ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit 732 of 2013

Date	Order with signature of Judge

For hearing of: CMA Nos. 6941 and 9683, both of 2013

Date of hearing: 19.11.2013

Mr. M. Farogh Naseem, Advocate for the plaintiff
Mr. Jawad A. Sarwana, Advocate for the defendant No. 1

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Munib Akhtar, J.: On 19.11.2013, I heard learned counsel for the plaintiff and defendant No. 1 on CMA 6941/2013, filed by the plaintiff, and CMA 9683/2013, filed by the defendant No. 1. By means of a short order, I dismissed the first mentioned application while allowing the other. The following are my reasons for having done so.

2. The plaintiff ("PSM") is in the public sector and operates a steel mill at Karachi. The defendant No. 1 is an Indian company ("Sea Goa") which is engaged in the business of the sale of iron ore. On or about 02.07.2003, the parties entered into a contract ("Agreement") whereby PSM agreed to purchase and Sea Goa agreed to supply iron ore on the terms and conditions as specified therein. The Agreement was to run over several years. Clause 1(h) defined "contract year" for purposes of the Agreement, and in terms thereof, the last day of the final contract year was 30.06.2008. Thus, the Agreement came to an end on that date. Clause 16 made provision for taxation in the countries of the parties (being of course, Pakistan for PSM and India for Sea Goa) and stated as follows:

> "Should any new duty or tax or increase in any existing duty or tax be imposed during the term of this contract upon the Iron Ore or the sale, transportation, exportation, or importation thereof, the same shall be borne and paid:
>
> i. by the Seller in respect of any new duty or tax or increase in any existing duty or tax levied by the Seller's Govt. and:
>
> ii. by the Buyer in respect of any new duty or tax or increase in any existing duty or tax levied by PAKISTAN"

Thus, the burden of taxation in each country lay wholly where it fell, i.e., on the party concerned. The Agreement also had an arbitration clause, contained in clause 20, and this was in the following terms:

"i. All disputes, controversies or differences which may arise between the parties out of in relation to [or] in connection with this Contract, or the breach thereof shall be resolved by mutual discussions and understanding within one month from the date of notice received from either party and if no such settlement is reached the matter will be finally settled by arbitration pursuant to the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules.

ii. An award of such arbitration shall be finally binding upon the parties and may be entered in any court having jurisdiction.

iii. The venue for the arbitration shall be London, England."

3. Learned counsel for Sea Goa, who opened the case, referred to the foregoing provisions and submitted that sometime in 2007, the Indian Government imposed an export duty on iron ore. This obviously affected Sea Goa and in terms of clause 16 of the Agreement, the burden of the duty fell entirely on Sea Goa. However, Sea Goa requested that the burden should be shared on an equal basis between the parties. Learned counsel referred to various correspondence and letters as placed on the record, including certain correspondence between PSM and the Public Procurement Regulatory Authority (commonly known as PPRA). In particular, learned counsel placed reliance on the letter dated 27.03.2008 from PSM to Sea Goa, which in material part stated as follows:

"[This is with reference to] your email dated 24-03-2008 on sharing the custom duty it is to inform you that the Board of Directors of Pakistan Steel has given due consideration and has allowed Pakistan Steel to share 50% of the amount of duty paid by M/s Sea Goa at your firms quoted rates for different grades of iron ores ...."

Learned counsel referred to clause 22 of the Agreement, which provided for the manner in which it could be amended. This provided, in material part, as follows: "None of the terms and conditions contained herein may be added to deleted, modified or altered except by written instrument signed by the Seller and the Buyer". Learned counsel then referred to a letter dated 11.06.2008, again written by PSM to Sea Goa. This letter enclosed two copies of the addendum by which the Agreement was to be formally modified, in terms as (according to learned counsel) had been agreed upon between the parties and stated in the aforementioned letter of 27.03.2008. By means of the letter of 11.06.2008, PSM asked for both copies to be signed (as originals) "as required by Finance department, to effect payment of sharing of export duty". Learned counsel then referred to the letter dated 14.06.2008, written by Sea Goa to PSM, enclosing therewith "two sets of signed original Addendum No. 12 to Iron Ore contract dated 02nd July 2003". A request was also made for

one set to be returned to Sea Goa after being signed by PSM. This is the addendum being relied upon by Sea Goa.

4. On the foregoing basis, learned counsel submitted that the Agreement stood amended such that the burden of the export duty was to be shared. However, no payment in this regard was forthcoming from PSM. It was submitted that Sea Goa's claim came to around USD 3.286 million. A legal notice was finally issued to PSM on or around 22.05.2013 by English solicitors retained by Sea Goa and on or around 09.07.2013 arbitration proceedings were launched in London in terms of clause 20 of the Agreement. Learned counsel submitted that Sea Goa subsequently discovered that in the meanwhile (on 03.06.2013), PSM had instituted the present suit in this Court, and certain ad-interim orders had been made on the same date on CMA 6941/2013. These orders were for the parties to maintain status quo. (I may note that the International Chamber of Commerce ("ICC") is sued as defendant No. 2 in the present suit.) Learned counsel submitted that this led to the filing of CMA 9683/2013 by Sea Goa. This is an application under section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("2011 Act"). Learned counsel referred to section 1(3) of the 2011 Act, which provides that it applies also to arbitration agreements entered into before the coming into force thereof. Learned counsel submitted that the matter fell squarely within the four corners of section 4 and therefore the suit ought to be stayed. Thus, CMA 9683/2013 ought to be allowed. Since PSM's application (CMA 6941/2013) was but the converse of this, it necessarily followed, according to learned counsel, that the latter application ought to be dismissed.

5. Learned counsel for PSM opposed the grant of Sea Goa's application and prayed for interim relief as sought by the former. It was submitted that since PSM was in the public sector and wholly controlled by the Federal Government, no action could have been taken without the latter's permission and consent. No such approval had been accorded to any amendment to the Agreement as was being claimed by Sea Goa, and learned counsel submitted that therefore there was no such amendment. In other words, the burden of the export duty lay, as agreed in terms of clause 16, where it had fallen, i.e., on Sea Goa alone. PSM had no liability whatsoever in this regard. Insofar as the 2011 Act was concerned, learned counsel referred to subsection (2) of section 4 and submitted that as provided therein, the parties to an arbitration agreement were not to be referred to arbitration if the agreement was either (a) null and void, or (b) inoperative, or (c) incapable of being performed. Learned

counsel relied on all three grounds to submit that the matter could not be referred to arbitration. Without prejudice to his primary submission that the Agreement had not been amended at all as claimed by Sea Goa, learned counsel submitted that amendments of contracts were of two types. One was an amendment properly so called, i.e., an agreement that amended the principal contract. The second situation was where although one of the parties sought to characterize the agreement in question as an amendment to or of an existing contract, the agreement was in law and reality a new contract altogether. Learned counsel submitted that if at all the amendment relied upon by Sea Goa had come into existence (which, as noted, was emphatically denied) it fell in the latter and not the former category. It was a new contract. Now, clause 20 of the Agreement, being embedded therein, was only an agreement to arbitrate in relation to disputes under or in respect of the Agreement itself. It could not apply to another, new contract that may have come about between the parties and any such contract could not be sent to arbitration. Since the so-called amendment was precisely of such a nature (i.e., a new contract), learned counsel contended that the arbitration agreement did not apply to it. Hence the purported reference to arbitration by Sea Goa was wholly null and void or inoperative or incapable of being performed. In fact, learned counsel submitted, on this basis the 2011 Act itself had no application to the facts and circumstances of the present case. It was further submitted in this context that the well known doctrine of "Kompetenz-Kompetenz", i.e., the competence of an arbitral tribunal to determine its own jurisdiction (or competence) to proceed with the arbitration was also not applicable. Finally, learned counsel contended, the claim for sharing the burden of the export duty and the putative amendment to the Agreement in this regard came about only after all shipments of iron ore from India had already come to an end. Thus, on no basis whatsoever had a case been made out for stay of the present suit. It therefore followed that Sea Goa's application ought to be dismissed, and since PSM's application was but the converse of this, it ought to be allowed. It was submitted that all the ingredients for interim relief were in place and learned counsel prayed accordingly.

6. After having heard learned counsel as above, I came to the conclusion that the applications ought to be disposed off by a short order, in the manner as noted above. I may state at the outset that whatever is said herein below is tentative in nature, in the sense that it is only for purposes of deciding the two applications that were argued before me. No observation made herein shall prejudice the case of either of the parties in the arbitration proceedings and nothing said here shall have the effect, direct or indirect, of preventing or precluding the said parties from raising any such case or taking any such

ground or making any such submission before the arbitrators as is deemed appropriate by them.

7. I start with Sea Goa's application under the 2011 Act since if that application was to be allowed (as of course, in fact, happened) then PSM's application necessarily failed and had to be dismissed. I carefully considered the submissions by learned counsel for PSM but in the end, with respect, concluded that they were without merit. The heart of the case was the distinction between two types of "amendment", as contended by learned counsel and noted above. With respect, I am unable to agree with any such categorization. An amendment is either such or it is not. If it is not, then it cannot be called an amendment at all. Whether or not the Agreement had been amended in terms as contended by Sea Goa is a matter that comes within the scope of clause 20. It is a dispute "in relation to" or "in connection with" the Agreement. It therefore falls within the scope of the arbitration agreement and hence the jurisdiction of the arbitrators. However, I emphasize that this observation is only for purposes of the present decision. It will be open to PSM to make a submission before the arbitrators that the claimed amendment does not come within the scope of clause 20, and for the arbitrators to make an appropriate determination on such submission. Insofar as section 4 of the 2011 Act is concerned, in my view it must be kept in mind that it relates only to the arbitration agreement itself. It is only if the arbitration agreement is null or void or inoperative or incapable of being performed that subsection (2) comes into play. This has nothing to do with the subject matter (actual or potential) of the arbitration agreement. That is the dispute that the parties have agreed to resolve through arbitration. Whether or not the subject matter includes or can include any (claimed) changes or amendments to the "main" agreement depends of course, on the scope of the arbitration agreement. As noted, clause 20 (which is in standard form) is broad enough to include such a dispute. In other words, the claimed amendment in all respects (and even as to the existence thereof) is "a matter which is covered by the arbitration agreement" within the meaning of subsection (1) of section 4.

8. It appeared to me, with respect, that learned counsel for PSM conflated two separate and distinct things, one being the existence or validity (in fact or in law) of the amendment to the Agreement as claimed by Sea Goa, and the other being the arbitration agreement itself. It could be that ultimately it is found that the claimed amendment is null or void or inoperative or incapable of being performed or is otherwise infected with some such illegality or infirmity such as renders it *non est*. But that is a matter separate and distinct

from the arbitration agreement itself. The first constitutes the subject matter of the dispute and the second (i.e., the arbitration agreement) the manner in, and forum before, which it is to be resolved. The 2011 Act and in particular section 4(2) thereof applies to the latter and not the former. The Court has only to see whether the arbitration agreement (which can, of course, be a clause within another agreement), and not any other agreement, is null or void or inoperative or incapable of being performed. If none of these conditions apply to the arbitration agreement, then section 4(2) cannot be invoked. In my view, the arbitration agreement in the present case (i.e., clause 20 of the Agreement) suffers from no such infirmity or defect.

9. Insofar as the submission that the claimed amendment was made after all shipments from India had concluded is concerned, that too is without merit for present purposes. No doubt the Agreement could only have been amended as long as it was alive. On the record as available, it appears that the claimed amendment was made before 30.06.2008, i.e., before the Agreement came to an end. That suffices, and it is irrelevant that by then the shipments had ceased.

10. For the foregoing reasons, I had concluded that Sea Goa's application under section 4 of the 2011 Act ought to be allowed and the present suit stayed. PSM's application sought interim relief by way of restraining "[ICC] from convening any arbitration proceedings or any party or [ICC] from appointing any arbitrator and [Sea Goa] from pursuing any claim against [PSM] before [ICC] and in case the proceedings have already commenced to stay such proceedings". It necessarily followed that this relief could not be granted, with the result that PSM's application failed and had to be dismissed.

11. The foregoing are the reasons for the short order dated 19.11.2013.

JUDGE