'ble High Court of Sindh held as follows:-

> ***"7. As for the first contention that defendants 2, 3 and 4 are not parties to the agreement, the short answer is that the claim of the plaintiff being based upon the breach of contract which contains the arbitration clause, it really is directed against Municipal Corporation, and the plaintiff cannot get out of arbitration clause merely by impleading certain officers of the Corporation or the subsequent contractor to whom the work has been awarded. If I was to accept this contention, it would amount to nullifying the arbitration clause to which the parties had bound themselves at the time of contract, and to which they still adhere".***

(iii) In the case of W. Bruce Ld. V. J. Strong. [1951] 2 K.B. 447, there was a chain of contracts for the sale of dried fruit. There was an arbitration clause only between the last purchaser and his vendor. In a suit for recovery of damages filed by the last purchaser against his vendor, the defendant took out a third party notice against his vendor, who in turn took out a third party notice against his vendor. It was only the last contract between the plaintiff and the defendant which contained an arbitration clause. The learned trial Judge refused to stay the suit, but on appeal the Court of Appeal allowed the appeal and compelled the plaintiff to refer his disputes with the defendant to arbitration notwithstanding the fact that the suit would have to proceed in Court so far as the determination of rights between the plaintiff and the third party, and between the third party and his vendor.

(iv) In the case of Sandeep Kumar Vs. Master Ritesh ((2006) 13 SCC 567), it has been held that if some of the defendants were not parties to the arbitration agreement, the question of invoking the arbitration clause as against those defendants would not arise.

(v) Paragraph *7-014 of* in the 21st Edition of Russell on Arbitration is reproduced herein below:-

> ***"Third parties involved:** There is no longer any scope for the court refusing a stay of proceedings on the ground that third parties are involved and that it would be preferable for the dispute to be dealt with by one tribunal (i.e. the court) in order to avoid the possibility of inconsistent decisions."*

WHETHER INCONVENIENCE CAUSED TO THE PARTIES BY THE VENUE FOR ARBITRATION BEING IN A FOREIGN COUNTRY CAN

BE A VALID GROUND TO REJECT AN APPLICATION SEEKING THE PROCEEDINGS IN THE SUIT TO BE STAYED:-

37. As regards the contention of the learned counsel for Ovex that since the Agreement was performed in Pakistan and all the material evidence is available in Pakistan, it would be inconvenient and expensive for Ovex to have its contractual disputes with En Pointe resolved by a forum situated in a foreign jurisdiction. The answer to this contention cannot be given in words better than the ones employed by the Hon'ble Mr. Justice Ajmal Mian in the judgment in the case of Eckhardt & Co. Vs. Muhammad Hanif (PLD 1993 SC 42). These are as follows:-

> ***"I may observe that while dealing with an application under section 34 of the Arbitration Act in relation to a foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honoured as generally the other party to such an arbitration clause is a foreign party. With the development and growth of International Trade and Commerce and due to modernization of Communication/Transport systems in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the Court should not lightly release the parties from their bargain, that follows from the sanctity which the Court attaches to contracts, must be applied with more vigour to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will tarnish the image of Pakistan in the comity of nations. A ground which could be in contemplation of party at the time of entering into the contract as a prudent man of business, cannot furnish basis for refusal to stay the suit under section 34 of the Act. So the ground like, that it would be difficult to carry the voluminous evidence or numerous witnesses to a foreign country for arbitration proceedings or that it would be too expensive or that the subject matter of the contract is in Pakistan or that the breach of the contract has taken place in Pakistan, in my view, cannot be a sound ground for refusal to stay a suit filed in Pakistan in breach of a foreign arbitration clause contained in contract of the nature referred to hereinabove. In order to deprive a foreign party to have arbitration in a foreign country in the manner provided for in the contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or would amount to forcing the plaintiff to honour a different contract, which was not in contemplation of the parties and which could not have been in their contemplation as a prudent man of business."***

The said enunciation of law has consistently been followed by the Superior Courts in this country in cases, including Hitachi Ltd. Vs. Rupali Polyester (1998 SCMR 1618), Manzoor Textiles Mills Ltd. Vs. Nichimen Corporation (2000 MLD 641), Serulean (Pvt.) Ltd. Vs.

Bhoja Airlines (Pvt.) Ltd. (2001 YLR 3150), CGM (Compagnie General Maritime) Vs. Hussain Akbar (2002 CLD 1528), Lithuanian Airlines Vs. Bhoja Airlines (Pvt.) Ltd. (2004 CLC 544), and Metropolitan Steel Corporation Ltd. Vs. Macsteel International U.K. Ltd. (PLD 2006 Karachi 664).

38. Ovex, as a prudent business entity, ought to have known when executing the Agreement and agreeing to resolve its contractual disputes with En Pointe through arbitration in a foreign jurisdiction, the expenses that it may incur and the inconvenience that it may face in taking to the evidence to a foreign jurisdiction for the resolution of its disputes under clause 8.07 of the Agreement. Ovex cannot be relieved from the bargain that it entered into with its eyes wide open. It is the Court's duty to give sanctity to such contracts.

WHETHER A COURT CAN RETURN THE PLAINT WHILE DECIDING AN APPLICATION UNDER SECTION 4 OF THE 2011 ACT:-

39. Vide the impugned order dated 10.10.2017, the learned Civil Court returned the plaint under Order VII, Rule 10 C.P.C. while deciding En Pointe's application under Section 4 of the 2011 Act. Section 4(1) of the 2011 Act provides that 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 insofar as they concern that matter. Section 4(2) of the said Act provides that when an application under Section 4(1) is filed, the Court shall refer the matter to arbitration unless it finds that the arbitration agreement is null and void, inoperative, incapable of being performed.

40. The conditions that have to be satisfied before the Court exercises jurisdiction to stay legal proceedings under Section 4 of the 2011 Act are as follows:-

(i) The application for a stay of legal proceedings under Section 4(1) of the 2011 Act has to be filed by a party to an arbitration agreement;

(ii) The legal proceedings against a party to the arbitration agreement have to be in respect of a matter which is covered by such an agreement;

(iii) The application under Section 4(1) of the 2011 Act is to be filed before a Court in which the legal proceedings have been brought by a party to the arbitration agreement; and

(iv) Unless the arbitration agreement is found to be null and void, inoperative or incapable of being performed, the Court shall refer the parties to arbitration.

41. In the case at hand, Ovex and En Pointe agreed in Section 8.07 of the Agreement for any controversy or claim arising out of or relating to the Agreement or breach thereof to be determined by a retired United States judge. The said parties also agreed for the venue of arbitration to be California, and for the governing law of the Agreement to be that of the State of California. The claim and/or the disputes agitated by Ovex against En Pointe in the suit arise from and are related to the terms of the Agreement. The application seeking a stay of the proceedings in the suit had been filed by En Pointe which is a party to the Agreement. I have already rejected the contention of the learned counsel for Ovex that the arbitration clause in the Agreement had been repudiated by En Pointe by instituting an action against Ovex before the Superior Court of the State of California. Therefore, it is my view that the conditions for staying the proceedings in the suit to the extent as against En Pointe are satisfied in the case at hand.

42. Where parties have agreed to refer a dispute to arbitration, and one of them notwithstanding that agreement commences an action to have the dispute determined by a Court, *prima facie,* the leaning of the Court would be to stay the action and leave the plaintiff to the tribunal to which he has agreed. This consideration is stronger in cases where there is an agreement to submit the disputes arising under a contract to a foreign arbitral tribunal. The case at hand is one such case. In the case of "Travel Automation (Pvt.) Ltd. Vs. Abacus International (Pvt.) Ltd." (2006 CLD 497), the Hon'ble Mr. Justice Khilji Arif Hussain, while at the High Court of Sindh, made a comparative analysis of Section 34 of the 1940

Act and Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 (which was in *pari materia* to Section 4 of the 2011 Act) and held that under the former, the Court had the discretion whether or not to stay the proceedings in the suit instituted by a party to an arbitration agreement whereas under the latter, such discretion did not vest in the Court while deciding an application under Section 4 of the 2011 Act. For the purpose of clarity, the relevant portion of the said judgment is reproduced herein below:-

> ***"In terms of section 34 of the Arbitration Act where any party to arbitration agreement or any person claiming under him commenced any legal proceedings against any other party to the agreement or person claiming under hire in respect of ally e alter 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, can apply to the court before which the proceedings are pending to stay the proceedings, and the court if satisfied that there is sufficient reason why the matter should not be referred to in accordance with arbitration agreement, may make an order staying the proceedings. Discretion has been given under section 34 of Arbitration Act, 1940 to court to stay or not to stay legal proceedings that is to say that the proceedings, despite arbitration clause between the parties, Court on its satisfaction that there was no satisfactory reason for making an arbitration and substantial miscarriage of justice would take place or inconvenience would be caused to the parties, if stay was granted, can refuse to refer the matter for arbitration in terms of arbitration clause agreed by the parties.***
>
> ***<u>While dealing with the matter under Recognition and Enforcement of (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005, such discretion is not available with the court.</u> Subsection (1) of section 4 provided that a party to arbitration agreement against whom legal proceedings has been brought in respect of the matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the court to stay the proceedings in so far as it concerned matter.***
>
> ***On comparing subsection (1) of section 4 with section 34 of the Arbitration Act, 1940 one can see that under section 34 of the Arbitration Act, 1940 any party to arbitration agreement or person claiming under trite commenced any legal proceedings against any other party to the agreement in respect of the matter agreed to refer, before filing of the written statement or taking any other step in the proceeding, can apply to the Court, and if Court is satisfied that there is a sufficient reason why matter should not be referred in accordance with arbitration agreement, may make order staying the proceedings whereas under subsection (1) of section 4 of Ordinance. 2005 a party to arbitration agreement against whom legal proceeding has been brought in respect of the matter which is covered by the arbitration agreement, upon notice to the other party to the proceedings, can apply to the court in which***

proceedings have been brought to stay the proceedings insofar as it concerned matter. In other words a suit can be partly stayed to the extent of the relief which is covered by the arbitration clause and or to which relation to party to a suit applied for stay of the proceedings.

Subsection (2) of section 4 of the Ordinance, 2005 has taken away discretion of the court whether or not to stay the proceeding in terms of the Arbitration Agreement, even on the ground of inconvenience etc. except where the arbitration agreement by itself is null and void, inoperative or incapable of being performed."
(Emphasis added)

Since the author of the said judgment rose to grace the Hon'ble Supreme Court, the ratio in the said judgment has to be respected and revered. Law to the said effect has also been laid down in the cases of "Far Eastern Impex (Pvt.) Ltd. Vs. Quest International Nederland BV" (2009 CLD 153) and "Cummins Sales and Service (Pakistan) Limited Vs. Cummins Middle East FZE" (2013 CLD 291).

43. Both the learned counsel for the contesting parties place reliance on the law laid down by the Hon'ble Supreme Court in the case of M.A. Chowdhury Vs. Mitsui O.S.K. Lines Ltd. (PLD 1970 SC 373). Learned counsel for Ovex relied on the said judgment in support of his contention that no one can, by consent, either vest a Court with jurisdiction which it does not otherwise possess or take away its jurisdiction which it does possess; that where two Courts are equally competent to try a cause or matter, then it is open to the plaintiff to chose his forum or for the parties to the dispute to agree to a particular forum in advance; that such agreement would be subject to the laws of the country in which the contract was made and where it was intended to be performed; and that such a choice or election by the parties cannot be in defiance of the law or opposed to public policy or to a statutory provision expressly prohibiting the making of such agreements or rendering the same, if made, invalid.

44. Learned counsel for En Pointe, while placing reliance on the judgment in the case of "M.A. Chowdhury Vs. Mitsui O.S.K. Lines Ltd." *(supra)*, argued that the arbitration clause in the agreement providing for disputes arising from and related to the Agreement except matters pertaining to injunctive relief to be resolved

through arbitration at Los Angeles, California by a retired United States judge did not, in any manner, defy the laws of Pakistan or was opposed to public policy. He stressed that the arbitration clause in the Agreement did not suffer from any invalidity and had to be given an effect by staying the proceedings in Ovex's suit. He further stated that on account of the arbitration clause in the Agreement, the suit instituted by Ovex against En Pointe was not incompetent so as to cause the learned Civil Court to reject or return the plaint, but since En Pointe had applied for a stay of the proceedings in the suit under Section 4 of the 2011 Act, it was obligatory upon the learned Civil Court to have stayed the proceedings. In making this submission, learned counsel for respondent No.2 placed reliance on the following portion of the judgment in the case of M.A. Chowdhury Vs. Mitsui O.S.K. Lines Ltd. (*supra*).

> ***"I am of the opinion that in order to preserve the sanctity of contracts I ought also to hold, as was done in the earlier cases in Great Britain that such foreign jurisdiction clauses, even when they purport to give jurisdiction to a Court in a foreign country, are really in the nature of arbitration clauses which come within the exceptions to section 28 of the Contract Act and, therefore, should be dealt with in the same manner as other arbitration clauses. In the case of arbitration it has to be remembered that the jurisdiction of the Courts is not altogether ousted, for, the Courts merely stay their hands to allow the parties to resort to the form of adjudication to which they have previously agreed. By only staying the actions before them the Courts still retain to themselves the jurisdiction to resume the case if the arbitration, for any reason, fails or the parties find it impossible to comply with the form of adjudication to which they had agreed."***

45. En Pointe, in its application under Section 4 of the 2011 Act, had prayed for the proceedings in the suit to be stayed and for Ovex to be directed to refer the matter to arbitration. The learned Civil Court returned the plaint by holding that it did not have the jurisdiction to adjudicate upon Ovex's suit on the ground that Section 8.08 of the Agreement provided for the Agreement to be governed by and construed in accordance with the laws of the State of California, and for the jurisdiction and venue to be in the State of California. In paragraph 7 of the said order, the learned Civil Court held that the *"parties with their free consent and free will [had]*

agreed and consented to the jurisdiction of the Courts at the State of California, U.S.A."

46. The return of the plaint by the learned Civil Court was on its own motion. Where a Court does not have the jurisdiction to entertain a suit, the proper course would be to return the plaint for its presentation before a Court of competent jurisdiction. In the case of Rafique Tabani Vs. Ghulam Haider Mohtram (1999 MLD 2915), it has been held *inter alia* that the power to reject a plaint could be exercised by the Court *suo moto* without feeling circumscribed by the grounds contained in Order VII, Rule 11 C.P.C.

47. Now, Section 8.07 of the Agreement not just provided for the contractual disputes between Ovex and En Pointe to be resolved through arbitration by a retired United States judge, but also for the venue of arbitration to be Los Angeles, California. Section 8.08 titled *"Governing Law"* provides for the Agreement to be governed by and construed in accordance with the laws of the State of California. It also records the consent of the parties to the Agreement to the jurisdiction and venue in the State of California. In this view of the matter, and on the strength of the ratio in the case of M.A. Chowdhury Vs. Mitsui O.S.K. Lines Ltd. *(supra)*, the learned Civil Court could only have stayed the proceedings in the suit to the extent of En Pointe, but could not have returned the plaint. The learned counsel for the contesting parties were also in unison on their submission that the learned Civil Court had erred by returning the plaint, and at best, it could have stayed the proceedings in the suit due to the arbitration clause in the Agreement.

WHETHER THIS COURT, IN EXERCISE OF APPELLATE JURISDICITON, CAN DECIDE THE APPLICATION UNDER SECTION 4 OF THE 2011 ACT AFTER SETTING ASIDE THE ORDER TO RETURN THE PLAINT:-

48. The learned counsel for the contesting parties were, however, at variance on whether this Court should modify the impugned order by staying the proceedings in Ovex's suit or to set-aside the impugned order with the direction to the learned Civil Court to decide afresh En Pointe's application under Section 4 of the 2011 Act. Learned counsel for En Pointe pressed this Court not to remand

the matter whereas learned counsel for Ovex took the position that Ovex could not be deprived of a right of appeal.

49. In the case at hand, since the Agreement admittedly contains an arbitration clause; and since I have already held that En Pointe did not repudiate the said clause by invoking the jurisdiction of the Superior Court of California in order to obtain an injunction; and since the claims made by Ovex in its suit before the learned Civil Court at Islamabad against En Pointe pertain to disputes arising from and related to the Agreement, I am of the view that remanding the case to the learned Civil Court would be a futile exercise. It is well settled that an appeal is a continuation of the original suit and the Appellate Court has ample power to scrutinize the documents on the record in the light of the arguments advanced by the contesting parties. An Appellate Court while hearing an appeal against an order/judgment or a decree of a Trial Court exercises the same jurisdiction which is vested in the Trial Court. In an appeal, the *lis* becomes open and the Appellate Court can do all that the original Court could do. Reference in this regard may be made to the law laid down in the case of Gul Rehman Vs. Gul Nawaz Khan (2009 SCMR 589), Inayat Vs. Darbara Singh (AIR 1920 Lahore 47), North-West Frontier Province Government, Peshawar Vs. Abdul Ghafar Khan (PLD 1993 SC 418), and Province of Punjab through Collector Bahawalpur Vs. Col. Abdul Majeed (1997 SCMR 1692).

50. In the case of CGM (Compagnie General Maritime) Vs. Hussain Akbar (2002 CLD 1528), the defendant in a suit had filed an application under Order VII, Rule 10 C.P.C. praying for the plaint in the suit to be returned on the ground that the contract/bill of lading had contained an exclusive jurisdiction clause providing for the disputes under the contract/bill of lading to be brought before the Tribunal de Commerce in Paris. The trial Court at Karachi passed an order dismissing the said application and holding that the suit shall proceed at Karachi. The order of the trial Court dismissing the said application was assailed in an appeal which was allowed by the Hon'ble High Court of Sindh and the proceedings in the suit were stayed due to the exclusive jurisdiction clause which is treated like an arbitration clause.

51. It is also well settled that remand of a case can only be ordered when it becomes absolutely necessary and inevitable in view of insufficient or inclusive material on the record. Remand should not be ordered when no evidence is to be recorded or where the material on the record is sufficient for the Appellate Court to decide the matter. Cases cannot be remanded just to prolong the litigation between the parties. Bearing all this in mind, I am not inclined to remand the matter to the learned Civil Court for a decision afresh on En Pointe's application under Section 4 of the 2011 Act.

WHETHER THE PLAINT IN THE SUIT TO THE EXTENT OF RESPONDENTS NO.4 AND 5 IS LIABLE TO BE REJECTED:-

52. As for respondents No.4 (Simon Abuyounes) and respondent No.5 (Jay Miley), they, in their individual capacities, are not parties to the Agreement. However, they are admittedly En Pointe's employees/officers. The claim made by Ovex against respondents No.4 and 5 in the suit is based on the acts performed and decisions taken by the said respondents in their capacity as En Pointe's employees/officers. But for the Agreement between Ovex and En Pointe, respondents No.4 and 5 would have figured nowhere in the litigation. It is not Ovex's case that the said respondents in their interaction or communication with Ovex acted not as representatives of En Pointe or in excess of the authority given to them by their employer.

53. It is well settled that as per company laws, a company is a separate legal entity distinct from its owners or shareholders or directors or officials or employees. A company has a perpetual existence and can sue and be sued in its own name. Any director or employee of a company is not personally liable for the liability of the company even if he acted on behalf of the said company. Conversely, a company is also not liable for the liability of its directors / employees arising out of an act in their individual capacity. Directors of a company are liable for misappropriation of the company's funds and other misfeasances but not for ordinary contractual liability of the company. The directors or employees of the company cannot be fastened with ordinary contractual liability

of the company. The House of Lords in the case of Lloyds Vs. Grace Smith and Co. (1912 AC 716) held that so long as the servant is acting within the scope of employment entrusted to him, his employer is liable for all frauds committed by that servant, whether for the benefit of the employer or for his own profit. The instant case, however, is not one where fraud or cheating on the part of the employees (respondents No. 4 and 5) *dehors* the Agreement is alleged. The communication by respondents No.4 and 5 with Ovex was in their capacity as En Pointe's employees and not otherwise. In the case of Muratab Ali Vs. Liaquat Ali (2004 SCMR 1124), the plaintiff opposed an application under Section 34 of 1940 Act filed by one of the defendants in the suit on the ground that the other defendants were not parties to the Agreement which contained the arbitration clause. This objection was repelled by the Hon'ble Supreme Court of Pakistan in the following terms:-

> ***"Because the application has been moved for staying the proceedings under section 34 of the Arbitration Act, therefore, notwithstanding the fact whether respondent No.2 was a party or not in terms of arbitration clause in the partnership agreement read with section 34 of the Arbitration Act, the suit has been rightly stayed and no exception can be taken against such orders, therefore, the argument raised by the learned counsel for the petitioners has no substance".***

Following the said ratio, the Court can stay the entire proceedings in the suit. The Court, however, also has the option to reject the plaint in *suo moto* exercise of its powers under Order VII, Rule 11 C.P.C. especially as against those defendants who are employees of the defendant who is a party to the arbitration agreement. In the case of Rafiq Tabani Vs. Ghulam Haider Mohtaram (1999 MLD 2915), it has been held that the power to reject a plaint can even be exercised *suo moto* without feeling circumscribed by the grounds contained in Order VII, Rule 11 C.P.C. In the case of National Fibres Ltd. Vs. Karachi Development Authority (1996 MLD 76), it has been held that if the defendant does not file an application for rejection of the plaint, this does not absolve this Court to exercise its discretion under Order VII, Rule 11 C.P.C. In the case of Trustees of the Port of Karachi Vs. Gujranwala Steel Industries (1990 CLC 197), it was held that the question of

rejection of the plaint under Order VII, Rule 11 C.P.C. has an element of priority, has to be disposed of at the earliest and can always be considered even suo moto, without a formal application.

54. In view of the above, the instant appeal is allowed and the impugned order dated 10.10.2017 for the return of the plaint is set-aside. En Pointe's application under Section 4 of the 2011 Act is allowed and the proceedings in Ovex's suit, to the extent as against En Pointe, are stayed whereas the plaint in the suit, to the extent as against respondents No.4 and 5, is rejected. Ovex is at liberty to resolve its differences and disputes with En Pointe in accordance with Section 8.07 of the Agreement; and Ovex's suit against the respondents other than En Pointe and respondents No.4 and 5 shall proceed in accordance with the law. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**