HCJD/C-121

ORDER SHEET

ISLAMABAD HIGH COURT ISLAMABAD

C.S. No.33/2011

Abid Associated Agencies International Pvt. Ltd. etc.
Versus
AREVA, etc.

S.No. of order/ Proceeding	Date of hearing	Order with signature of Judge, and that of parties or counsel, where necessary.
	28-05-2015	Ch. Mushtaq Ahmed Khan, Advocate for the plaintiff. Mr. Basharat Qadri Advocate for the defendant No.1&2. Mr. Arshad Zaman Kayani, Advocate for the defendant No.3. Mr. Syed Hassan Ali Raza Advocate for defendant No.7,8,9,&11. Mr. Waqas Malik Advocate for defendant No.10.

C.M. No.512/2014.

Through this order, I intend to decide C.M. No.512/2011. The application was initially filed under Section 34 of the Arbitration Act 1940 by the defendant No.1 and 2 for stay of the proceedings. Subsequently, the application was amended by the addition of Section 4(1) of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 *(hereinafter referred to as the 'Act of 2011')*.

2. The admitted facts are that the plaintiff No.2, on behalf of the predecessor-in-interest of plaintiff No.1, entered into a contract of agency, dated 22-08-1994, with the predecessor-in-interest of defendant No.1 (*hereinafter referred to as the 'Agreement'*). Initially, the validity of the Agreement was till 31-12-1995, but the same was extended from time to time. The Agreement, *interalia*, included Article 9.1, which provided for the termination of the Agreement. The predecessor-

in-interest of defendant No.1 informed the predecessor-in-interest of plaintiff No.1 vide letter dated 18-07-2000, that the concerned division relating to the Agreement had been sold, therefore, as a consequence, the agreement was being terminated. The Agreement also provided for resolution of disputes vide Article-12 thereof. The plaintiff initiated arbitration proceedings pursuant to Article-12 of the Agreement, under the Rules of the International Chamber of Commerce (*hereinafter referred to as the 'ICC'*). The plaintiff partially complied with the ICC Rules, which led to a partial award dated 28-10-2008, whereby the claim was rejected. As far as the remaining claims were concerned, it was left open to the plaintiff to comply with the ICC Rules. The plaintiffs filed suit No.33/2011 (*hereinafter referred to as the 'Suit'*), arraying 14 defendants. The applicants filed the instant application and the plaintiffs filed counter affidavits.

3. The question, therefore, before this Court for consideration is whether under Section 4(1) of the Act of 2011, the proceedings in the Suit should be stayed, and whether the plaintiff has made out a case for invoking the exceptions as stipulated in sub-section-2 of Section-4 *ibid*.

4. Mr. Basharat Qadri, Advocate, the learned counsel for the applicant, contends that the plaintiffs/respondents have concealed in the plaint that they had invoked the arbitration clause, which had culminated in the arbitral award dated 28-10-2008; the arbitration clause had commenced on 18-05-2006 and

concluded on 28-10-2008; the plaintiffs/respondents had fully participated in the proceedings by accepting the jurisdiction of the Arbitration Tribunal; the plaintiffs/respondents have misstated that the defendant No.1 had declined to pay its share of the arbitration costs, rather it undertook to pay its part of the costs to match the claimants payments; it was the claimant's failure to pay which resulted in the giving of the partial award; the plaintiffs/respondents, before, during or after the arbitration award raised no objection as to the agreement being null and void, inoperative or incapable of being performed; the plaintiffs/respondents have failed to make out a case to bring it within the exceptions mentioned in sub-section (2) of section 4 of the Act of 2011; the provision of the Act of 2011 does not vest any discretion in the Court to refuse the application for staying the proceedings in the suit, unless a case is made out under sub-section (2) of Section 4 of the Act of 2011; the learned counsel, in support of his contentions, has placed reliance on P.L.D. 2006 Karachi 664, 2009 Y.L.R. 334, 2013 C.L.D. 291, 1997 S.C.M.R. 988, unreported judgment of this Court in C.S. No.13/2012; the allegations and assertions made by the plaintiffs in the suit, and arraying the defendants who were not privy to the agreement, is merely an attempt to avoid the arbitration proceedings and, therefore, malafides are alleged.

5. Ch. Mushtaq Ahmed Khan, Sr. ASC, contends that the Agreement has become incapable of being performed and, therefore, the Suit is not liable to be stayed under Section 4(2) of the Act of 2011; the case law relied upon by the learned counsel for the defendant No.1 is distinguishable on facts and

law, rather, it is asserted that it supports the case of the plaintiffs/respondents; the provisions of the Act of 2011 would apply were the dispute is between parties to the Agreement; the Agreement was executed with M/S Framatome, which is not a defendant in the Suit and, therefore, there is no bar to file a suit in a Court vested with general jurisdiction against defendants who were not parties to the Agreement; the Agreement was terminated on the ground that M/s Framatome was not capable of performing the Agreement as it had transferred/disposed-of the relevant division which used to manufacture the compressors; the contract has been terminated, therefore, the plaintiffs/respondents are no more an agent of M/S Framatome; the Agreement is inoperative, having been terminated, and therefore, under Section 4(2) of the Act of 2011, the case of the plaintiffs/respondents falls within the ambit of the exception, therefore, the application is liable to be dismissed. The learned counsel has relied on the definition of the term '*inoperative*' and '*incapable of performance*', and has relied upon P.L.D. 2013 S.C. 641, particularly page-671 thereof, in support of the contention that section 4 of the Act of 2011 does not de-bar the Court in Pakistan to proceed with the proceedings which arise out of a contract which is null and void; he relies on International Chamber of Commerce Arbitration, 3rd Edition by *W. Laurance Craig, William W. Park and Jan Paulsson*, pages-74 to 80, in support of his contention that the arbitration clause cannot be invoked in the case of parties not privy to the agreement; the plaintiffs/respondents cannot initiate arbitration proceedings against such defendants who are not privy to the agreement;

Section 34 of the Arbitration Act, 1940 vests discretion in the Court.

6. The learned counsels have been heard and the record perused with their able assistance and, consequently, the opinion of this Court is as follows.-

7. The arbitration clause incorporated in the Agreement, and the legality thereof, is not in dispute. The respondents/plaintiffs had earlier invoked the arbitration clause, and pursuant thereto had initiated arbitration proceedings before the Tribunal consisting of three Arbitrators. The respondents/plaintiffs had participated in the proceedings, which had culminated in the Tribunal giving a partial award. The Suit has been filed by the plaintiffs and the prayer is as follows.-

> *"In view of the above, it is most respectfully prayed therefore, that following relief may kindly be granted:*
>
> *(i) A decree for a declaration to the effect that the act of the defendant No.1, 2 and 3 of termination of the contract dated 22.08.1994, all the decisions taken before and thereafter, are illegal, malafide, inviolative of the terms and conditions of the contract dated 22.08.1194 and as such the letter dated 18.07.2000 being void, ab-initio, malafide, non-est per incurium, the plaintiff continues to be the agent of the respondents No.1 to 3 up the date of expiry of original contract of exclusive agency and is entitled to*

the past and further commission as per terms of contract with mark-up at the Bank rate from all the transactions by all the defendants in the past, present and future, who are liable to pay jointly and severally.

(ii) A decree for recovery of established amount of Rupee-Equivalent to EUROS 1,212,724,60 may kindly be passed issued in favour of the plaintiffs' and against the defendants, as plaintiffs' business share @7% for the transaction known and recorded between Pakistan Petroleum Limited and the defendants, pursuant to the Purchase Order No.3002/5130 dated 24.02.1995;

(iii) A decree for recovery of Rupee-Equivalent to EUROS 38,800,000.00 on account of damages caused to plaintiffs' reputation, good-will, business prospects and future earning by defendants' breach of contract, in the shape of attempted/wrongful alleged termination of the contract dated 22.08.1994 between the parties.

(iv) A decree for rendition of account of all the transactions carried by the defendants with PPL for payment of amount that is finally found outstanding in favour of the plaintiffs as against the defendants as a business share and 7% for the transactions. Further, a decree may be passed after proper rendition of accounts between the parties for payment of the amount that is final found outstanding in favour of the plaintiffs and against the defendants.

(v) An order may be most graciously passed for attachment of the properties of the defendants and/or their subsidiaries operating in Pakistan as also freezing any payments in Pakistan Petroleum Limited's accounts that are outstanding in defendants' favour, with a view to secure the rights and interests of the plaintiffs and proper adjudication thereof;

(vi) A direction may kindly be issued for complete disclosure/rendition of the accounts to the defendants, including Pakistan Petroleum Limited, relating to the transactions contracted with PPL pursuant to Purchase Order No.3002/5130 dated 24.02.1995 including all the transactions carried between the defendants and PPL before or thereafter.

(vii) Any other appropriate relief, which this Honourable Court deemed fit may also be awarded .

(viii) Costs of this litigation and other legal actions, to which the plaintiffs may be found entitled in the circumstances of the case, may also be most graciously awarded by the Honourable Court."

8. It is evident from the above prayer that the respondents'/ plaintiffs' cause of action essentially relates to the disputes arising out of or in connection with the Agreement. The termination of the Agreement by the predecessor-in-interest of the defendant No.1 has given rise to the cause of action. In this

back ground it has to be examined whether the proceedings ought to be stayed under Section 4 of the Act of 2011

9. Claus-12 of the Agreement is as follows.-

"*Article 12: DISPUTES - APPLICABLE LAW*

12.1 *Should a dispute arise between the Parties in connection with the interpretation and/or the implementation of the Contract, the plaintiff shall notify the reasons to the other Party by registered letter.*

The parties shall try to promptly reach in good faith an amicable settlement for such dispute.

In case such amicable settlement is not reached, within 30 days after the above notification, the dispute shall be settled under the Rules of Conciliations and Arbitration of the International Chamber of Commerce (ICC) by three (3) arbitrators appointed in accordance with the said Rules, Rules which the Parties recognize that they know.

The language of the arbitration proceedings and the language of the arbitration decision shall be in English.

The Parties agree that the award and termination of the arbitrators shall be final and binding on both Parties.

The place of the arbitration shall be Paris.

12.2 *The arbitrators shall apply the substantive law of Switzerland to the merits of the disput and IN ALL CASES SHALL DECIDE IN ACCORDANCE WITH THE TERMS OF THE CONTRACT.*"

10. Section 4 of the Act of 2011 is as follows.-

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

11. The preamble of the Act of 2011 specifically refers to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, and declares the purpose of the enactment as providing for the recognition and enforcement of arbitration agreements and foreign awards pursuant to the said Convention and matters connected therewith. Section 4 provides that a party to an arbitration agreement, against whom legal proceedings have been brought in respect of matters covered by the arbitration agreement, may seek the stay of proceedings if the dispute(s) are concerning matters covered there under. Sub section 2 of section 4 provides for the exceptions when the Court will refuse to stay the proceedings. If the arbitration agreement is not covered under the exceptions then no discretion is vested in the Court to refuse granting the application for staying the proceedings, as the legislature has used the word 'shall'.

12. Before proceeding further, it would be pertinent to examine the meaning of an 'arbitration agreement' and the phrase 'null and void, inoperative or incapable of being performed'. The expression 'arbitration agreement' is distinct from the entire underlying or substantive agreement. In the instant case, Article 12 is the 'arbitration agreement' in the context of section 4 of the Act of 2011, distinct from the entire Agreement. They are, therefore, separable. The meaning of 'Null and void, inoperative or incapable of being performed' are essentially to be determined in relation to the 'arbitration agreement', and not to the underlying or entire agreement. The phrase 'Null and void, inoperative or incapable of being performed' is not defined in the Act of 2011. The 'arbitration agreement' attracts the standard principles of contract law, therefore, as a corollary 'null and void', 'inoperative' or 'incapable of being performed' will also have to be construed and interpreted accordingly. Consequently, an 'arbitration agreement' may be null and void due to several factors recognised by the applicable law e.g. for lack of consent, capacity, fraud etc. The invalidity in the case of being 'null and void' is from the very inception. The arbitration agreement will be 'inoperative' if for some reason it ceases to have effect. It will, therefore, be inoperative if, for example, disputes have been settled, or a judicial order has been passed by a competent court of law restraining the parties from giving effect to the arbitration agreement. Likewise, 'incapable of being performed' relates to circumstances where the enforcement or performance of the 'arbitration agreement' becomes impossible e.g the forum agreed

for arbitration no more exists, or the conditions of the 'arbitration agreement' are such that they are not capable of being enforced. It may, therefore, be concluded that null and void, inoperative or incapable of being performed is in the context of and in relation to the 'arbitration agreement', and not the underlying or the entire agreement.

13. It may also be noted that there is a further distinction between the law applicable in the case of the entire agreement, the arbitration agreement and the forum chosen for arbitration. This determination becomes essential for interpreting the arbitration agreement according to the law that governs it. In SULAMERICA CIA NACIONAL DE SEGURO S.A versus ENSEA ENGENHARIA S.A [2012] EWCA Civ 638 the Court of Appeal held that a three stage enquiry is to be undertaken to determine the governing law of the arbitration agreement, firstly, whether the parties expressly chose the law of the arbitration agreement, secondly, whether an implied choice has been made and, lastly, in the absence of an express or implied choice, the system of law with which the arbitration agreement has the closest and most real connection. The law governing the arbitration clause shall be applied to determine whether it is null and void, inoperative or incapable of being performed.

14. It is, therefore, obvious from the above discussion that in deciding an application under section 4 of the Act of 2011, the Court has to decide if there is an arbitration agreement, and in case the answer is in the affirmative, to

consider whether the dispute(s) are covered by the arbitration agreement, then to determine the proper law governing the said arbitration agreement, so as to finally decide whether, under the applicable governing law, the arbitration agreement has become null and void, inoperative or incapable of being performed. In the instant case the assertion of the respondent/plaintiff is that the entire agreement has become inoperative and incapable of being performed. However, no such assertion has been made regarding the arbitration agreement i.e Article 12 of the Agreement. It is their case, that since the Agreement has been terminated and *M/s Framatome*, the predecessor-in-interest of the defendant No.2 has sold the relevant division to the defendant No.1, therefore, the agreement has become incapable of being performed. It is not disputed that ICC exists and the disputes can be resolved pursuant to Article 12 of the Agreement.

15. There is no force in the contention made on behalf of the respondents/plaintiffs that the agreement has become incapable of being performed and, therefore, the suit is not liable to be stayed under Section 4(2) of the Act of 2011. The conduct of the respondents/plaintiffs contradicts their own stand. Pursuant to clause-12 of the Agreement, the arbitration proceedings under the ICC Rules were initiated and, admittedly, the same culminated in rendering of a partial award of the Tribunal, consisting of three Arbitrators. The respondents/plaintiffs had fully participated in the proceedings of their chosen forum, but at some stage they decided not to

proceed further. The award rendered by the Tribunal was also not challenged by the plaintiffs. The suit was instituted in 2011 i.e. after more than eleven years from the date of termination of the Agreement. After the termination, the respondents/plaintiffs had themselves invoked the arbitration clause and participated in the arbitration proceedings under the ICC Rules. The prayer of the Suit makes it obvious that the disputes arise out of and are in connection with the Agreement, particularly, its termination vide letter dated 18-07-2000, and the consequences flowing there from. It has not been asserted that the arbitration agreement, incorporated as Article 12 of the Agreement, has become inoperative or incapable of being performed. The respondents/plaintiffs are bound by the arbitration agreement. Furthermore, it is apparent from the prayer sought in the suit that other defendants have been arrayed so as to avoid the proceedings being stayed under Section-4 of the Act of 2011.

16. The respondents/plaintiffs had indeed executed the Agreement out of free will, and had incorporated an arbitration agreement as Article 12 thereof. They had voluntarily agreed and accepted to take disputes, if any, to a Tribunal consisting of three Arbitrators. The respondents/ plaintiffs are bound by the commitment under Article 12 of the Agreement.

17. This Court is also conscious of the observation made by the august Supreme Court in the case of '*Hitachi Limited Vs. Rupali Polyster*' [1998 SCMR 1618].-

"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 system in the World, the contracts containing such an arbitration clause are very common nowadays. The 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 transit the image of Pakistan in the comity of nations. A ground which could be a 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 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."

18. For what has been discussed above, this Court is satisfied that Article 12 of the Agreement is a valid 'arbitration agreement', the disputes raised in the suit, read with the prayer sought, are covered under the said arbitration agreement. The respondents/plaintiffs have not asserted that the 'arbitration agreement' is null and void, inoperative or incapable of being performed. Their assertion that the Agreement has become incapable of performance is neither relevant nor tenable for the purposes of section 4 of the Act of 2011. Consequently, the instant application is allowed and the proceedings in the suit are stayed.

(ATHAR MINALLAH)
JUDGE

Announced in open Court on _____

JUDGE

Approved for reporting.

*Luqman Khan/

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