JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

F.A.O. NO.99 OF 2017

MST. SHABNAM IFTIKHAR AND OTHERS

VERSUS

UMER PARWEZ AND OTHERS

Appellants by	**:**	**Barrister Junaid Jahangir.**
Respondents No.1 to 6 by	**:**	**Mr. Sher Afzal Khan Marwat, Advocate.**
Date of hearing	**:**	**03.02.2022.**

SAMAN RAFAT IMTIAZ, J.:- The instant first appeal has been filed by the Appellants u/s 39(1)(v) of the Arbitration Act, 1940 ("**Arbitration Act**") against the Order dated 09.05.2017 ("**Impugned Order**") passed by the learned Civil Judge, West-Islamabad ("**Trial Court**"), whereby an application under Section 34 of the Arbitration Act filed by Appellant No.1 (Mst. Shabnam Iftikhar) was dismissed.

2. Succinctly, the facts of the case as per the Memo of Appeal are that originally, Appellant No.1 and her brother, Muhammad Parwez, and one, Imtiaz Ahmed executed Partnership Deed dated 10.03.1985 (**"Partnership Deed"**) to form a partnership firm under the name and style of M/s Shad Enterprises ("**Firm**") registered with the Firm Registrar, Islamabad. The said firm was engaged in the business of repair, maintenance and construction of buildings. After retirement of Imtiaz Ahmed from the Partnership Firm, Muhammad Parwez and Shabnam Iftikhar reconstituted the partnership as per Clause-10 of the Partnership Deed.

3. That upon the sad demise of the Partner, Muhammad Parwez on 22.11.2013, the Firm stood dissolved by virtue of Clause IX of the Partnership Deed. As the Partnership Firm was involved in the maintenance of an Apartment building by the name of 'Executive Suites' and was also undertaking construction and maintenance activities in terms of its second project i.e. an apartment building by the name of 'Executive Heights', the Appellant No.1/Defendant No.1 along with the Respondents No.1 to 6/Plaintiffs No.1 to 6 (legal heirs of the Deceased Partner) decided to keep the Partnership Firm alive for purposes of which, the Respondents No.1 to 6/Plaintiffs No.1 to 6 filed a Civil Suit titled "Umer Parwez & Others versus Shabnam Iftikhar & Others" wherein the Appellant No.1/Defendant No.1 made a conceding statement in order to procure an order of the court to keep the Partnership Firm and its business legally operative and intact. The Respondents No.1 to 6/Plaintiffs were introduced into the Firm by virtue of the Revised Partnership Deed dated 30.04.2015 ("**Revised Partnership Deed"**).

4. That the Appellants contend that the building Executive Heights is being constructed, managed and maintained by the Appellant No.2/Defendant No.2 on the instructions of Appellant No.1/Defendant No.1 and whereas the Respondent No.1/Plaintiff No.1 was managing the affairs of the building Executive Suites i.e. he was assigned responsibilities which were originally vested in the Deceased Partner. The aforesaid arrangement was the result of an Arbitral Award rendered by two arbitrators in the year 2005 when a dispute arose between the founding partners i.e. the Appellant No.1/Defendant No.1 and the Deceased Partner.

5. In the year 2015-16, Respondents No.1 to 6 started interfering in the affairs of 'Executive Heights' by alleging that the Award of 2005 was a result of forgery.

6. The Respondents No.1 to 6/Plaintiffs filed civil suit for declaration, permanent & mandatory injunctions and recovery of damages & compensation against the Appellants/ Defendants No. 1 to 3 and Proforma Respondents No.7 to 12/Defendants No. 4 to 9. In short, it was alleged that the Appellants/Defendants No.1 to 3 were unlawfully interfering in the business of the Respondents No.1 to 6/Plaintiffs and in connivance with the Proforma Respondents No.7 to 12/Defendants No.4 to 9 caused harassment to Respondents No.1 to 6/Plaintiffs including registration of FIR, sealing of their offices, etc., which resulted in damages.

7. The Appellant No.1 filed an application under Section 34 of the 1940 Act requesting the court to stay the proceedings and to refer the matter for arbitration in terms of Clause x of the Revised Partnership Deed, which was dismissed vide the Impugned Order, hence the instant appeal.

8. The Impugned Order dismissing the Appellant's' application for stay of proceedings under Section 34 of the Arbitration Act is based essentially on two grounds: (a) that advocate undertaking to file power of attorney and seeking time to file written statement constitutes taking steps in the proceedings; and (b) that first part of the relief claimed in the suit is against the Appellants/Defendants No.1 to 3 who are party to the arbitration agreement whereas the rest of the claim is against Proforma Respondents No.7 to 12/Defendants No. 4 to 9, who are not party to the

arbitration agreement, therefore, controversy cannot be resolved through arbitration as partial reference to arbitration would not serve any useful purpose.

9. Learned counsel for the Appellant, *inter alia*, contends that the Impugned Order is a result of misreading of facts and against settled law; that a statement of an advocate without power of attorney cannot be binding upon the Appellants; that even otherwise undertaking to file written statement does not constitute steps in the proceedings; that the dispute arises out of the Revised Partnership Deed without which there would have been no dispute between any of the parties to the suit; that as per the Revised Partnership Deed, any dispute between the parties shall be referred to arbitration; that alternatively the Trial Court has *suo moto* powers to order separate trials under Order II, Rule 6, C.P.C., therefore, it is prayed that the Impugned Order be set-aside and the proceedings in the civil suit be stayed. In support of all his contentions, the learned counsel for the Appellants relied upon *Uzin Export Import Enterprises Vs. M. Iftikhar & Company Ltd.*, PLD 1986 Karachi 1, *Shin Satellite Public Company Limited Vs. Messrs Kasb Technology Services Limited*, 2016 YLR 2322, *Lithuanian Airlines Vs. Bhoja Airlines (Pvt.) Ltd.*, 2004 CLC 544, *Pakistan Stone Development Company Limited Vs. Muhammad Yousaf*, 2018 CLC 877, *Anjuman Faizul Islam (Regd.) Rawalpindi Vs. Messrs Building Artisans Ltd.*, PLD 1994 Lahore 122, *Messrs M. M. Yaseen Vs. Messrs Iriving R. Boody & Co.*, PLD 1957 (W.P.) Karachi 756, *Messrs Royal Group Vs. Messrs SEMOS Pharmaceuticals (Pvt.) Ltd.*, 2011 CLC 235, *M/s Serulean (Pvt.) Ltd. Vs. M/s Bhoja Airlines (Pvt.) Ltd.*, 2001 YLR 3150, *Yusuf Muhammad Siddiq Vs. Muhammad*

Rafique, PLD 2015 Sindh 319, *Ovex Technologies (Private) Limited Vs. PCM PK (Private) Limited*, PLD 2020 Islamabad 52, *M/s Haji Muhammad Ibrahim Vs. Karachi Municipal Corporation*, PLD 1960 (W.P.) Karachi 916, *Amanullah Piracha Vs. Mrs. Tasneem Baig*, 1988 MLD 1552, *Muratab Ali Vs. Liaquat Ali*, 2004 SCMR 1124, *Uzin Export Import Foreign Trade Co. Vs. Macdonald Layton & Co. Ltd.*, 1996 SCMR 690, *Syed Asadul Haq Vs. M/s Balochistan Glass Limited*, 2011 CLC 294, *Muhammad Ashraf Vs. Dilbar Khan*, 2011 CLC 304, *M/s Imperial Builders Vs. Lines (Pvt.) Limited*, PLD 2006 Karachi 593, and *Malik Muhammad Ishaque Vs. M/s Erose Theatre*, PLD 1977 SC 109. Learned counsel for the Appellant prayed for the acceptance of this appeal by setting aside the Impugned Order.

10. Conversely, learned counsel for Respondents No.1 to 6 while defending the Impugned Order vehemently opposed the instant Appeal and submitted that splitting of claims under Order II, Rule 6, C.P.C., would be against the Arbitration Act; that the objective of the Arbitration Act is speedy disposal whereas in the present case the Appellants' application under Section 34 of the Arbitration Act has been pending for six years; that the conduct of the Appellants including seeking time to file written statement and filing of written statement, subsequent application of deletion of parties, counter to stay application, etc., amounts to participating in the proceedings; that Respondent No. 3/Plaintiff No. 3 has expired due to which the partnership between the parties has dissolved as per clause (viii) of the Revised Partnership Deed; arbitration clause cannot survive after dissolution of the firm; that even otherwise prayer clause No.1 of the suit does not arise from the arbitration agreement; that prayer

clauses against Proforma Respondents No.7 to 12/Defendants No.4 to 9 cannot be separated; that there is no business dispute under the arbitration agreement with the Appellants; that the cause of action was against the police officials who are Proforma Respondents No.7 to 12/Defendants No.4 to 9; and that arbitrator cannot give relief against Proforma Respondents No.7 to 12/Defendants No. 4 to 9. The learned counsel for the Respondents No.1 to 6 relied upon *Pakistan Telecommunication Company Limited Vs. Union Communication (Pvt.) Limited,* 2021 CLC 965*, Pakistan Airlines Pilots' Association Vs. Federation of Pakistan,* 2021 PLC (C.S.) 860, *Government of the Punjab Vs. M/s Muhammad Asad & Co.*, 2021 CLC 2135, *Muhammad Farooq Vs. Nazir Ahmad*, PLD 2006 SC 196, *Pakistan International Airlines Corporation Vs. M/s Pak Saaf Dry Cleaners*, PLD 1981 SC 553 and *Badsha Meah Sowdagar Vs. Nurul Haq*, PLD 1967 Dacca 250.

11. In exercise of his right of rebuttal, the learned counsel for the Appellants submitted that steps taken after filing of application for stay of proceedings under Section 34 of the Arbitration Act do not constitute step in the proceedings that would amount to waiver of the arbitration agreement. He drew the Court's attention to various paragraphs of the Plaint and argued that the plaint starts off with details of the partnership firm and that the dispute is set out in paragraph 16, which is essentially with the Appellants, therefore the matter should be referred to arbitration as per their agreement.

12. I have heard the arguments of the learned counsel for the parties and perused the record.

13. With regard to the first ground for dismissal of the Appellant's application under Section 34 of the Arbitration Act, it is noted that the record reflects that notice of the suit filed by the Respondents No.1 to 6 against the Appellants and the Proforma Respondents No.7 to 12/Defendants No. 4 to 9 was issued on 02-05-2016. On the next date i.e., 18-05-2016, Mr. Sohail Waraich, Advocate submitted that he shall file his power of attorney on behalf of the Appellants/Defendants No. 1 to 3 in the office and further that he shall file the written statement on their behalf within a period of two weeks. However, on the next date i.e., 03-06-2016, an application under Section 34 of the Arbitration Act was filed on behalf of the Appellant No.1 praying for stay of proceedings and for reference of the matter in dispute between the parties to arbitration in terms of clause x of the Revised Partnership Deed.

14. The question that arises under the circumstances is whether the aforementioned submissions of the legal counsel on the first date of appearance constituted "steps in the proceedings" which would disentitle the Appellants from invoking the arbitration clause. This question has arisen in a multitude of cases and as such it is well settled by now that seeking a single adjournment does not amount to "steps in the proceedings" so as to disentitle the party from seeking stay of proceedings. Similarly, it is also a well-settled proposition that any step taken after filing of the application under Section 34 of the Arbitration Act does not disentitle the defendant from seeking stay of proceedings. The learned counsel for the Appellants has cited a plethora of case law in this regard. Even the cases relied upon by the learned counsel for Respondents No.1 to 6 do not include any case where the defendants were held disentitled from invoking the arbitration clause simply on account

of one adjournment. In all such cases, there were multiple adjournments requested for the purpose of filing written statement. In light of such cases, I, therefore, hold that the learned Trial Court erred in concluding that the single instance of adjournment for submission of written statement amounts to steps in the proceedings.

15. I now turn to the second ground given in the Impugned Order for dismissing the Appellant No.1's application under Section 34 of the Arbitration Act i.e., that the Proforma Respondents No.7 to 12/Defendants No. 4 to 9 are not party to the arbitration agreement i.e., the Revised Partnership Deed and as such partial reference to arbitration will not resolve the controversy involved in the suit.

16. According to the Plaint, the handing over of possession to buyers of the apartments in Executive Heights halted because of the controversy between the parties. Allegations have been made of dishonesty, embezzlement, cruelty and disloyalty by Appellant No.3/Defendant No.3 toward Respondent No.2/Plaintiff No. 2, who are husband and wife. It has been alleged further that the Appellants/Defendants No.1 to 3 started threatening Respondents No.1 to 6/Plaintiffs with the aim to paralyze the functioning and management of the two residential complexes and in this background the Appellants No.2 and 3/Defendants No.2 and 3 in connivance with the Proforma Respondents No.7 to 12/Defendants No. 4 to 9 unleashed a reign of terror and harassment. As per the contents of the plaint, the Appellants/Defendants No.1 to 3 and Proforma Respondents/Defendants No.4 to 9 caused registration of FIR based on a concocted and false account and at the instance of Appellants No.2 and 3/Defendants No.2 and 3 prepared a qalandra, whereafter the Proforma Respondent No.11/Defendants

No.8 passed order of sealing of the office of the Respondents No.1 to 6/Plaintiffs. It has been stated that the Appellants/Defendants No.1 to 3 have no right to interfere in the management of the affairs of Shad Enterprises and that the first cause of action arose with the illegal detention of the Respondent No.1/Plaintiff No.1 and subsequent causes arose with attempts to take over the management of affairs of Shad Enterprises.

17. Therefore, the following prayers were made by the Respondents No. 1 to 6/Plaintiffs by way of the plaint:

> *"In the light of the submissions made hereinabove, it is respectfully prayed that following relief may graciously be granted.*
>
> > *1. That Plaintiffs being owners in possession of the Executive Suites and Executive Heights, with 62 percent share in the projects Executive Suites and Executive Heights with Plaintiff No.1 as the sole managing partner on behalf of all partners including defendant No.1, has a right to manage the affairs of the Shad Enterprises to the exclusion of all the partners and defendants No.1 to 3 have no rights, whatsoever, to interfere in the Plaintiff No.1 affairs, management and possession,*
> >
> > *2. That all the defendants be permanently restrained from interfering into plaintiffs business or possession and may further be restrained from violating the chastity and dignity of the privacy rights of the plaintiffs as well of the inmates of the Executive Heights and Executive suites, and,*
> >
> > *3. That Defendant No.9 be directed to keep the police away from the civil business of the plaintiffs and may further be directed to adhere to the law, and,*
> >
> > *4 That Defendant No.8 may graciously be restrained from interfering into the business and possession of the plaintiffs, and,*
> >
> > *5. That plaintiffs be collectively awarded a decree for recovery of Rs.50 Million each from defendants No.2 to 7 as damages (total 300 Million and 50 Million against each defendants No.2 to 7) and compensation for defamation, torture, mental agony, malicious prosecution, and inflicting damages to the business, property and reputation of all the plaintiffs, and,*
> >
> > *6. That any other relief deemed fit in the circumstances and not specifically prayed for, may also graciously be awarded.* "

18. It may be seen from the above summary of the allegations contained in the Plaint that the dispute arose between Respondents No.1 to 6/Plaintiffs

and the Appellants/Defendants No. 1 to 3 regarding business matters due to which the Proforma Respondents No.7 to 12/Defendants No.4 to 9 allegedly at the behest of and in connivance with the Appellants/Defendants No.1 to 3 took illegal actions against the Respondents No.1 to 6/Plaintiffs causing them damages.

19. The case law relied upon by the learned counsel for the Appellants to support the contention that an application under Section 34 of the Arbitration Act can be allowed despite impleading of parties to the suit who are not party to the arbitration agreement is distinguishable because the Court concluded that in the facts and circumstances of such cases the parties who were not party to the arbitration agreement were not necessary or proper parties for the adjudication of the questions involved.

20. On the other hand, in the facts and circumstances of the instant case, the Proforma Respondents No.7 to 12/Defendants No. 4 to 9 may not be necessary for the adjudication of the issues arising between the Appellants No.1 and 2/Defendants No.1 to 2 and Respondents No. 1 to 6/Plaintiffs insofar as their business dispute is concerned but both the Appellants No.1 and 2/Defendants No. 1 to 2 as well as the Proforma Respondents No.7 to 12/Defendants No. 4 to 9 are necessary parties for the adjudication of the claim of damages allegedly arising from the illegal actions of the Proforma Respondents No.7 to 12/Defendants No. 4 to 9 taken at the behest of and in connivance with the Appellants No.1 and 2/Defendants No. 1 and 2. However, since the Proforma Respondents No.7 to 12/Defendants No. 4 to 9 are not party to the arbitration agreement, the matter cannot be referred to arbitration nor can separate trial be ordered as suggested by the learned

counsel for the Appellants as separate trials could lead to conflicting judgments.

21. Therefore, I find that the learned Trial Court was correct in concluding that the controversy between all the parties to the suit cannot be resolved by way of arbitration and partial reference to arbitration would not serve any useful purpose. This being so, the instant appeal fails and is hereby **dismissed.**

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court _____.

JUDGE

Junaid