AMENDED TITAL OF PLAINT

IN THE HIGH COURT OF SINDH AT KARACHI
(Civil Original Jurisdiction)

Presented on 13-01-2012
Assistant Registrar (D-II)

Suit No. 1804 of 2009

Amended Title of Plaint
Submitted by the Plaintiff
In terms of order dated January 11, 2012

Cummins Sales And Service (Pakistan) Limited,
having its registered office at
2, Bangalore Town, Shahrah-e-Faisal, Karachi 75350
Through its Authorized signatory.

Plaintiff

Versus

1. **Cummins Middle East FZE,**
of Units ZF 05 & 06,
Jebel Ali Free Zone, Dubai, U.A.E.,
Through its Chief Executive / Director / Company Secretary / Principal Officer.

2. **Cummins Power Generation Limited,**
with its registered office at
Manston Park, Columbus venue,
Manston, Ramsgate, Kent CT12 5BF, England
Through its Chief Executive/Director/Company Secretary/Principal Officer.

3. **Cummins Engine Company Limited,**
with its registered office at
Unit 1-B, Uniongate, (First Floor),
Ridgeway Trading Estate, Iver, Buckinghamshire,
SL0 9HX, England.
Through its Chief Executive/Director/Company Secretary/Principal Officer.

4. **Cummins Limited,**
49-51, Greahsm Road, Staines Middlesex,
TW 18 2 BD, United Kingdom.
Through its Chief Executive/Director/Company Secretary/Principal Officer.

5. **Orient Energy System,**
having its office at Plot No. 16,
Korangi Industrial Area, Karachi
Through its Partners / Proprietor / Manager.

Defendants

Suit for permanent injunction and damages.

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IN THE HIGH COURT OF SINDH AT KARACHI.

Suit No. 1804 of 2009.

O R D E R

Date of hearings:	**06.08.2012, 16.08.2012 and 28.08.2012.**
Plaintiff:	**Cummins Sales And Services (Pakistan) Limited, through Mr. Moeen Qamar, Advocate .**
Defendant 1,2 & 4:	**Cummins Middle East FZE, Cummins Power Generation Limited and Cummins Limited, through M/s. Sajid Zahid & Mansoor A. Shaikh, Advocates .**
Defendant No.5:	**Orient Energy System, through Mr.Ghulam Abbass Pishori, Advocate .**

MUHAMMAD TASNIM, J: Through this order, I shall dispose of two applications, one being C.M.A.No.1028/2010 filed by defendants No.1, 2 & 4, under Sections 3 & 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2009, read with Section 151 C.P.C., praying therein for stay of proceedings in above suit so that dispute, if any, may be referred by the plaintiff either to an English Court or to the London arbitration in accordance with the dispute Resolving Mechanism. Notice of this application was served upon the plaintiff, who filed its counter-affidavit on 24.02.2010 and another application being C.M.A.No.3248 of 2010 filed by plaintiff, seeking summarily rejection of defendants' application for stay of suit being C.M.A.No.1028/2010 filed under Section 3 & 4 of the Recognition and Enforcement (Arbitration Agreements and

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Foreign Arbitral Awards) Ordinance, 2009, read with Section 151 C.P.C.

2. Facts, as set-out in the plaint, are that plaintiff is engaged in business of import, distribution, supply, sale, installation and after sale service of various kinds of engines, power generating equipment as well as other various industrial and commercial installation ever since 1993 and power generation equipment sale and installation since 1997. It is the case of parties that they entered into three agreements as follows:

Ser.	Agreement	Parties	Status
01	Distribution Agreement effective January 01, 2007	Cummins Power Generation Limited (Defendant No.2) and Cummins Sales And Service (Pakistan) Limited (Plaintiff)	Valid till December 31, 2009
02	Distribution Agreement effective February 21, 2005	Cummins Engine Company Limited (Defendant No.3) and Cummins Sales and Service (Pakistan) Limited (Plaintiff)	Valid till December 31, 2006
01	Dealership Agreement effective February 21, 2005	Cummins Middle East FZE (Defendant No.1) and Cummins Sales And Service (Pakistan) Limited (Plaintiff)	Valid till December 31, 2006 Renewed till December 31, 2009

3. It is further stated in paragraph-26 of the plaint that Power Generation agreement dated 29.10.2006, effective from 01.01.2007 till 31.12.2009 regulates the whole commercial relationship between the plaintiff and the defendants as power Generators includes engine and all other related equipment for the reason that the Generators cannot function without engine. It is the case of the plaintiff that defendants have defaulted for performance of their agreement and finally it appears that termination letter dated 15.05.2009

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was served by defendant No.1 upon the plaintiff, which has forced the plaintiff to file present suit with the following prayers:

a) *pass a decree permanently restraining the Defendants from discontinuing the supply of Cummins Products to the Plaintiff in Pakistan as and when requested by the Plaintiff through placing orders for supply in a manner and the mode which is continuously being followed by the Plaintiff and Defendants since year 1993 onwards;*

b) *pass a decree permanently restraining the Defendants from terminating the existing contractual arrangements between the Plaintiff and Defendants, particularly the* ***Power Generation Agreement dated October 29, 2006, effective from January 01, 2007 till December 2009*** *as well as from discontinuing performance of their continued contractual arrangements which are in field and in place between the Plaintiff and the Defendants since year 1993 for supply of Cummins Engines (diesel, gas), Cummins power generation sets, Cummins power electronic equipment, Cummins automatic transfer switches, Cummins switchgears, Cummins paralleling control system and Cummins networking and ancillary equipment etc;*

c) *pass a decree permanently restraining the Defendants from giving effect to the* ***Termination Letter dated May 15, 2009*** *served by the Defendant No.4 (having no dealing with the commercial dealing with Plaintiff) upon the Plaintiff;*

d) *pass a decree permanently restraining the Defendants from interfering into plaintiff's*

business of Cummins Products in Pakistan (either directly or indirectly or through any other licensee / dealer / distributor) which is being conducted by the Plaintiff since year 1993 onward;

e) pass a decree permanently restraining the Defendants from appointing any other person or company as an exclusive or non exclusive Distributor/Franchisee/Licensee for import, marketing, supply, sale and maintenance of Cummins Products in Pakistan either by replacing the Plaintiff or otherwise;

f) pass a money decree for payment of Rs.6,049,105,127/- to the Plaintiff as compensation for the loss suffered by the Plaintiff on account of breaches and violations committed by the Defendants of their contractual arrangements etc., alongwith profit @ 15% per annum;

g) cost of the suit may be provided; and

h) grant any other relief as deemed appropriate by this Honourable Court.

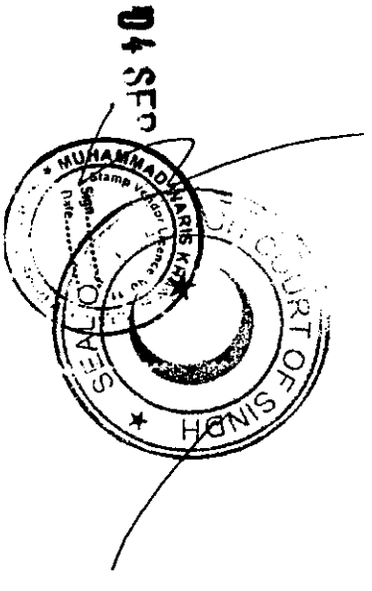
4. Alongwith suit, an application being CMA No.11513/2009 under Section XXXIX Rule 1 & 2 C.P.C., was filed. It appears that on 22.12.2009 notice of such application was issued to the defendants and parties were directed to maintain *status-quo* till next date of hearing. However, such order was modified to the extent that defendants may continue with their commercial operation of business. However, such concession was given to the defendants subject to result of this suit.

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5. After service of the notice of the above suit the defendants No.1, 2 & 4 filed applications being C.M.A.No.1028/2010 under Sections 3 & 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2009, read with Section 151 C.P.C., for stay of suit. Defendants have stated in their application that plaintiff and defendants had entered into two agreements viz. Cummins Power Generation Distributor Agreement dated 29.10.2006 between Cummins Power Generation Limited (defendant No.2) (as **annexure "F-1"** to the plaint) and the plaintiff (**"Distributor Agreement"**) and Cummins Dealer Agreement dated February 21.02.2005 between Cummins Middle East FZE (Defendant No.1) (being **Annexure 'F-3'** to the plaint) and the plaintiff, as extended by a letter Agreement signed by the Defendant No.1 on December 2, 2008 and signed by the Plaintiff on December 12, 2008 (being part of the **Annexure 'F-3'** to the Plaint above) (**"Dealer Agreement"**). It is also stated that **Distributor Agreement in Clause-11** pertaining to **"LAW AND DISPUTES"** stipulates as under:

> *"11. **LAW AND DISPUTES***
>
> *11.1 **Law:** This Agreement is governed in all respects by English law and is subject to the exclusive jurisdiction of the English Courts.*
>
> *11.2 **Disputes among Cummins Distributors:** In the event of any dispute between Distributor and any other distributor or dealer of Cummins Power Generation or its affiliates, all facts touching on such dispute shall be submitted promptly to Cummins Power Generation in writing, and the decision of Cummins Power Generation transmitted in writing to the parties involved shall be final and binding on said parties.*
>
> *11.3 **Mediation:** The parties will attempt to resolve any dispute between them which*



results from this agreement in a spirit of co-operation. Accordingly, the parties agree to engage in good faith negotiation to reach a rapid and equitable solution. If the parties are unable to resolve a dispute through direct negotiation they will use the services of a mediator appointed by the Centre for Dispute Resolution ("CEDR") in London. The rules of CEDR will apply to that mediation. If the mediation fails to reach an equitable solution to the dispute within 45 days after the request by either party to submit the dispute to mediation, then the dispute will be settled exclusively by final and binding arbitration initiated by either party.

11.4 ***Arbitration:*** *Any question or dispute arising out of or in connection with this Agreement shall be referred to a panel of three arbitrators in London. Each party shall nominate one arbitrator and the third arbitrator will be appointed by agreement between the two nominated arbitrators. Failing agreement, the third arbitrator will be appointed by the President for the time being of the London Chamber of Commerce. The UNCITRAL rules will govern the arbitration. The decision of a majority of the arbitrators shall be final and binding upon the parties."*

6. It is further stated that the Dealer Agreement also contains similar clause in paragraph-11 thereof. It is submitted in the application that in view of plaintiff having instituted the suit in clear violation of the Dispute Resolving Mechanism, the defendants in accordance with their rights under the English Law which is governing law and for protecting their interests, passed on legal advice received from their lawyers in England, instituted proceedings for an 'anti-suit injunction' in pursuance of the Senior Courts Act, 1981 in the High Court of Justice, Queen's Bench Division, Commercial Court seeking, *inter-alia*, a declaration that the suit instituted by the plaintiff in Pakistan is in breach of the Dispute Resolving Mechanism, to which both the parties are contractually bound. It is further

stated that pursuant to a hearing held before the English Court on 28.01.2010, the English Court was pleased to grant requisite injunction, which is applicable only to the plaintiff, in terms of which plaintiff has been directed, *inter-alia*, until the next date of hearing not to pursue, or take any further steps in, or procure or assist the pursuit of, the Pakistan proceedings by itself, its directors, employees, officers or agents. In this background, it was prayed in the application under disposal that proceedings in the suit be stated and the dispute, if any, may be referred by the plaintiff either to an English Court or to the London arbitration in accordance with the Dispute Resolving Mechanism.

7. Plaintiff filed counter-affidavit to the application (C.M.A.No.1028/2010) filed by the defendants, wherein execution of aforesaid three agreements was admitted. It was also admitted by the defendants that the agreements **"annexures F-1 to F-3"** contained the clause-11 quoted hereinabove. It was stated in the counter-affidavit that disputes as mentioned in the suit are outside the purview and scope of the Arbitration Clause as contained in the agreements. It was further stated that the evidence of the dispute is available in Pakistan where the properties connected with the disputes are also located. The contractual relationships, business and commercial understandings as well as mutual promises and assurance have been performed by both sides ever since 1993 in Pakistan therefore, proceedings in the suit cannot be stayed.

8. Mr. Sajid Zahid, learned counsel for the defendants No.1,2 & 4 has submitted that dealership-agreement dated

21.02.2005, effective from 21.02.2005, expiry on 31.12.2009 contained arbitration clause being Clause-11.4, hence present proceedings is not maintainable before this Court and matter is referable to the to the Arbitration in terms of arbitration mechanism agreed between the parties. He also submitted that agreement annexure "F-3" has already expired on 31.12.2009. He further submitted that clause.4 of the agreement provides that agreement shall not be effective until it has been signed by the Dealer and Cummins but if and when so signed, it shall effective on the effective date and continue in force for the term. He further submitted that no act or failure to act by either party to this agreement shall be construed an extension or renewal of this agreement except renewals or extensions in writing duly signed by both the parties. He further submitted that no further agreement extending the period of annexure "F-3" was ever executed by the parties to the proceedings. He further submitted that clause-11.4 provides that any question or dispute arising out or in connection with this agreement shall be referred to a panel of three arbitrators in London. Each party shall nominated one arbitrator and the third arbitrator will be appointed by agreement between the two nominated arbitrators. Failing agreement, the third arbitrator will be appointed by the President for the time being of the London Chamber of Commerce. The UNCITRAL rules will govern the arbitration. The decision of a majority of the arbitrators shall be final and binding upon the parties. Learned counsel for the defendants has also invited attention of the Court to clause-12.6 of the agreement and submitted that agreement annexure "F-3" constitutes the full understanding of the parties and supersedes all prior

agreements whether oral or written. It further provides that any prior agreements are cancelled as at the start of this agreement and neither party is relying upon any representation, warranty or other provision except as expressly provided. He further submitted that clause-12.6 further provides that this agreement cannot be altered, except by a written amendment signed by the dealer and an authorized officer of Cummins and specified to be an amendment to this agreement. Learned counsel further submitted that Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ***(hereinafter called as "the Act, 2011")*** is applicable to the case in hand. He further submitted that Act, 2011 came into force on 19.07.2011. He submitted that Sections 1 & 3 of Act, 2011 apply to arbitration agreements made before, on or after the date of commencement of Act, 2011. He further invited the attention of the Court to Section 2(c) which provides definition of "Convention" and submitted that convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, set forth in the schedule of the Act, 2011. Learned counsel further submitted that Pakistan is signatory to the United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958 as appears in the preamble of the Act, 2011. Learned counsel further submitted that in terms of subsection 2 to Section 3 of the Act, 2011, an application to stay legal proceedings pursuant to the provisions of Article II of the Convention can be filed in Court, in which legal proceedings are pending. He further submitted that subsection (1) to Section 4 of the Act, 2011, provides that

a party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by 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. He further submitted that subsection 2 of Section 4 of the Act, 2011 provides that on an application under subsection (1), the Court '***shall***' refer the parties to arbitration, unless it finds that arbitration agreement is ***null*** and ***void***, in operative or incapable of being performed. He further invited the attention of the Court to schedule to the Act, 2011 and more particularly to sub-Article 3 to Article II which provides that the Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that said agreement is ***null*** and ***void,*** inoperative or incapable of being performed. Learned counsel further submitted that after expiry of the agreement between the parties there was no contractual basis for continuing to deal with the plaintiff, it can never be the intention of the Court to place any party in more advantageous position than it was during the operation of relevant agreement. In the end learned counsel for the defendants No.1, 2 & 4 submitted that C.M.A.No.1028/2010 be allowed and the suit filed by the plaintiff be stayed and the matter may be referred to arbitration in accordance with the arbitration agreement entered into between the parties. In support of his contentions, learned counsel for the defendants No. 1, 2 & 4 placed reliance on the following case law:

1. *MESSRS TRAVEL AUTOMATION (PVT.) LTD. THROUGH MANAGING DIRECTOR V. ABACUS INTERNATIONAL (PVT.) LTD. THROUGH PRESIDENT AND CHIEF EXECUTIVE AND OTHERS (2006 C L D 497),*

2. *FAR EASTERN IMPEX (PVT.) LTD. V. QUEST INTERNATIONAL NEDERLAND BV AND OTHERS (2009 C L D 153),*

3. *(GAS AUTHORITY OF INDIA LTD., V. SPIE CAPAG, S.A. AND OTHERS (AIR 1994 DELHI 75),*

4. *SVENSKA HANDELSBANKEN AND OTHERS V. M/S INDIAN CHARGE CHROME LTD. AND OTHERS ((1994) 2 SUPREME COURT CASES 155),*

5. *A. MERDITH JANES CO. LTD. V. CRESCENT BOARD LTD. (1999 C L C 437),*

6. *R. M. INVESTMENT & TRADING CO. PVT. LIMITED V. BOEING CO. AND ANOTHER (AIR 1994 SUPREME COURT 1136),*

7. *M/S. SRIVENKATESWARA CONSTRUCTIONS AND OTHERS V. THE UNION OF INDIA (AIR 1974 ANDHRA PRADESH 278),*

8. *SQN. LDR. (R.) KHURRAM ZAMAN V. MRS. AFIA ZAFAR AND OTHERS (2008 C L D 662),*

9. *LAHORE DEVELOPMENT AUTHORITY THROUGH DIRECTOR GENERAL, L.DA., LAHORE V. MOHANDISIN-E-MASUD THROUGH MANAGING PARTNER AND ANOTHER (2010 Y L R 66),*

10. *AFTAB KHALIL AND OTHERS V. SHAUKAT HUSSAIN (2008 C L C 1592),*

11. *MESSRS ECKHRDT & CO, MARINE GMBH V. MUHAMMAD HANIF (P L D 1993 SUPREME COURT 42),*

12. *BOLAN BEVERAGES (PVT.) LIMITED V. PEPSICO. INC. AND OTHERS (2004 C L D 1530),*

13. *MESSRS SHAKIL WAQAS & CO. AND OTHERS V. GENERAL MANAGER/MARKETING, PAKSITAN RAILWAYS AND OTHERS (P L D 2011 KARACHI 185),*

14. *CONCENTRATE MANUFACTURING COMPANY OF IRELAND AND OTHERS V. SEVEN-UP BOTTLING COMPANY (PRIVATE) LIMITED AND OTHERS (2002 C L D 77),*

15. *TAHIR ZAMAN V. JIN WEI (M) SDN BHD AND OTHERS (2004 C L D 603),*

16. *MARGHUB SIDDIQI V. HAMID AHMAD KHAN AND OTHERS (1974 S C M R 519),*

17. *LAHORE STOCK EXCHANGE LTD. THROUGH MANAGING DIRECTOR AND ANOTHER V. MESSRS HASSAN ASSOCIATES THROUGH MANAGING PARTNER (2010 MLD 800),*

18. *MESSRS GULF PACIFIC FERTILIZER, CALIFORNIA, U.S.A. THROUGH ATTORNEY V. MESSRS ALI AKBAR ENTERPRISES AND OTHERS (2000 M L D 1537),*

19. *ZULQARNAIN AND OTHERS V. SURBULAND KHAN AND ANOTHER (2004 S C M R 1084),*

20. *NOOR AHMAD V. MUHAMMAD SHAFI (P L D 1969 BAGHDAD-UL-JADID 17),*

21. *MRS. MUSSARAT SHAUKAT ALI V. MRS. SAFIA KHATOON AND OTHERS (1994 S C M R 2189),*

22. *METROPOLITAN STEEL CORPORATION LTD. V. MACSTEEL INTERNATIONAL U.K. LTD. (2006 C L D 1491),*

23. *M. A. CHOWDHURY V. MESSRS MITSUI O. S. K. LINES LTD. AND OTHERS (P L D 1970 SUPREME COURT 373),*

24. *M/S. UZIN EXPORT & IMPORT ENTERPRISES FOR FOREIGN TRADE V. M/S. M. IFTIKHAR & COMPANY LIMITED (1993 S C M R 866),*

25. *M/S. DANISH BROTHERS LIMITED AND OTHERS V. COTTON EXPORT CORPORATION OF PAKISTAN (PVT.) LIMITED (1994 M L D 2227),*

26. *ASSOCIATED AGENCIES LTD. AND ANOTHER V. INDUSTRIJA MASINA/TRACTORA AND ANOTHER (P L D 1993 KARACHI 459),*

27. *MESSRS SERULEAN (PVT.) LTD., KARACHI V. MESSRS BHOJA AIRLINES (PVT.) LTD. THROUGH CHAIRMAN AND ANOTHER (2001 Y L R 3150),*

28. *ISLAND TEXTILE MILLS LTD., KARACHI V. V/O TECHNOEXPERT AND ANOTHER (1979 C L C 307),*

29. *PORT QASIM AUTHORITY, KARACHI V. AL-GHURAIR GROUP OF COMPANIES AND OTHERS (P L D 1997 KARACHI 636),*

30. *LAHORE STOCK EXCHANGE LIMITED V. FREDRICK J. WHYTE GROUP (PAKISTAN) LTD. AND OTHERS (P L D 1990 SUPREME COURT 48),*

31. *DAR OKAZ PRINTING AND PUBLISHING LIMITED LIABILITY COMPANY V. PRINTING CORPORATION OF PAKSITAN PRIVATE LIMITED (P L D 2003 SUPREME COURT 808),*

32. *HAJI SOOMAR HAJI HAJJAN V. MUHAMMAD AMIN MUHAMMAD BASHIR LTD. (P L J 1981 SUPREME COURT 299) and;*

33. *S. GHOUS MOHIUDDIN V. MESSRS NATIONAL REFINERY LTD. (P L D 1968 KARACHI 652).*

9. On the other hand, Mr. Moeen Qamar, learned counsel for the plaintiff has submitted that this application is liable to be dismissed as the same was filed under Ordinance XXXIII of 2009 dated 26.11.2009. Learned counsel further submitted that since the aforesaid Ordinance was not laid before the National Assembly and that Ordinance expired after a period of Four months. He further submitted that the Act, 2011 was promulgated on 19.07.2011, where under no application has been filed by the defendants. He further submitted that by filing C.M.A.No.12255/2011 the defendants have submitted to the jurisdiction of this Court hence they cannot press present C.M.A. i.e 1028/2010. Learned counsel

for the plaintiff has invited attention of the Court to paragraph-2.1 of the plaint to contend that the plaintiff apart from its registered corporate office in Karachi, has a Regional Offices in Lahore and Rawalpindi. Additionally, the plaintiff has its display, sales, supply and after sale service facilities in the cities of Karachi, Lahore, Rawalpindi and Gujranwala. He further invited the attention of Court to paragraph-2.2 of the plaint and submitted that all the business operations of the plaintiff are being conducted and run with 170 employees which include business executives, support staff and technical staff e.t.c. He further submitted that from the year 1993 onwards the plaintiff on sole basis of its visionary management, marketing skills as well as after service, has been able to achieve tremendous growth in its business which can be gauged from the fact that in the year 1993 the value of the business conducted by the plaintiff in Pakistan was Rs.6,500,000/- which valued for the year 2008 has been US $ 20 million. He further submitted that defendants had assured the Plaintiff that a long term business relationship for an indefinite period. He further submitted that plaintiff was assured that the defendants would ensure supply of all the Cummins Products which are ordered by the plaintiff and that on account of plaintiff's success in Pakistan, preferential treatment would also be extended to the plaintiff as compared to other distributors. He further submitted that no doubt agreements mentioned in the plaint had expired but parties continued to follow the same till the filing of the suit and there is no dispute between all parties, which is referable to the arbitration. He further submitted that Engine Assembly Plant was installed in Pakistan without any written agreement.

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Learned counsel further submitted that section 1(3) and Section 10 of the Act, 2011 do not save any pending proceedings under Ordinance XXXIII of 2009 till the passing of the Act, 2011. Learned counsel for the plaintiff further submitted that agreement executed between the plaintiff and defendants shall continue to operate even after expiry period mentioned in the agreement itself. He further submitted that in spite of expiry of agreement period parties entered into *supra* contractual relationship to the extent of supply of engine e.t.c. and the business relationship was existing between the parties till the filing of the suit. Learned counsel for the plaintiff further submitted that termination order dated 15.5.2009 was issued which forced the plaintiff to file the present suit and interim order was also passed by this Court. Leaned counsel further submitted that findings recorded by the learned Judge in the case of ***MESSRS TRAVEL AUTOMATION (PVT.) LTD. THROUGH MANAGING DIRECTOR (supra)*** with regard to discretion of the Court while dealing with an application under Section 3 & 4 of the Ordinance XX of 2005 is not a good law and Judgment is *per in curium*. He further submitted that dispute has not been mentioned in the application under disposal hence on this ground as well the application is liable to be dismissed. In support of his contentions learned counsel for the plaintiff has placed reliance on the following case law:

1. *IZHAR ALAM FAROOQI, ADVOCATE V. SHEIKH ABDUL SATTAR LASI AND OTHERS (2008 S C M R 240),*
2. *WAK ORIENT POWER AND LIGHT LIMITED V. WESTINGHOUSE ELECTRIC CORPORATION AND OTHERS (2002 S C M R 1954),*
3. *MESSRS MUSLIM COMMERCIAL BANK LIMITED V. TAHIR EDIBLE OIL (PVT.) LTD. AND OTHERS (2003 C L C 416),*
4. *NORTH-WEST FRONTIER PROVINCE GOVERNMENT, PESHAWAR THROUGH COLLECTOR, ABBOTTABAD AND ANOTHER (P L D 1993 SUPREME COURT 418),*

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5. *INTERNATIONAL MULTI LEASING COMPANY V. CAPITAL ASSETS LEASING CORPORATION LIMITED AND ANOTHER (2004 C L D 1),*

6. *MESSRS ECKHARDT & CO., MARINE GMBH V. MUHAMMAD HANIF (P L D 1993 SC 42),*

7. *M/S. UZIN EXPORT & IMPORT ENTERPRISES FOR FOREIGN TRADE V. M/S. M. IFTIKHAR & COMPANY LIMITED (1993 S C M R 866),*

8. *MESSRS TRAVEL AUTOMATION (PVT.) LTD. THROUGH MANAGING DIRECTOR V. ABACUS INTERNATIONAL (PVT.) LTD. THROUGH PRESIDENT AND CHIEF EXECUTIVE AND OTHERS (2006 C L D 497),*

9. *METROPOLITAN STEEL CORPORATION LTD. V. MACSTEEL INTERNATIONAL U.K. LTD. (2006 C L D 1491),*

10. *FAR EASTERN IMPEX (PVT.) LIMITED, KARACHI V. QUEST INTERNATIONAL NEDERLAND BV AND OTHERS (2009 Y L R 334).*

10. Mr. Ghulam Abbas Pishori, learned counsel for the defendant No.5 has adopted the arguments of learned counsel for the defendants No.1, 2 & 4 and has submitted that suit is liable to be stayed and matter is referable to the arbitration in view of agreements between the plaintiff and defendants for resolution of their dispute through arbitration mechanism.

11. From the submissions of the parties, following points emerge for consideration of this Court:

1. *What would be the effect of expiry of Ordinance XXXIII of 2009 during the pendency of suit which was subsequently re-promulgated on 20.04.2010 and finally the* Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 was promulgated on 19.07.2011.

2. *Whether discretion available to Court for refusal to stay suit under Section 34 of the Arbitration Act, 1940 and under the Provisions of the Arbitration (Protocol and Convention) Act, 1937 is also available in cases governed by the Act, 2011?*

3. *Whether plaintiff has made out a case within exceptions provided under subsection (2) of Section 4 of the* Recognition and Enforcement (Arbitration

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Agreements and Foreign Arbitral Awards) Act, 2011?

4. *What is the effect of Section 202 of Contract Act in the case in hand though the dealership agreement dated 21.02.2005 expired on 31.12.2009?*

12. With regard to **point No.1** that what would be the effect of expiry of Ordinance XXXIII of 2009 during the pendency of suit which was subsequently re-promulgated on 20.04.2010 vide Ordinance IX of 2010 dated 20.04.2010 and finally the Act, 2011 was promulgated on 19.07.2011, it is an admitted position that for the first time the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 was promulgated on 14.07.2005 vide Ordinance VIII of 2005 and such Ordinance was not laid before the National Assembly of Pakistan. After the expiry of four months period, Ordinance XX of 2005 dated 03.12.200 was re-promulgated. Thereafter same Ordinance was again re-promulgated vide Ordinance III of 2006 dated 18.03.2006 and thereafter vide Ordinance XIV of 2006 dated 13.07.2006. Thereafter Ordinance XLII of 2006 was promulgated on 28.12.2006 and after lapse of the aforesaid Ordinance, it was re-promulgated on 02.06.2007 through Ordinance XXV of 2007. After expiry of aforesaid Ordinance, it was re-promulgated on 26.11.2009 through Ordinance XXXIII of 2009. It is during the pendency of this Ordinance, the application under disposal was filed.

13. To deal with this issue, it will be advantageous to reproduce different provisions of laws for ready reference. In the Ordinance XXXIII of 2009, sections 3 & 4 provided as under:

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" ***3. Jurisdiction of Court.***---*(1) Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Ordinance.*

(2) An application to stay legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court, in which the legal proceedings are pending.

(3) In the exercise of its jurisdiction, the Court shall,---

(a) follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and

(b) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908).

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, inoperative or incapable of being performed."

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14. Section 10 of the Ordinance XXXIII of 2009, which deals with repeal and saving, is as under:

> ***"10. Repeal and saving.***---*(1) The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937) (hereinafter in this section referred to as "the Act") is hereby repealed.*
>
> *(2) Notwithstanding the repeal of the Act, it shall continue to have effect in relation to foreign arbitral awards made---*
>
> *(a) before the date of commencement of this Ordinance; and*
>
> *(b) within the meaning of section 2 of the Act which are not foreign arbitral awards within the meaning of section 2 of this Ordinance."*

15. After the lapse of four months, Ordinance XXXIII of 2009 expired and it was re-promulgated on 20.04.2010 through Ordinance IX of 2010. It will be noticed that in all the aforesaid Ordinances, in Section 10, which is the repeal clause, it was stated that the Arbitration (Protocol & Convention) Act, 1937 is hereby repealed. After the expiry of aforesaid Ordinance IX of 2010, the Act, 2011 was promulgated on 19.07.2011 and in Section 10 of the Act, 2011 it is also stated that the Arbitration (Protocol & Convention) Act, 1937 is hereby repealed.

16. The provisions of Section 3 & 4 of the Act, 2011 provided as under:

> " ***3. Jurisdiction of Court.***---*(1) Notwithstanding anything contained in any other law for the time being in force, the*

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Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act.

(2) An application to stay legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court, in which the legal proceedings are pending.

(3) In the exercise of its jurisdiction, the Court shall,---

(c) follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and

(d) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908).

*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, inoperative or incapable of being performed."

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17. Section 10 of the Act, 2011, which deals with repeal and saving, is quoted as under:

> ***"10. Repeal and saving.***---*(1) The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937) (hereinafter in this section referred to as "the Act") is hereby repealed.*
>
> *(2) Notwithstanding the repeal of the Act, it shall continue to have effect in relation to foreign arbitral awards made---*
>
> *(a) before the date of commencement of this Ordinance; and*
>
> *(b) within the meaning of section 2 of the Act which are not foreign arbitral awards within the meaning of section 2 of this Act."*

18. Section 3 of the Arbitration (Protocol & Convention) Act, 1937 is quoted hereunder:

> *" **3. Stay of proceedings in respect of matters to be referred to arbitration.** Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol ser forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under them in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the*

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proceedings; and the Court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

19. It will be noticed from the above that Sections 3 & 4 in Ordinance XXXIII of 2009 are couched in the same words as Sections 3 & 4 appear in the Act, 2011 except with one difference that in Ordinance XXXIII of 2009 the word **"ORDINANCE"** has been used, whereas in the Act, 2011 the word **"ACT"** has been used. Apart from the above, there is no material difference between the Ordinance and the Act. It is settled law that once an Ordinance expires, the law which was repealed by that Ordinance takes the field. So when this application was filed Ordinance XXXIII of 2009 dated 26.11.2009 was in field and on its expiry repeal Act i.e Arbitration (Protocol & Convention) Act, 1937 occupied the field. Thereafter said Act was repealed by the present Act, 2011 through Act XVII of 2011 dated 19.07.2011.

20. In the case of ***Pir Sabir Shah v. Shad Muhammad Khan (P L D 1995 SC 66)***, the Honourable Supreme Court of Pakistan while dealing with the effect of Repeal of Ordinance has held as under:

" At the instance of Parliamentary Party, References under section 8-B of the Political Parties Act, 1962 were filed against the members of the Provincial Assembly of N.-W.F.P. (Khyber Pakhtunkhwa). The Election Commission of Pakistan by majority of 2 to 1 dismissed

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the said References. The matter came up before this Court when the effect of repeal of Ordinance XXX of 1993 whereby some amendments were made in Section 8-B, were considered. .this Court held that in view of the above discussed legal position there is no doubt in my mind that on the repeal of Ordinance XXX of 1993, which was never placed before the Asembly for approval and which stood repealed on the expiry of 4 months period from the date of its promulgation in accordance with the provisions of' Article 89 ibid, the amendment introduced in section 8-B by Ordinance, XXX of 1993 stood removed from the statute book with the consequence the original provisions of section 8-B of the Act stood revived on such repeal."

21. In another case of ***Federation of Pakistan v. M. Nawaz Khokhar (P L D 2000 SC 26)***, the Honourable Supreme Court of Pakistan while examining the effect of Repeal of Ordinance had been pleased to hold as under:

" On 18th November, 1996 Ehtesab Ordinance (CXI), 1996 was promulgated which was further amended by Ordinance (CXXIII), 1996, Ordinance VII of 1997 and Ordinance XI of 1997. Ordinance CXI amended as aforesaid was repealed and replaced by Ordinance XX of 1997, which was repealed by Ehtesab Act, IX of 1997. The said Act was amended through Ordinance II of 1998, which stood repealed on 3rd June, 1998 as it was not passed by the Parliament. Writ petitions were filed before the Lahore High Court challenging the vires of these Ordinances/Acts. The writ petitions were disposed of and the matter came up before this Court when it

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was held that "the contention appears to be correct. Ordinance II of 1998 was promulgated on 4-2-1998. It is not disputed that Ordinance II of 1998 was not passed by Majis-e-Shoora. Under Article 89 of the Constitution, this Ordinance stood repealed on 3-6-1998. We have already held that an Ordinance promulgated under Article 89 of the Constitution is a temporary legislation, therefore, the amendments made in the Act by Ordinance II of 1998 stood obliterated and original provisions in the Act stood revised on repeal of Ordinance II of 1998."

22. In the case of ***State v. Muhammad Sharif (P L D 1960 Lah. 236)***, the effect of Repeal of Ordinance was considered and it was held as follows:

" The Essential Commodities (Control of Distribution) Order, 1953 was promulgated under the Essential Supplies (Temporary Powers) Act of 1946. The said Act was to remain in force for a particular period but was subsequently extended by a number of statutes. By means of Ordinance X of 1955, the Essential Supplies (Temporary Powers) Act was repealed, however, under section 17 of the said Ordinance, Orders made under the Essential Supplies (Temporary Powers) Act were protected. Later, the Ordinance X of 1955 was repealed by Essential Supplies Ordinance IV of 1956, which was repealed and substituted by Ordinance V of 1956. This Ordinance was repealed and substituted by Ordinance XXI of 1956. Subsequently, the Ordinance XXI of 1956 was replaced by the Essential Supplies Act, containing the same provisions as the

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Ordinance. The respondent was charged for an offence under section 6 of the Control of Essential Commodities Ordinance (V) of 1956 read with section 4 of the Essential Commodities (Control of Distribution) Order, 1953. The Magistrate, acquitted him on the ground that the Ordinance V of 1956, under section 6 of which he was being prosecuted, had expired six weeks after the meeting of the National Assembly in September 1956, i.e., on the 18th of November 1956, and as the Ordinance was only a temporary statute, there could not be any prosecution under an expired Ordinance. An appeal before this Court was filed by the State against the acquittal of respondent. The Court observed that in view of Full Bench Judgment in Crown v. Haveli (P L D 1949 Lah. 550) a prosecution under Essential Commodities Ordinance V of 1956 could not be continued after the date of expiry, i.e. the 18th of November 1956. The Court ultimately held that "if the Ordinance was to expire on the 18th of November 1956 and the effect of its expiry was to make it non-existent, except for transactions past and closed, the mere repeal of it a day before its expiry could not have given it greater effect than it could originally have. There does not seem to be any objection to the proposition that by a repeal a statute will not have effect for a longer term than it would otherwise have had. All that section 6 the General Clauses Act means is that in spite of the repeal a statute is deemed to be in force in respect of the particular matters enumerated in that section, i.e., its original life would continue in spite of the repeal, but section 6 certainly does not

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mean that by the repeal it would be in force even after the period for which it was legally to be in force as enacted. We are not inclined, therefore, to accept the argument that on account of the repeal this prosecution could have continued."

23. In the case of ***The Sargodha Bhera Bus Service Limited v. The Province of West Pakistan (P L D 1959 SC 127)*** the Honourable Supreme Court of Pakistan after examining the effect of Repeal of Ordinance was pleased to hold as under:

" Facts of the case were that up to 17th December 1956 taxes were realized under the Punjab Motor Vehicle Taxation Act (IV of 1924). Later, the Governor of West Pakistan promulgated Ordinance No.XXXV of 1956 under Article 102 of the Constitution 1956. The West Pakistan Provincial Assembly met on the 28th of January 1957 and the Ordinance was actually laid before it on the 8th of March 1957, but the Assembly was itself suspended by the President under Article 93 of the late Constitution. The Ordinance, therefore, was only valid for six weeks beyond the 28th January 1957 under Article 102 of the Constitution, and ceased to operate on the 11th March 1957. The Act in which the Ordinance was embodied in the form of a statute (Act XXXII of 1958) was passed by the Legislative Assembly and the assent thereto of the Governor was first published in the official Gazette on the 24th April, 1958. Appeal before this Court were filed against orders of High Court of West Pakistan, Lahore, for an order restraining the collection of

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payment of taxes under the Motor Vehicles Taxation Act, 1924. This Court held that "the powers of legislation of the Governor, therefore, were of a transitory, temporary and contingent nature. They are, no doubt, co-extensive with those of the Provincial Assembly, as argued by Mr. Brohi, but this can be said only with regard to the field of legislation as regards the Provincial list and the concurrent list of subjects as given in the Fifth Schedule to the late Constitution. But it is evident that the powers of the Assembly are more extensive, inasmuch as it was empowered to enact permanent Acts at all times not subject to any limitations as the Governor's powers are meant to be by Article 102, which are to be exercised in emergency and with temporary effect only, and carry with them the implication that when a permanent Act is repealed by an Ordinance, the Act will revive on the expiry of the Ordinance"".

24. In the case of ***Air League of PIAC Employees v. Federation of Pakistan M/O. Labour and Manpower Division Islamabad and others (2011 S C M R 1254)***, the Honourable Supreme Court of Pakistan while dealing with the issue has observed in the following words:

"17. . . . . Similarly, Article 264 of the Constitution provided that where a law is repealed or is deemed to have been repealed, by, under, or by virtue of Constitution, the repeal shall not affect the previous operation of law or anything duly done or suffered under the law; affect any right, privilege, obligation or liability acquired, accrued or incurred under the law; affect any penalty

forfeiture of punishment incurred in respect of any offence committed against the law; or affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liavility, penalty forfeiture or punishment. However, it shall not revive anything not in force or existing at the time at which the repeal takes effect. Article 264 of the Constitution shall not be applicable in the instant case firstly; for the reason that the IRA, 2008 was not repealed by, under, or by virtue of the Constitution, rather it died on expiry of the statutory period. Secondly; the purpose of Article 264 of the Constitution is to provide protection to the operation of law, rights, liabilities accrued, and penalties incurred in respect of any repealed law and does not state that it would provide protection to the laws previously in force. Article 264 of the Constutiton is in a language that deals with the effect of repeal of laws and, unless the constitution provides otherwise, nothing will be revived which was not in force or existing at the time when the repeal takes effect. The IRA, 2008, was repealed by its own force in terms of section 87(3). Had it been an Ordinance issued under Article 89 of the Constitution, on the expiry of its statutory period the repealed law would have been revived but the provisions of this Article would not be applicable here because IRA, 2008 is not an Ordinance and has been enacted by the Act of Parliament, therefore, no sooner did it lapse on 30-4-2010, no other law earlier repealed including IRO, 1969 could occupy the field. In addition to it, the mandate of section 6 of General Clauses Act and Article 264 of the Constitution had not provided that on account of repeal, the law

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previously in field would stand revived as these provisions in broader sense had attached finality to the actions which were already done. The finding given by the High Court of Sindh that after the repeal of IRA, 2008, the IRO, 1969 came back in operation, is not tenable. Thus it is held that the IRO, 1969 would not be revived after the repeal of IRA, 2008."

25. In view of above settled legal position, the expiry of Ordinance during the pendency of the case will not effect the pending application and the same shall still be maintainable as the repeal Act i.e the Arbitration (Protocol & Convention) Act, 1937 contained section 3, which provided that notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol ser forth in the first schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under them in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings and the Court unless satisfies that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. Even otherwise, pending proceedings are protected under Article 264 of the Constitution of Islamic

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Republic of Pakistan, 1973 and under Section 6 of the General Clauses Act. In this view of the matter, expiry of Ordinance XXXIII of 2009 during the pendency of the suit will not come in the way of the defendants and pending proceedings shall be governed by the provisions of the Act, 2011. Even otherwise Section 1(3) of the Act, 2011 provides that it shall apply to arbitration agreements made before, on or after the date of commencement of this Act, but shall not apply to foreign arbitral awards made before 14.07.2005.

26. With regard to **point No.2** whether discretion available to Court for refusal to stay suit under Section 34 of the Arbitration Act, 1940 and under the provisions of the Arbitration (Protocol and Convention) Act, 1937 is also available in cases governed by the Act, 2011. To answer the above point, it will be advantageous to quote Section 34 of the Arbitration Act, 1940, Sections 3 & 4 of the Act, 2011 and sub-Article 3 to Article II to the Act, 2011.

27. Section 34 of the Arbitration Act, 1940, for ready reference, is quoted hereunder:

> " ***34. Power to stay legal proceedings where there is an arbitration agreement.*** *Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any party to the agreement or any person claiming under him in respect of any matter 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 may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial*

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authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

28. Sections 3 & 4 of the Act, 2011 are again reproduced hereunder for ready reference:

> " ***3. Jurisdiction of Court.---(1)*** *Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act.*
>
> *(2) An application to stay legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court, in which the legal proceedings are pending.*
>
> *(3) In the exercise of its jurisdiction, the Court shall,---*
>
> *(e) follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and*
>
> *(f) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908).*
>
> ***4. Enforcement of arbitration agreements.---(1)*** *A party to an*

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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, inoperative or incapable of being performed."

29. Sub-Article 3 of Article II to Schedule to the Act, 2011 is quoted hereunder:

" *3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

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30. This point has been extensively dealt with by a learned Single Judge of this Court (Now Judge of the Honourable Supreme Court of Pakistan), while Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance (XX) of 2005 was in force, in the case of ***Messrs TRAVEL AUTOMATION (PVT.) LTD. (supra).*** Learned Judge after examining the provisions of Section 34 of the Arbitration Act, 1940 and Section 3 & 4 of

Ordinance XX of 2005 has recorded his findings in the following words:

> " *After the enforcement of Ordinance XX of 2005 radical changes have been made in law and discretion of court which was available under section 34 of the Arbitration Act, 1940 apparently is no more available to court. The question on which earlier, while exercising discretion under section 34 of the Arbitration Act about convenience or inconvenience of the parties, availability of evidence on a plaintiff lace other than the place of arbitration, whether to stay proceedings or not, was within the discretion of the court. However, while dealing with the matter under section 4 of the Ordinance XX of 2005 court has no such discretion except where cases fall within exception categories mentioned in the section itself. It is interesting to note that section 3 of the Ordinance, 2005 opens with the non-obstante clause that notwithstanding anything contained in any other law for the time being in force the court shall have exclusive jurisdiction to adjudicate and settle matter related to or arising from the Ordinance. On reading subsection (2) of section 4 with Article II of United Nations Convention, it is clear that on filing of an application by any party to the proceeding the court has to stay the proceeding unless it finds that the agreement is null and void or inoperative or incapable of being performed. So far as the agreement in question is concerned it is not the case of the plaintiff that the said agreement is void agreement and in fact plaintiff has sought declaration, that the said agreement is valid, binding and fully*

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operative and enforceable against the defendant and in these circumstances irrevocable coupled with interest, and for mandatory injunction restoring the same in favour of the plaintiff."

31. The above judgment was also followed by another learned Judge of this Court (as she then was) in the case of ***FAR EASTERN IMPEX (PVT.) LTD. (supra)***, while dealing with the discretion of the Court at the time of disposing of an application under the provisions of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2007 has recorded her findings as under:

> *" Section 4 is mandatory in nature would be applicable to the present case, the cases cited by the learned counsel for plaintiff relating to the applicability and consequences of section 34 of the Act, 1940 would not be attracted to the present case. The discretion available to the Court under section 34 of the Arbitration Act shall not be available under Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2007 being mandatory in nature, the foreign elements could not be considered nor the discretion vests with the Court to stay or not to stay the proceedings in terms of the arbitration agreement. In this context reliance has been placed in the case of Messrs Travel Automation (Pvt.) Ltd. Through Managing Director v. Abacus Intentional (Pvt.) Ltd. Through President and Chief Executive and 2 others 2006 CLD 497, the learned Single Judge relying on Article II of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 arrived at*

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the conclusion that under section 4 of the Ordinance XXII of 2004 the courts are no more left with the discretion for adjudging the convenience or inconvenience of the parties, availability of the evidence at a place other than the arbitration place and whether or not to stay the proceedings was no more within the discretion of the Court and the Arbitral Courts shall have exclusive jurisdiction to adjudicate or settle matter, the Court has to stay the proceedings unless it finds Arbitral agreement was null and void, inoperative or incapable of being performed."

32. A perusal of Section 3 & 4 of the Arbitration Act, 1940 shows that 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 him in respect of any matter agreed to be referred, any party to such legal proceedings may, on 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 if the Court is 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. The examination of Section 34 of the Arbitration Act, 1940 further shows that it provides discretion to the Court to stay or not to stay legal proceedings pending before it in spite of the fact that there is arbitration clause in the agreement which is subject-matter of the proceedings pending before the Court, the Court on examination of the material satisfies itself that there was no satisfactory reason for referring the matter for

arbitration and substantial miscarriage of justice would take place or inconvenience would be caused to the party, if stay was granted, can refuse to refer matter for arbitration in terms of arbitration clause agreed between the parties. The examination of Ordinance XXXIII of 2009 dated 26.11.2009 and the Act, 2011 show that such discretion is not available with the Court. Subsection 1 of section 4 provided that a party to arbitration agreement against whom legal proceeding has been brought in respect of the matter which is covered by the arbitration agreement may, upon notice to other party to the proceedings, apply to the Court to stay proceedings insofar as its concerned matter. A comparison of subsection (1) of section 4 of the Act, 2011 with section 34 of Arbitration Act, 1940 shows that under section 34 of the Arbitration Act, 1940 when any party to arbitration agreement or any person claiming under him commenced any legal proceedings against any other party to the agreement in respect of the matter agreed to refer for arbitration, before filing of written statement or taking any other steps in the proceedings can apply to the Court, and if Court is satisfied that there is 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 XXXIII of 2009 or the Act, 2011, a party to arbitration agreement against whom a legal proceedings have 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. Subsection 2 of section 4 of the Ordinance XXXIII of 2009 and the Act, 2011

has taken away discretion of the Court whether or not to stay the proceedings in terms of arbitration agreement, even on the ground that inconvenience e.t.c. except where the arbitration agreement by itself is ***null*** and ***void,*** inoperative or incapable of being performed. Sub-article 3 to Article 2 to schedule of Ordinance XXXIII of 2009 and the Act, 2011 provides that the Court of a Contracting State, seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is ***null*** and ***void***, inoperative or incapable of being performed.

33. In view of above, it is held that under Ordinance XXXIII of 2009 or under the Act, 2011 the Court has no discretion but to stay the proceedings under arbitration agreement between the parties except where the arbitration agreement is ***null*** and ***void***, inoperative and incapable of being performed.

34. With regard to **point No.3**, whether plaintiff has made out a case within exception provided under subsection (2) of Section 4 of the Act, 2011, the subsection (2) of section 4 of Ordinance XXXIII of 2009 or the Act, 2011 provides the precondition for refusing stay of the proceeding is that arbitration agreement is ***null*** and ***void***, inoperative or incapable of being performed. The words ***null*** and ***void***, inoperative or incapable of being performed should be read keeping in view the rule of *ejusdem generis* i.e when a particular word pertaining to class, category or genus or

followed by general words, the general words are construed as limited to things of the same kind as those specified.

35. Learned counsel for the plaintiff has failed to point out from the record that the arbitration agreement is null and void, inoperative or incapable of being performed. Learned counsel for the plaintiff has argued that though agreement entered into between the parties had expired on 31.12.2009 but the terms of the same are being followed by the parties. He did not argue that arbitration agreement is *null* and *void,* inoperative and capable of being performed. For dismissal of the present application, he has submitted that matter may not be referred for arbitration for the reasons that entire evidence relating to dispute is available in Pakistan and all the properties connected with the disputes are also located in Pakistan. He further submitted that contractual relationships, business and commercial understandings as well as mutual promises and assurances have been performed by both the parties ever since 1993 in Pakistan, therefore, matter may not be referred for arbitration. On the basis of aforesaid arguments, the application for stay of suit cannot be rejected as the arbitration can be refused to a party to the arbitration agreement unless Court finds that the arbitration agreement is ***null*** and ***void***, inoperative or incapable of being performed. In this view of the matter, it is held that plaintiff has failed to make out a case for refusal to stay the suit.

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36. With regard to **last point** that what is the effect of Section 202 of Contract Act in the case in hand though the dealership agreement dated 21.02.2005 has already expired on 31.12.2009, learned counsel for the plaintiff has contended

that dealership agreement between plaintiff and defendants was coupled with the interest and defendants cannot unilaterally cancel the same.

37. In the case of ***Travel Automation (Pvt.) Ltd. (supra)***, while dealing with the above point the Court has dealt with the issue in the following words:

> *" Coming to the last contention of the learned counsel for the plaintiff that agreement of distributorship between the plaintiff and defendant No.1 was coupled with the interest and defendant No.1 cannot unilaterally cancel the same. It is an admitted position that distributorship agreement entered into between the parties from time to time was for a specified period of time. Clause 12.1 provided that agreement shall be for a fixed period of three years and to be continued thereafter for a fixed period of three years unless earlier terminated as provided in the agreement. The said clause further provided that notwithstanding this, either party to this agreement may terminate the agreement upon three calendar months written notice given to the other party, such notice not to be given earlier than twelve months from the date of execution of the Agreement. Clause 12.2 provided events of default on which defendant can terminate the agreement and all licences and, permissions immediately. Likewise clause 12.3 provided that plaintiff can terminate the agreement by written notice to Abacus on event of default provided in this clause. Clause 12.4 provided that upon termination of the agreement for any cause, all rights of the distributor shall be terminated and distributor shall immediately cease to use the trade mark,*

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service mark and other intellectual property belonging to Abacus and shall return forthwith all existing copies of the standard agreements, manuals, publicity material and all other materials of every nature etc. The plaintiff's case is that the plaintiff has not violated any of the stipulations mentioned in clause 12 of the agreement dated 1-5-1997 and that plaintiff has acquired vested right in the said distributorship and their interest stands legally protected and cannot be assailed much less taken away in such a unilateral, arbitrary unreasonable manner ignoring their services, sacrifices, investments which have all gone waste in view of the illegal and mala fide termination of their distributorship. Be that at it may, since agreement itself was for a fixed period of time provided stipulation for the cancellation and termination of it. Reliance upon section 202 of the Contract Act has no application to the facts of the present case for more than one reasons."



38. It is an admitted position between the parties that dealership agreement entered into between the parties was for specified period. As stated in the paragraph-2 of this order, dealership agreement had expired on 31.12.2009. The agreement was for a fixed period of time and it also provided a clause for cancelation and termination of the same. The reference of Section 202 of the Contract Act has no application to the facts of the present case. This point is also answered accordingly.

39. For the forgoing reasons, I am of the view that the plaintiff has failed to bring the case within the exceptions provided under subsection (2) of Section 4 of the

Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2009 or the Act, 2011, so as to refuse to stay the proceedings. The application (C.M.A.No.1028 of 2010) is granted and the proceeding of the present suit is stayed. It is further ordered that the disputes between the plaintiff and defendants No.1, 2 & 4 be referred to arbitration in terms of Arbitration Clause quoted above. I would like to make it clear that any observation made hereinabove are tentative in nature, and arbitrator while deciding the matter will not influence from it.

40. Through another application being C.M.A.No.3248/2010, the plaintiff has prayed for summarily rejection of defendants' application being C.M.A.No.1028/2010 filed under Section 3 & 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2009, on the ground that the aforementioned Ordinance, promulgated on 26.11.2009 has expired/lapsed after the completion of its constitutional life/term under Article 89 of the Constitution of Islamic Republic of Pakistan, 1973.

41. Learned counsel for both the parties made their submissions while arguing the application (C.M.A.No.1028/2010). Since C.M.A.No.1028/2010 has been allowed by the above order and in view of findings recorded on **Point No.1** this application (C.M.A.No.3248/2010) also stands disposed of for the reasons mentioned in the earlier part of this order.

Karachi, 07-09, 2012.

Sd/- M. Pasnim,
Judge

Riaz/P.A/*

CERTIFIED TO BE TRUE COPY

07/9/12

ASSISTANT REGISTRAR

07/9/12

COPY APPLIED FOR ON
FEES ESTIMATED AT
ESTIMATED FEES DEPOSITED ON
COPY MADE READY ON 07.09.12
STAMP SUPPLIED ON
COPY CERTIFIED ON
COPY DELIVERED ON

COPYING FEE	Rs.	P.	
FOLIO FEE	Rs.	P.	
ATTESTING FEE	Rs.	P.	
	TOTAL Rs.		123/-

07/09/12

07/9/12

ASSISTANT REGISTRAR