ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

POWER OF ARBITRATORS TO GIVE INTERIM ORDERS IN ETHIOPIA

By

Yohannes Afework

June, 2023

Addis Ababa, Ethiopia

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Advisor: Mr. Zekarias Kennaa' (Professor)

A Thesis Submitted in Partial Fulfillment of the Requirements for the Masters Degree of Laws (LL.M) in Business Law

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Declaration

I, Yohannes Afework, declare that this thesis titled; Power of Arbitrators to Give Interim Orders in Ethiopia, is my own work which it has never been presented in any other university. And that all the sources of materials used have been duly acknowledged.

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Date: Dec 30, 2023

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Approved by: Board of Examiners

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Advisor:	**Signature**	**Date**
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Examiner	**Signature**	**Date**
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Examiner	**Signature**	**Date**

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Acronyms

ADRs	Alternative Dispute Resolutions
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on Trade Law
OECD	Organization for Economic Co-operation and Development
ICC	International Chamber of Commerce
AAA	American Arbitration Association
WIPO	World Intellectual Property Organization
No.	Number

Abstract

Evolution of arbitration as a method of dispute mechanism can be tracked back to the early days of business, when traders looked to a third party to solve disputes that arise amongst them. Historically, the power to grant interim measures in international arbitration was solely reserved to national courts. As to today, many countries have permitted the permission of interim measure to be given by arbitration tribunal as a concurrent jurisdiction of the national court. Contemporary arbitration in most legal system if not all is accompanied by procedural safeguards and opportunities to protect the interest of the litigant parties. One of the inevitable consequences of such procedural safeguard is enabling one of the parties to delay the proceeding in the resolution of the disputes which in turn negatively affect the right of one of the parties and sometime seriously affect the right of the other party. Classic examples for such type of serious damage includes loss of market value of property and destruction of an ongoing business. The availability of interim measures will largely depends on international conventions, national legislations and institutional rules in case of institutional arbitration. The new Arbitration Proclamation in this regards permits issuance of interim order by arbitration tribunal to ensure the preservation of the property and by doing so enables the effectiveness of the arbitral process. Ethiopia recently ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the effect of which can be interpreted as a tool precluding a contracting parties from adopting measure that preventing the measure of the tribunal to order interim measure. This paper will examine the need the existing legal framework on interim measure and its intricacy.

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

Though the essential functions of a legal system is to deal with controversies and disputes. Legal literature contributes very little to the broader debate relating to the meaning, origin, nature, content and transformation of a dispute.[1]

The technical demands of the system of procedure as well as the requirements of substantive law restrict the legal concept of a dispute to the ambit of rights and remedies.[2] A dispute is therefore formulated as a legal abstraction that in many respects is at odds with the reality of a dispute within a particular social or cultural context consequently, the legal notion of a dispute tends to be based on a dichotomy between a legal and a non-legal dispute.[3] The mainstreaming dispute settlement mechanism is through litigation in courts of law.

Most authorities agree on the advantages of out of court dispute resolution, commonly known as Alternative Dispute Resolutions (ADRs) than court-litigated cases. According to a renowned author in the area[4]

> Out of court settlement offers some clear advantages over adversary proceedings, it's cheaper, faster and potentially more hospitable to bring unique solutions that take more fully into account non-material interests of the disputants. It can educate the parties about each other's need and those of their respective community.

The writer put in a very short and precise manner almost touching upon the basic merit of out of court dispute settlements. Disputants, when resolving their disputes, under such mechanisms, try to find solutions through which the interest of both sides will be accommodated and that of the community will be preserved. Disputants are mostly concerned with non-material interests,

[1] Johan Andew Fairs, Analysis of the theory and principles of alternative dispute resolution, PhD dissertation, university of South Africa, June, 1995 at 28
[2] Ibid
[3] Ibid
[4] Stephen B. Goldberg, Frank E.A and others, Dispute Resolution Negotiation, meditation, and other processes, Boston, Tronto, London 1992 at 23

because what is primarily important in ADR is, among others, preservation of confidential information.[5] So, decisions rendered in the process of out of court settlement will be much more preferable to the disputants than those reached at formal court litigations. Both parties try to create an environment within which they work cooperatively and smoothly for their destination endeavor to reach agreements.[6] Such agreements will not serve as a precedent to bind on other similar cases, since what the disputants in a particular case considered relevant to their case is limited to that case only.

Human relation can best be preserved when there is face-to-face contact and discussion so as to put sanction on the deviant behavior of the minority than deciding cases at courts. ADR settlement can be applied to most cases and in almost all human relations.[7] But it is best suitable and profitable in areas where future relation is expected to continue among the disputants especially in the areas of family and business disputes.[8] The wide application of out of court dispute resolution is expected to bring convenient solutions, to long term relation of the parties and relief for third parties who have no contribution for the conflict or who were not the cause of the controversy.

Michael Burkun states the merits of out of court settlement in a more elegant way that I ever could find in the following manner[9]

> A bargaining struck imperfect though it is perceived to be is far more advantageous than the uncertain result of a go - it - alone policy at court. If maximizing gains is the name of the game, a bargain, for all its shortcomings, is the best solution. Bargaining is rational in that it brings means and ends into the most protective juxtaposition.

However, professional arbitrators appeared only in the early twentieth century and more extensively during the 1940s for the purpose of collective bargaining, and thus courts encouraged the out of court dispute settlement since 1930s. Out of court dispute settlement both

[5] Jean R. Sternlight, Is Binding Arbitration a Form of ADR? An Argument that the Term "ADR" Has Begun to Outlive Its Useless, Journal of Dispute Resolution, Vol. 2000 No.1 (2000) at 99
[6] Jack B. Weinstein, Some Benefits and Risks of Privatization of Justice Throughout ADR, The Ohio State Journal on Dispute Resolution, Volume 11 No. 2 (1996) at 245
[7] Ibid
[8] Muhammed Aziz and T. Chandrasekar, Improving the ADR: Narrow Band, Broad Benefits, Digestive Diseases and Sciences (2020)
[9] Michael Barkun, Law Without Sanctions, Order in Primitive Societies and the World Community, New Haven and London, 1968 at 39

in government and private sectors was being institutionalized and used in the following human relations in most countries.

Commercial activities, construction industry, dispute between consumers and manufacturers, family dispute, medical malpractice claims, securities disputes, attorney fee disputes, dispute between non-institutionalized employees and employers and so on.

In the contemporary world, arbitration is becoming one of the most frequently used dispute settlement mechanism. There is no universally agreed definition for the term Arbitration. According to one author, arbitration is defined as:[10]

> a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in place of the tribunals provided by the ordinary process of law.

When we narrow down our focus on Ethiopia, ADRs especially arbitration, is becoming the most dominant form of dispute resolution amongst business persons and entities. There are two categories of arbitrations: voluntary and compulsory arbitration. A close look at Article 2 of the New Arbitration and Conciliation Working Procedure Proclamation[11] reveals that the arbitration agreement is the result of the consent of the contracting parties. The parties' consent provides the underpinning for the power of the arbitrators to decide the dispute. The parties' consent also limits arbitrators' power because arbitrators can decide only issues within the scope of the parties' agreement. Arbitrators are also expected to apply rules, procedures, and laws chosen by the parties. Normally, the parties express their consent to submit any future dispute to arbitration in a written agreement that is a clause in the commercial contract between them. If they do not have an arbitration clause in their contract, however, they can still enter into an agreement after a dispute has arisen. This is known as a submission agreement. However, there are instances whereby the law requires mandatory arbitration. In the latter cases arbitration becomes obligatory and is not dependent upon the consent of the parties.

[10] Wesley A. Sturgel, Arbitration- What is it?, New York University Law Review, Vol. 35 (1960) at 1032
[11] Arbitration and Conciliation, Working Procedure Proclamation, Proclamation No. 1237/2021, Negarit Gazeta 27th Year No 21.

Voluntary arbitration purely depends on the consent of the parties. This type of arbitration has been practiced in societies for long, even before formal law came into existence. It refers to the submission of a dispute by voluntary agreement of the disputing parties to one or more impartial arbitrators for a final and binding decision. Arbitration results from a contractual agreement in which the parties agree in advance of a dispute or after it has arisen, that an arbitration process will substitute the formal judicial proceedings. The new Arbitration, Conciliation and Working Procedure Proclamation deals with this issue of voluntary arbitration.[12]

The other form of arbitration is compulsory arbitration. The traditional mode of arbitration, a voluntary process, nowadays, with the increased need for ADR mechanisms is changing its scope to include arbitral processes of a compulsory nature. Compulsory arbitration is growing throughout the world in specific areas of dispute. Compulsory arbitration exists due to the fact that specific categories of cases are referred to arbitration by the operation of the law. Family disputes in Ethiopia were subjected to mandatory arbitration before the coming into effect of the Federal family law that did away with arbitration in family matters and provided that divorce cases have to be obligatorily submitted to courts.[13]

In obligatory arbitrations, the parties are forced into an arbitration process outside the jurisdiction of courts. Thus, there is no contract or agreement to refer to, and it is an imposition by law.[14] A mandatory form of arbitration is introduced to increase efficiencies of courts and thereby reduce congestion in courts. It is also to safeguard and preserve customary values and to maintain social relationships. However, some scholars are of the opinion that compulsory arbitration is not arbitration at all, because once its main element of voluntary action is removed, the shell that remains hardly has qualities to be called arbitration.[15]

To put it in other words, arbitration is a process whereby controversies of economic nature are heard and decided beginning with and depending upon the agreement of the parties to submit their claims to one or more persons chosen by them.[16] Another major point referred to by legal

[12] This is also well reflected in the Proclamation
[13] Article 118 of the Revised Family Code of Ethiopia
[14] David S. Schwartz, Mandatory Arbitration and Fairness, Notre Dame Law Review, Volume 84 (2008-2009) at 1250
[15] For instance, see Alexander J.S. Colvin, The Metastasization of Mandatory Arbitration, Chicago Kent College of Law, Volume 94 No.2 (2019)
[16] Emmanuel Gaillard, Abuse of Process in International Arbitration, ICSID Review (2017) at 15

scholars is that arbitration deal with the same kinds of controversies that are dealt with by the courts. This arises from the consensus that arbitration is a substitute for litigation in the courts and should be limited to justiciable controversies.[17]

Due to the numerous distinguishing features arbitration has from other dispute resolution methods, it is necessary to know whether an agreement concerning the resolution of a dispute is an arbitration agreement or otherwise and whether a certain proceeding underway is or is not an arbitral process.

Some distinguishing features of arbitration according to Mustill and Boyd are:

i) Courts can not intervene on the pretext of the arbitral tribunal committing an error of fact or a misunderstanding of evidence.

ii) Except in some kinds of arbitration the predominant understanding is that courts can intervene where the tribunal held a mistaken view of principles of law, in the proceedings.

iii) An error of law entails remedy through an appeal only when based on what is stated in the award.

iv) The effect of misconduct is only to make the award voidable until and unless it is set aside as a result.

v) It is only when agreement cannot be reached, an arbitrator dies, is incapable, refuses to act, or creates unreasonable delay that the court may assume the power to appoint arbitrators

vi) The court can intervene to protect the arbitral process by exercising the powers it uses against acts amounting to contempt of court. It may exercise these powers, be it over parties who have consented to the arbitral process or third parties who hampered the process.

vii) An award in arbitration may get enforcement as a judgment of a court, through leave of the court.[18]

Minimum legal requirements in arbitration assure, unless waived by parties:

[17] Ibid
[18] See Michael Mustill and Setward Boyd, The Law and Practice of Commercial Arbitration in England (1991) at 4

a. Rights of hearing including entitlement to notice, opportunity to present evidence and cross examine opposing evidence, and

b. Rights to an award which the arbitrators deem fair and just and for such award to have legal finality, conclusiveness and enforceability

In this research an attempt is made to examine the role of arbitration tribunal or/ and arbitrators to give interim order in Ethiopia.

1.2. Statement of the Problem

Interim order is defined by different authors on the field in different manners. Generally, it's the power of an arbitration tribunal to take temporary and provisional measures. Often, it's an order used to maintain the status quo of the litigant parties and their related material status to the case.[19]

The law of interim order has a peculiar nature as distinguished from other areas of law. This peculiarity emanates from the equitable nature of interim order.[20] To put it in other words, the granting or refusal of it depends on the particular circumstances of the case where it is believed that justice could be served, interim order will be issued. Determining whether the case deserves equity or not is the task of arbitrators.[21] Therefore, the biggest ingredient in the decision to issue an interim order is the individual judge's discretion and sense of justice. Yet, such individual discretion is subject to a consideration of some general guideline.

The arbitration tribunal may play roles in arbitral proceedings in various ways. Interim measures of protection are one of these roles. Since an arbitral tribunal has no power against third parties, it needs to use the power of the court where its order is to affect third parties. The new Arbitration and Conciliation Working Procedure Proclamation empowers arbitral tribunals to give interim orders. This research will examine this power of arbitral tribunals to give interim orders and check the sufficiency of such powers to achieve the purpose for which the power is given.

[19] Jack J. Slaughter, A Review of the Interim Order Powers and Consultation Processes of the Ontario Labor Relations Board, Advocates Quarterly, Volume 37 No. 87 at 96
[20] Ibid
[21] Ajar Rab, Arbitration and Conciliation Amendment Act, 2015-Enforceable Interim Orders, Where is the Belief? National Law University, Volume 4 (2017)

1.3. Purpose of the Study

The purpose of the study is mainly to examine the existing legal framework set up to regulate the role of arbitration tribunals to give interim orders. The purpose of the research is to examine the law and the practice that has ensued under the law and to come up with recommendations on the powers of arbitral tribunals in placing interim orders and to have them enforced.

1.4. Objective of the Study

The research will attempt to investigate the essence of the power of an arbitration tribunal to give interim order in a dispute that came before it. The study will also explore the existing debates surrounding the role and significance of interim order in ADR. This study will as well try to critically analyze the problems of the existing dispute settlement mechanisms under Ethiopia law. The researcher will also attempt to examine the implication of interim measures as envisaged under the new Arbitration Proclamation. He will try to produce some recommendations which could help policy makers and strategy planners of the country for the proper and prompt enforcement to attain accelerated, equitable, economic, and sustainable dispute settlement via arbitration.

1.4.1. General Objective

The general objectives of the study are therefore to:

1. Investigate the meaning of interim measures in the context of arbitration;
2. Examine the nature and feature of interim orders;
3. Examine the existing law on arbitration with regard to interim measures; and
4. Assess the scope, sufficiency and enforceability of interim measures taken by arbitration tribunals under the existing legal framework in Ethiopia.

1.4.2. Specific Objective

Particularly, the study tries to:

1. Analysis the meaning of ADR
2. Analysis the nature and essence of interim measure
3. Critically analyze the role of tribunal in giving interim order

4. Identify the existing legal and practical gaps with regards to interim power of the arbitration tribunal.

1.5. Significance of the Study

Among other things, the research will have the following major significance. First and foremost, the study will critically examine the existing legal and institutional framework for operation and functionality of the power of the arbitrators to give interim orders. Thus, the end result would be a good input for policy makers which could serve as a good guideline as to how to amend the law to make it effective and functional. The other significance of the research is that despite the fact that ADR is a fairly well researched area, there has been little or no research output which examines the role of arbitrators in giving interim orders and this work, it is believed, would contribute to enrich legal literature on the subject. Moreover, this research will serve as stepping stone for further study in the field of interim measures to be placed by arbitrators.

1.6. Research Methodology

This research makes use of the doctrinal and non-doctrinal method of research. The research employs both primary and secondary sources extensively. The research also extensively consults the literature on the power of arbitrators to give interim orders. To exhibit the contemporary concerns, experiences of some countries are mentioned. Although literature on the power of arbitration tribunals is next to none, highest effort is made to consult all available materials. Primary sources more particularly Arbitration and Conciliation Working Procedure Proclamation, Federal Court Proclamation and New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by Ethiopia and other relevant laws are examined in detail and critical manner. Where available, court decisions and rulings, published or unpublished would be analyzed to examine the practical application of interim orders in arbitration.

1.7. Research Questions

Despite the fact that the conventional way of settling dispute is via litigation in courts, the role and significance of ADR in handing and resolving dispute can't be underestimated. Within this broader framework, the research tries to address the following questions:

a. Does the existing legal framework provide enough space for interim order to be given by arbitrators?

b. What are the gaps in the existing legal framework and its application with regard to interim orders?

c. What should be done to put in place an effective power of arbitrators to give interim orders in Ethiopia?

1.8. Scope of the study

Interim order is one of the main issues in any arbitration and countries have different experiences and theories in connection to the power of the court to issue interim order. However, due to different constraints including time and resource, the scope of this research is limited to experience of some selected countries. Geographically, Interim order can be issued before at the Federal and Regional courts. Again for reasons in connection to time, the research is limited to cases that were entertained by the Federal courts and unable to access the prevailing practice under regional courts. It should be noted that the research doesn't include Addis Ababa city administration court and Federal court located in Dire Dawa. The justification to selected Addis Ababa is for accessibility of data collections especially from court, specialized commercial bench, which is relevant to the matter.

1.9. Limitation of the Study

Lack of adequate literature on outside of courts dispute settlement in Ethiopia and its impact is the major barrier that significantly affected this research. It will not be over-overstating to say that there is lack of literature on the role and application of arbitral tribunals to give interim order in Ethiopia. Lack of enough time and lack of willingness of legal professionals to be interviewed is another barrier. Access to unpublished court decisions may also be mentioned as another difficulty that contributed to the limitation of the study.

1.10. Organization of the Study

The thesis is organized into five chapters. The first chapter provides a background to the research, states the problem, frames the research questions, and puts in context the thesis within

the existing literature. Chapter two of the paper will examine conceptual framework of ADR mechanisms and the nature, purpose and historical background of interim measure orders. Chapter three discusses the experiences of some countries on the right of arbitrators to place interim orders in arbitral proceedings and interim orders in some international institutions of arbitration. The fourth chapter will examine interim measures under the new arbitration and conciliation working procedure Proclamation No. 1237/21. The final chapter deals with the brief summary, examination and reflections on cases entertained by courts after the promulgation of Proclamation No 1237/21 and ends with conclusions and recommendations.

CHAPTER TWO

THE CONCEPTUAL FRAMEWORK AND THE NEED FOR ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS

2.1 Definition of the Concept of "Alternative Dispute Resolution" Mechanisms

In every society, disputes arise in day to day relationships among peoples of its communities. When disputes arise, in order to settle such disputes, one of the parties may initiate litigation process through filing a legal suit. Parties may also decide to resort to means other than court adjudication. Such methods of settling disputes are referred to as "alternative dispute resolution" (ADR) mechanisms.[22]

The term ADR refers to procedures of settling disputes by means other than litigation. It encompasses a variety of ways to resolve disputes without conventional court trials, including: negotiation, mediation, arbitration and other hybrid forms. They are all used to save legal and managerial time and money and possibly to lead to more satisfactory results.[23]

Some argue that the word "alternative" mean alternative to the court litigation of state machinery and this presupposes that the primary and fundamental dispute resolution system is that provided by the state, while ADR is secondary and supplemental.[24] Nevertheless, having regard to the fact that historically the state itself is a relatively recent development, it may be argued that the oldest methods are alternative dispute resolution methods (ADR) and not state courts.

Black Law Dictionary define the term as alternative as:

> One or the other of two things; giving an option or choice; allowing a choice between two or things or acts to be done.

Hence, it seems that ADR has a purpose of giving choice to the parties to resolve a dispute arising between them. However, to have a clear understanding as to which dispute resolution

[22] Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema, Harvard Law Review, Volume 9 (1985/1986)
[23] Sai-On Cheung, Henry C.H. Suen and Tsun-IL Lam, Fundamentals of Alternative Dispute Resolution Processes in Construction, (2002)
[24] World Bank Group, Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers (2011)

mechanism preceded the other, it would be important to consider the development and background of ADR.

2.2. Background of the ADR Movement

The broad-based advocacy for increased use of mediation, arbitration and related processes is often called the ADR movement.[25] ADR has developed as a formal technique and means of resolving dispute in accordance with procedures aimed at avoiding the inherent costs and delays of the adversarial process. It has emanated from a negative source experience of the litigation process.[26]

Even before there was an ADR movement, methods other than litigation were used for resolving disputes, and were as old as humanity itself. The academic ADR movement is a re-discovery of what was used before for resolving disputes. Disputes were resolved by traditional and indigenous mechanisms such as by bosses, tribe-leaders, village priests and family friends across the world.[27] Even though the movement has discovered nothing fundamental and new, it has contributed for the development of techniques in important details differing from those commonly used in the past. It has created a great deal of academic interest in the academically neglected subject of non-state dispute resolution techniques.[28]

It is the USA that is always raised to have led the way in developing alternative ways of keeping parties away from court litigation as the country most acutely experienced costs and delays. Besides the legal system has lagged behind as business life picked up sharply through the 1960's to the 1980s driven by the new technology, increasing domestic and global competition.[29] To this effect, many observers in the legal and academic communities began to have serious concern about the negative effect of increased litigation and ADR assumed the attributes of a law reform movement in early 1970's.[30]

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[25] Stephen B. Goldberg and Frank E.A Sander, Dispute Resolution: Negotiation, Mediation and Other Process, Wolters Kluwer Publisher 6th edition
[26] Ibid
[27] Talha Kose, Islamic Mediation in Turkey: Third Party Roles of Aims in the resolution of communal Conflicts, Thesis, Unpublished (2002)
[28] Carrier Menkel-Meadow, Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History or War, UCLA Law Review, Volume 44 (1996-1997) at 1625
[29] Michael McManus and Brianna Silverstein, Brief History of Alternative Dispute Resolution in the United States, CADMUS, Volume 1 No. 3 (2011)
[30] Ibid

One well-known effort in the search for alternative methods occurred in 1976 when the former chief Justice Warren Burger convened the Roscoe E. Pound conference on the causes of popular dissatisfaction with the Administration of Justice in Saint Paul, Minnesota.[31] At the conference, leading jurists and lawyers expressed concern about increased expense and delay for parties in a crowded justice system. Professor Frank Sander proposed the idea of a multi-door courthouse based on the premise that the justice system should make a wide range of dispute resolution process available to disputants where by individual disputes would be matched to appropriate process such as mediation, arbitration or fact finding. In part, ADR stemmed from its reliance on the phrase "access to justice" to posit a structure with several doors of entry.[32]

Within a short period of time, his call has been heard and the American Bar Association adopted his idea through establishing "multi-door court houses" in certain regional states. This marked the beginning of ADR Movement as alternative means of litigation in the U.S.A.[33] However, ADR has not developed without critics. The commentary critical of the ADR movement developed in 1980's by certain personalities such as Professor Owes Fiss alleging that the justice system would suffer as a result of public support settlement facilities.[34]

Generally speaking, every dispute resolution mechanism is required to deliver quality justice. Quality justice is an outcome of speedy, efficient and fair decision. Adjudication, however, has failed to dispense quality justice as the volume of dispute brought before the court has increased and the proceedings became more lengthy and costly.[35] High legal costs and long delays put a damper on the exercises of an individual right to go to court. In other words, this made access to justice more difficult. Thus, ADR was developed to enable access to justice when adjudication failed through avoiding delays, costs, rigidity and inflexibility of the formal justice system.[36] It focuses on analyzing on what is appropriate to the parties in a particular case in order to achieve

[31] Roscoe Pound: The Causes of Popular Dissatisfaction with the Administration of Justice, presented at the annual convention of the America Bar Association. The full version of this piece is available at https://law.unl.edu/RoscoePound.pdf
[32] Ibid
[33] Michael McManus and Silverstein, Brief History of Alternative Dispute Resolution in the United State, Volume 1 Issue 3 (2011)
[34] Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema, Harvard Law Review, Volume 9 (1985/1986)
[35] Wayne McIntosh, 150 Years of Litigation and Dispute Settlement: A Court Tale, Law and Society, Volume 15 No. 3 (1980/1981)
[36] Paula Baron, Lillian Corbin and Judy Gutman, Throwing Babies out with the Bathwater? Adversarialism, ADR and the Way Forward, Monash University Law Review , Volume 40 No. 2

a similar or better result than litigation. ADR as a process is in a continuous change.[37] The Forms in which parties resolve their business and personal difference developed and varied as the time passed by. The term ADR incorporated a variety of dispute resolution methods.

2.3. Major Types of ADR

2.3.1 Negotiation

Negotiation is a voluntary and non-binding dispute resolution process in which two or more participants and/ or their lawyers engage in a direct discussion with each other and attempt to reach a joint decision of common concern in situations where they are in disagreement.[38] In this process, unlike mediation and arbitration, there is no third party involvement.[39] Compared to the process in which third parties are involved, negotiation has the advantage of allowing the parties themselves to have full control over the process and the outcome. It had been always said that negotiation is the most flexible, informal and used more than any other method.[40]

2.3.2 Mediation/ Conciliation

Mediation is a confidential and non-binding dispute resolution process. It is, essentially, a process of negotiation but structured and influenced by the intervention of a neutral third party, the mediator, who tries to bring the parties to a mutually agreeable resolution through creating an atmosphere, which allows the parties to communicate.[41] For this purpose, the mediator may make recommendations or suggestions but not a binding final decision. Resolution can only be based on the informed consent of both parties and the parties are at liberty either to accept or reject the suggested solution. This makes mediation different from arbitration and adjudication.[42]

The purpose of mediation is to enable the parties to arrive at a mutually acceptable resolution of the dispute in a cooperative and informal manner. From this it can be derived that mediation is a

[37] Ric
[38] Andra Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectives of Negotiation Style, Harvard Negotiation Law Review, Volume 7 (2002)
[39] Melvin Aron Eisenberg, Private Ordering Through Negotiation: Dispute- Settlement and Rulemaking, Volume 89 No.4 (1976) at 645
[40] Ibid
[41] Anastasiya S. Arkhipkinaa, Arkhipkina and Marianna I. Dyachuk, New in the Legislation on Conciliation Procedures in Russia: Judicial Conciliation and Mediation, Journal of Siberian Federal University, Humanities and Social Sciences, Volume 13 No. 2 (2020)
[42] Ibid

flexible process which can be used to fit the need of a particular case and it can produce creative solution to complex disputes.[43]

There is no universal consensus as to the precise definition of the terms, mediation and conciliation. A distinction is sometimes drawn, in terms of the active intervention of the third party. Based on this, some suggest that mediation is merely "assisted negotiation." Others take the opposite view and refer to mediation as the process where recommendation is made. Still others reject these attempts of differentiation and use the two words interchangeably.[44]

2.3.3 Arbitration

Arbitration is a traditional most formalized and binding method of resolving disputes outside the court system. One renowned scholar defined the term as follow:[45]

> Arbitration is a mode of settling differences through the investigation and determination, by one or more unofficial person/s selected for the purpose, of some disputed matter submitted to them by contending parties for decision and award, in lieu of a judicial proceeding.

In this process, disputing parties present their case to a neutral third party who is empowered to render a decision. The arbitrator often will play an active role in questioning the witnesses and also evaluates the facts and arguments of the parties, before rendering a final decision.[46] However, an arbitrator is not bound to apply the formal rule of evidence. The parties, on the other hand, have the right to choose who the arbitrators will be.[47]

It is also important to note that arbitration can have a non-binding form. In the non-binding form of arbitration, the judgment offered by the arbitration need not be accepted by the disputing parties.[48] Stated otherwise, the decision given by the neutral third party is considered as a

[43] Linda C. Leif, The Use of Conciliation or Mediation for the Resolution of International Commercial Dispute, Canadian Business Law Journal, Volume 45 (2007)
[44] Ibid
[45] R. Misra, Arbitration and the Courts, Institution of Judicial Training and Research (1992)
[46] Nathalie Bernasconi-Osterwalder Lise Johnson Fiona Marshall, Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and Counsel, IV Annual Forum for Developing Country Investment Negotiations, Background Paper (2010)
[47] Ibid
[48] Steven C. Bennett, Non-Binding Arbitration: An Introduction, Dispute Resolution Journal, Volume 6 No. 2 (2006)

recommendation and its binding effect depends up on the parties' willingness to be bound by the decision. Arbitrations may be expected in the resolution of specific disputes and they are more flexible in decision making than courts. Therefore, it may be said that arbitration is more flexible than litigation.[49]

2.4 Nature, Purpose and Historical Background of Interim Orders

The law of interim order has a peculiar nature distinguishable from other areas of law. This peculiarity emanates from the equitable nature of interim orders. In other words, the granting or refusal of it depends on the particular circumstances of the case and the order is placed when it is believed that justice could be served. Determining whether a case deserves equity or not is the task of judges.[50] Therefore, the heaviest ingredient in the decision to issue an interim order is the individual judge's discretion and sense of justice.[51] Yet, such individual discretion is subject to a consideration of some general guidelines.

The nature of interim order is also peculiar in that no jury trial is available.[52] This is with regard to common law countries whose legal system depends on jury system.

In addition, interim order is different from other areas of law in its enforcement mechanism, i.e., interim order is enforcement by contempt power. As Thompson and Sebert noted punishment for contempt is a mechanism by which the court enforces the rights of a party who is entitled to the benefit of an equitable remedy.[53] The same is true for interim order as it is one of the equitable remedies.

As regards the purpose of interim order, it is related with to do or not to do a certain act. When the order of interim order is not to do, the purpose will be to preserve and keep things in the same condition.[54] That means any intervening event which may bring irreparable injury to the petitioner of interim order will be restrained. On the other hand, when the order of interim order

[49] Shapiro and Others, Comparing three processes underlying judgments of procedural justice: A field study of Mediation and Arbitration, Journal of Personality and Social Psychology, Volume 65 No. 6 (1993)
[50] Markus Wirth, Interim or Preventive Measures in Support of International Arbitration in Switzerland, ASA Bull, Volume 18 (2000)
[51] Malihe Khalehi and Maryam Afshari, Exportation of Interim Order by the Arbitrator with the Approach to the Civil Procedure Code, Journal of Politics and Law, Volume 9 No. 9 (2016) at 205
[52] M.J Beheshti and Mardani, civil procedure (Vol. II, 2nd ed.). (2011) Tehran: Publication of Mizan at 126.
[53] Robert and Thompson and John Sebert, Remedies damages, equity restitution, 2nd edition (1989) at 223
[54] European Court of Human Rights, Interim Measures (2022) at 13

is to do a certain act, the purpose of interim order is to undo an already committed wrong.[55] Thus, it has a restorative character.

The historical origin of interim order is related with the emergence of equitable remedies since it is one of the prominent equitable remedies. Therefore, a brief exposition of the evolution and development of equity is as much important as interim order. To come to the point the development of equity is at the same time with that of interim order. Before tracing the origin of equity, one should know what it is. Equity has been defined differently due to its subjectivity. However, for our purpose we can take Spry's definition. He defines it as follows:[56]

> Equitable principles have a distinct ethical quality, and further, they are of the nature of the greatest width and elasticity and are capable of direct application as opposed to application merely by analogy, in new circumstances as they arise from time to time.

Thus, the rigorous and rigidity of formal rules can be loosened by equity. This in turn contributes for efficient administration of justice since citizens may have trust on the legal system.

Historically the evolution of equity dates back to the thirteen century England.[57] Until that time, justice was dispensed by the Saxon courts and later by Norman Manorial county, and other local courts.[58] During the 12th Century Henry II of England created a national system of judges and courts for administration of all legal matters, and access to the kings' court was obtained through the issuance of writs by the king's secretary chancellor.[59] Such types of writs were issued freely to meet new factual situations whenever it is thought that it responds to justice.[60] In the beginning there was no distinction between law and equity in the king's court that is the king's court used to provide relief for all types of cases.[61]

Nevertheless, as time went on the king's court became inadequate to meet the needs of developing society, for instance, when petitioners asked a specific relief which was not in the

[55] Ibid
[56] F. Spry, Equitable Remedies, 4th edition, Law Book Company, Sydney (1990) at 1
[57] Sir Frederick Jordan, Chapters on Equity in New South Wales, in Sir Frederick Jordan Select Legal Paper, Legal Book, Sydney (1983) at 4
[58] Ibid
[59] Howard L. Oleck, Historical Nature of Equity Jurisprudence, Fordham Law Review, Volume 20 Issue 1 (1951) at 34
[60] Ibid
[61] Ibid

king's court. To alleviate such problems a need arose for having independent organs which have equitable nature. Thus, in the thirteenth century a court called Chancery Court emerged in England.[62]

The important thing which paved the way for the coming of Chancery Court is the inadequacy of common law. But, what is inadequate? The insight of historians on the inadequacy of common law is different. Some like cooke, stressed on the substantive or doctrinal shortcomings of common law like rigidity of formal laws.[63] Others have stressed on the procedural shortcomings of the common law system like slowness and reliance on jury.[64] Yet, others stressed on the belief that some persons need special treatment due to their particular conditions like poorness to institute a suit in common law.[65]

Despite the fact that the stress of historians differ, there is a consensus that Chancery Court emerged in history when the traditional legal remedies failed to offer the plaintiff adequate relief.

For another, the need for delegation of authority played a role in the evolution of the Chancery Court. Previously it has been said that access to common law courts was obtained through the issuance of writs by the Chancellor. But as time went on, petitions addressed to the king asking for specific relief increased and became time consuming.[66]

Particularly in the fourteenth century, the number of petitions increased and the king started to delegate his power to a certain Council and the Council to the chancellor who is also the member of the Council.[67] Then, the responsibility of the Chancellor increased and petitions started to be addressed directly to him. In the meantime his department (Chancellor's) ceased to be an office and began to act like a court.[68] Finally, by the middle of the fourteenth century the Chancery became independent court separated from the common law court. From that day onwards the chancery court served as a separate court which entertains cases based on equitable principles until it merged with common law court. This court had developed many equitable principles of

[62] Ibid
[63] Robin Cooke, Fairness , VUWLR, Volume 19 (1989)
[64] Ibid
[65] Ibid
[66] Ibid
[67] James F. Baldwin, The king's council and the Chancer, the American Historical Review, Volume 15 No. 3 (1910) at 496
[68] Ibid at 498

substantive and procedural nature which today exist in many legal systems.[69] In other words, chancery court was the spring board of many equitable remedies which are available in law now. For instance, interim order is a living witness to this fact.

As regards the evolution of Chancery Court, Miller noted that:[70]

> With its origin in the power residing in the king's grace to give exceptional relief to petitioners as occasion demanded, the exercise of which gradually passed to the Chancellor, the Court of Chancery emerges to view as a distinctive judicial tribunal in the course of the 1400's.

He also noted through that the activity of this court was to supplement the deficiency of inadequacy of common law remedy. Originated in England, equity court was not confined to England. Many countries of common law origin taking the model of England's Chancery Court established equity courts with their ordinary courts. For instance, India, Australia and United States used to have separate courts of equity. In the 19th century England merged its equity court and common law court into a single system by the judicature act of 1873.[71] Similarly, United States eliminated the distinction between Law and equity jurisdiction in the federal courts by the Federal Civil Procedure Rule adopted in 1936.[72] Nowadays, almost all countries which used to have separate equity courts have merged their equity court with their ordinary courts. This merger of law and equity has brought change on the nature of equitable principles. Yet most equitable principles like interim order kept their uniqueness even being in laws. For instance, no jury trial is held and the issuance of them is discretionary.[73] Therefore, equitable remedies like interim order remain distinct though equitable principles merged with ordinary laws.

As regards the subject matter of the study the Chancery Court of England began to grant interim order as a remedy for the inadequacy of decisions in the common law courts by the end of 14th

[69] Thomas O. Main, Traditional Equity and Contemporary Procedure, Washington Law Review, Volume 78 (2003) at 449

[70] Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective, Published by the Law Center of New York University (1952) at 24

[71] Simon Chesterman, Beyond the Fusion Fallacy: The Transformation of Equity and Derrida's 'the Force of Law', Journal of Law and Society, Volume 24 No. 3 (1997) at 352

[72] Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, University of Pennsylvania Law Review, Volume 135, No. 4 (1987) at 962

[73] Doug Rendleman, The Triumph of Equity Revisited: The Stages of Equitable Discretion, Nevada Law Journal, Volume 15 (2015) at 1399

century.[74] The Chancery Court borrowed the word injunction, prominent form of interim order, for instance came from Roman law interdict which was a decree of the Roman praetor directly commanded what should be done or omitted.[75] Thus, taking its essence from Roman law, interim order evolved in England and, spread and developed in many countries. Particularly, it is widely used in common law countries.

Despite this the concept of interim order and its use is not well known in civil law countries. The use of interim order as a remedy is very limited and only in some countries like, Germany.[76] Historically perhaps the equity of Roman praetor which was called to complement the rules of civil law may be contrasted with the equity of Anglo- American legal system. However, Roman equity was administered by the general law, not in separate court or separate proceeding like England.[77]

In general, the use of interim order in civil law countries is very much limited. To conclude this section interim order, like most equitable remedies, evolved and developed in common law countries and is widely used in these countries and little used in civil law countries. Nowadays, however, the use and application of interim order in civil law countries including Ethiopia is very evident.

[74] Howard L. Oleck, supra note 32
[75] Ibid
[76] Alexander Layton, Interim Measures in English and Circulation, Yearbook of Private International Law, Volume 21 (2020) at 165
[77] Ibid

CHAPTER THREE

EXPERIENCES OF SOME COUNTRIES ON THE RIGHT OF ARBITRATORS TO PLACE INTERIM ORDERS IN ARBITRAL PROCEEDINGS AND INTERIM ORDERS IN SOME INTERNATIONAL INSTITUTIONS OF ARBITRATION

3.1. Introduction

A final award may be of no value to the successful party in case where, in the meantime, the behavior of the other party renders the outcome of the proceedings largely ineffectual-such as when the recalcitrant party dissipates its assets or places them in a jurisdiction where enforcement is cumbersome or otherwise impossible.[78]

It's true that given the contractual nature of arbitration and the principle of party autonomy, unless and otherwise there is a major default in the mandatory breach of the contract, parties agreement on arbitration procedure should be respected.[79] In case where the parties haven't agreed on arbitration procedure, the tribunal or the arbitrator, as the case may be, is mandated to conduct arbitration in accordance with applicable rule of the tribunal or the *lex loci arbitri.*[80]

Under various arbitration instruments and leading institutions of arbitration, arbitrators have broader power in conducting arbitration proceedings. Many jurisdictions in the world have recognized arbitration as one mechanism of dispute settlement. In various jurisdictions, there are both procedural and substantive rules that have to be followed in arbitral proceedings.

Arbitration may be initiated either by the operation of the law, which is commonly referred as compulsory arbitration[81] or by agreement or contract between the parties to a dispute.[82] An arbitration agreement is a contract in which the parties concerned pledge to use arbitration as a

[78]Marianne Roth, Interim Order, Journal of Dispute Resolution (2012) at 425
[79] Sunday A. Fagbemi, The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality, AFE Babalola University Journal of Sustainable Development Law and Policy, Volume 6 No.1 (2015) pp. 224-225
[80] Alastair Henderson, Lexi Arbitri, Procedural Law and the Seat of Arbitration, Singapore Academy of Law Journal, Volume 26 (2014) at 889
[81] Wesley A. Sturges, Compulsory Arbitration- What is it? Fordham Law Review, Volume 30 (1961) at 2
[82] Ibid at 1

means of settling existing or future disputes.[83] Thus, it could be either arbitration agreement or arbitral submission.

Arbitral procedures usually try to do away with any procedure that courts adhere to, wherever a simpler and suitable procedure may be used. Where the arbitral tribunal is to be composed of a single arbitrator it is usual to determine preliminary matters concerning procedure through correspondence but where there will be more arbitrators, a preliminary meeting is considered proper.[84] Obviously prior to the meeting the parties should select and notify the arbitrators of their appointment. While this may be done through letters, the arbitrators' acceptance is needed to perfect the appointment.[85] In Ethiopia it is usual for arbitrators to express their acceptance in writing, but they may also do it at a preliminary meeting where it will be recorded in minutes. Before accepting, a careful arbitrator would check that his authority is in proper order by checking the underlying documents.

Once an arbitration tribunal is duly constituted it has the power, among other things, to give interim orders.[86] Interim measures of protection are one of these roles. Since an arbitral tribunal has no power against third parties, it needs to use the power of the court where its order affects third parties. Interim measures of protection may be extended to the effect that the subject matter of dispute which is in the hands of third parties may be preserved or detained. Inspection of property in disputes may be made upon the order of the court where it has passed into the hands of third parties.[87]

The power of an arbitration tribunal to give interim orders should be established under the applicable procedural law which could be either the procedure indicated by the parties or the law applicable at the place of arbitration, if the parties failed to indicate their choice.

In the next section, we will examine the role of arbitral tribunals in giving provisional interim orders in some jurisdictions and the treatment accorded to interim orders under some institutional rules of arbitration.

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[83] UNCTAD, Dispute Settlement: international commercial arbitration (2005) at 3
[84] UNCITRAL, Notes on Organizing Arbitral Proceedings (2012) at 2
[85] Ibid
[86] Chi Manjilao, Are we paper tigers- the limited procedural power of Power of Arbitrators Under Chinese Law, Journal of Dispute Resolution, Volume 2 (2011) at 260
[87] Ibid

3.2. Experiences of Some Countries on the Right of Arbitrators to Place Interim Orders in Arbitral Proceedings

3.2.1 In the United Kingdom

The English legal framework on arbitration provides for interim measures to be placed by arbitrators. Unless otherwise agreed by the contracting parties, the arbitration tribunal has for the purposes of and in relation to arbitral proceedings the mandate to order interim orders in relation to those matters listed in the law.[88] These matters are, among others, the taking of the evidence of witnesses, the preservation of evidence, making orders relating to property which is the subject of the proceedings or as to any matter in relation to which any question arises in the proceeding, for the purpose of authorizing any person to enter any premises in the possession or control of a party to the arbitration, the sale of goods as the subject of the proceedings.[89] The court will intervene in providing interim injunction order to the extent that the tribunal is unable or unwilling to giver ruling on the interim order relief sought by one of the parties. The most notable feature of interim injunction order of arbitrator under the 1996 United Kingdom Arbitration Act is the possibility of opting out for the parties in the arbitration agreement or clause.[90]

Previously in the United Kingdom, pending an arbitral decision, the courts have generally preferred to acknowledge their power to order interim measures. As a common law country, the courts granted interim injunctions in pending arbitrations based on the *Nippon Yusen Kaisha v. Karageorgis and Mareva Compania Naviera v. International Bulkcarriers.*[91] However, in another case, the court held that the English court addressed the availability of interim measures in arbitration. In this case, the court decided that while staying the litigation in favor of arbitration, it had powers to attach the assets of a party. This position was in conformity with the

[88] Article 23 Arbitration Act, 1996 of UK
[89] Ibid
[90] Sandeep Adhipathi, Interim Measures in International Commercial Arbitration: Past, Present and Future, A Thesis Submitted to the Graduated Faculty of the University of Georgia in Partial Fulfillment of the Requirements for the Degree of Masters (2003) at 5. The full version of this paper is available at https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1000&context=stu_llm (last access on April 20, 2023)
[91] Court of Appeal, Civil Division, Mareva Companies Naviera v. International Bulkcarriers SA the Mareva, The full version of this case is available on https://www.uniset.ca/other/cs4/19801AER213.html (last accessed on March 19, 2022)

Arbitration Act as incorporated under Article II (3) of the New York Convention on recognition and enforcement of foreign arbitral award.[92]

With regard to security cost that should be deposited in case the arbitration tribunal ordered injunction order, until 1994, if the disputant parties have no prior agreement, it used to be only the jurisdiction of a court to order depository cost. This stance of the court had been established in two prominent cases: *Mavani and Bank Mellat v. Helliniki Techniki* S.A cases.[93] However, under the existing legal regime, the arbitration tribunal has the power and the mandate to determine security costs.

For a successful application the following requirements are needed to be followed by the party that seeks such kind of relief.[94]

The first requirement is that the jurisdiction of the arbitral tribunal or the court before which the application is submitted.[95] Second, the requesting party should display serious and irreparable harm to his/its rights, property or economic values.[96] Third, the urgency of issuing the measures together with the probability of success on the merits and finally, the possibility of ordering an appropriate security to be furnished by the applicant, if this would appear to be necessary, and to secure the balance of interests between the parties.[97]

Under the United Kingdom's legal regime, there are certain elements of discretion that should be exercised by arbitral tribunals or the courts before deciding on an application for interim relief measures. The following are the common elements of discretion that are usually exercised by the arbitral tribunals or courts before deciding on the application.[98] The first area subject to discretionary power is the interpretation of the underlying contract, and what the arbitrators will

[92] This convention indicated 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 the said agreement in null and void, inoperative or incapable of being perform.

[93] For more on this, please see Georgios C. Petrochilos, Procedural Detachment in International Commercial Arbitration: The Law Applicable to Arbitration Procedure, PhD Dissertation (2000) pp. 35-40

[94] John McKendrick, Interim measures: Attempting to Trace the Line of Deference shown by English Courts to Arbitral Tribunal, 8th Annual Arbitration and Investment Summit (2020) at 3

[95] Ibid

[96] Bernard Adaafu, Interim Measures in International Arbitration, Seminar Paper at 2. The full version of this paper is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3791700 (last accessed on March 20, 2022)

[97] Ibid

[98] Nishith Desai, Interim Reliefs in Arbitration Proceedings: Powerplay between Courts and Tribunals, Legal and Tax Counseling World Wide, (2020)

take in to account is that the application for an interim measure must examine the terms of the contract and the spirit of the contract.[99]

One of the most important meanings that should be investigated in the terms of the contract and its spirit is how much uncovered commercial risk the parties seem to accept and how considerable were risks they were ready to shoulder at the time of concluding the contract.[100] If the parties expressed their willingness to accept high commercial risks, it may limit the possibility of granting any of the considerably high protective measures, but if the contract and its spirit reveal that the will of the parties limited their risks in the contract, this may justify the issuance of more protective interim relief measures in case the performance of the contract reveals that the circumstances drove the accepted limits of risks beyond the agreed upon sphere.[101]

Secondly, the tribunal has discretionary power to examine the range and kinds of interim relief measures and the required conditions provided for in the applicable law.[102] Third, the tribunal has the power to assess as to the possibility and the rate of successfulness of the applicant on the merit of the case. Fourth, it's within the complete power and mandate of the tribunal on the question of an ex parte proceeding and decision.[103] There are opinions that would object to the issuance of such measures in the absence of the other party because this would conflict with the rights of defense and due process. However, the majority of writers would support issuing such measures if notification of the other party would result in serious harm that cannot be repaired.[104] In this case, the other party should have full opportunity to comment on the decision of the arbitral tribunal and submit whatever defense he might have to revoke any measure ordered.

[99] This is somehow inherent power of the arbitrators
[100] Aboul-Enein, Issuing Interim Relief Measures in International Arbitration in the Arab States, The Journal of World Investment and Trade, Volume 3 No.1 (2002) at 32
[101] See 'The Arbitration and Private International Law' in Domke (ed) International Trade Arbitration (1958) at 222
[102] Indian Centric Global, Interim Reliefs in Arbitral Proceedings: Powerplay between Courts and Tribunals (2020) at 8
[103] These preconditions are similar with the one we have discussed above
[104] Pamela McCormick, A Risk of Irreparable Damage: Interim Measures in Proceedings before the European Court of Human Rights, Cambridge University Press (2017) at 17

3.2.2 In South Africa

The law provides for the mechanism whereby whilst the final judgment is pending for the arbitration tribunal to give interim relief seeking some kind of protection of the property or the asset of the other party. The whole purpose of interim measure is the protection of the asset and property of the other party so that by the time the arbitration tribunal reaches its final decision, it would not be meaningless. Interim measures are believed to be one of the critical aspects of arbitration proceedings.

Traditionally, interim measure was only given by courts however in the contemporary world arbitration tribunals also take interim measures.[105]

Interim measure could be ordered either in the forms of procedural order, which is more or less an informal procedure and form or as an interim award, a formal procedure to be followed. The order may be given either in ex parte or after giving the other party the opportunity to present his side of the argument. Ex parte proceeding and order of interim measure is justified by the nature of the order, if it's urgent remedy, needs to be taken in order to avoid irreparable damage. However, the governing principle is to give the other party the opportunity to bring his argument since fairness and equality of the litigant parties are among the main tenets of arbitration.

Unless the disputant parties exclude the tribunal from giving interim order, the tribunal has, in principle, the power and mandate to issue interim measure.[106] To enforce a provisional measure the intervention of court is mandatory as arbitration tribunal by its very nature doesn't have such coercive power. This is also by implication indicated under the law.[107]

In South Africa, the power to grant interim order is also provided under a separate bill for international arbitrations.[108] Unless by a contrary stipulation the parties agreed otherwise, the tribunal may, at the request of one of the disputant parties, grant interim measures in connection with, among other things, to maintain or restore the status quo and preserve evidence.[109] Among other things, the party who seeks interim relief should demonstrate that the harm would be

[105] Ibid
[106] Article 26 of Arbitration Act 42 of 1965
[107] Ibid, Article 21(e)
[108] Republic of South Africa, International Arbitration Bill
[109] Ibid, Article 17

irreparable and there is a high possibility he would succeed on the merit of the case.[110] Moreover, the interim measure issued by an arbitration tribunal would be binding and enforceable irrespective of the country in which it was issued.[111] However, for listed grounds under the law, the court may refuse to recognize and enforce interim order coming from another jurisdiction.[112]

3.3. Interim Orders in International Arbitrations and Under Some Institutional Rules of Arbitration

3.3.1. Interim Orders In International Arbitrations

As stated in the previous chapter, many national jurisdictions recognize the right of arbitral tribunals to take interim measures pending the issuance of final award.[113] The Tribunals also have the power to issue interim orders. In international arbitrations, however, court intervention is not that much welcomed for various reasons. First and foremost, resorting to national court would undermine the very purpose for which the contracting parties resort to international arbitrations i.e., the seeking of neutral entity to resolve their disputes.[114] The second reason may be that court order might take substantial time than arbitration and that is why contracting parties from the very beginning resort to arbitration.[115] For foreign clients to appear and present their case for injunction order, they need a local counsel and this is additional cost and procedure which international investors want to avoid from the very beginning.

Interim measure is one of the main concerns under international arbitration. The final result of an international arbitration might be meaningless if the action of the other party makes the award useless.[116]

[110] Ibid, Article 17(a)
[111] Ibid, Article 17 (h)
[112] Ibid, Article 171
[113] Please see the previous section on this
[114] UNCTAD, Investment-State Disputes: Prevention and Alternatives to Arbitration (2010) at 14
[115] Renato Nazzini, The Law Applicable to the Arbitration Agreement: Towards Transnational Principles, The International and Comparative Law Quarterly, Volume 65 No.5 (2016) at 690
[116] David E. Wagoner, Interim Relief in International Arbitration- Enforcement is a Substantial Problem-, Journal Dispute Resolution, Volume 51 No.4 (1996)

The terminology may differ from one institution of rule of arbitration to another however the issue of interim measure is well regulated under international institutional arbitration. Some of the terminology are provisional measures, protective measures, interim measures, conservatory measures, urgent measures, precautionary measures and of holding measure.[117] These terms could be used interchangeably though.

Generally, the types of provisional measures that may be ordered by institutional arbitrations is not predetermined. The most generic term used is that of "appropriate measure" or "necessary measure." However, it is possible to classify the type of interim measure that may be given by the tribunal in to three: measures in relation to preservation of evidence, measure in relation to the conduct of the arbitration and relationship between the parties during arbitral proceedings.[118]

There is no agreement between legal system as to who has the power and the mandate to determine the governing interim order measures. Some countries are of the view that the *lexi arbitri* has the power, the other is of the stand that *lex casusae*, the law where the underline contract is governed. Finally, there are those which stand based on the international standard. The international standard usually emanated from rule of international institutional arbitration and decision of tribunals.

3.3.2. Interim Orders Under the Rules of Some International Arbitral Institutions

In various institutional arbitrations, the power to give or to take interim measures is somehow incorporated though the wording, the implication and the extents are quite different.

3.3.2.1. Under the UNCTAD/UNCITRAL Model Law

The UNCTAD model law on international commercial arbitration defines the term injunction order and its purposes under the heading of power of arbitration tribunal to order interim measure. As per this model law, unless otherwise agreed by the parties, the arbitration tribunal may order any party who is a party to the proceeding such interim measure of protection as the arbitral tribunal may consider necessary. In doing so, the tribunal may ask appropriate security in

[117] OECD Competition Policy Roundtable Background Note, Interim Measures in Antitrust Investigations, OECD Competition Policy Roundtable Background Note (2022) at 6
[118] UNCITRAL Notes on Organizing Arbitral Proceedings (2016) at 16

connection with interim measures.[119] This definition has got at least four elements in terms of the purpose of interim orders.[120]

The first and foremost element is that interim orders help the parties to maintain the *status quo* until the final decision on the merit of the case is rendered by the tribunal. This is one of the widely accepted uses of interim measures.[121]

The second function behind this is protection of the arbitration process itself.[122] Once the tribunal ordered interim measures the other party will be estopped from obstruction of the proceeding. Among other things, once there is interim measure given by the arbitration tribunal the other party will be barred from instituting a separate proceeding in seeking a temporary relief.[123] This in turn prevents contradiction of judgment.

The third function of interim measure is preservation of asset and property.[124] This is perhaps the most common and the central function of interim orders preventing assets from being transferred to another person thereby making the enforcement of award meaningless.

The last function of interim measure as per the UNCITRAL Model law is preservation of evidence.[125] Interim measure could be used as means to preserve evidences that are relevant and material to the determination of the case. This in turn facilitates the proper conduct of the arbitration process and just rendering of arbitration cases.[126]

Through there are no clear preconditions for requesting interim measures under this Model Law, there are sort of precondition developed overtime. The requesting party, among other things, has to demonstrate to the tribunal that there is a reasonable possibility of the applicant to succeed in the merit of the case and the existence of irreparable harm or damage.[127]

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[119] Article 17 of the UNCITRAL Model on International Commercial Arbitration
[120] UNCITRAL Model Law on International Commercial Arbitration (1985) with amendment adopted in 2006 at 9
[121] Ibid
[122] Ibid
[123] Mika Savola, Interim Measures and Emergency Arbitrator Proceedings, Croat Arbitration Year Book, Volume 23 (2016) at 74
[124] Ibid
[125] Ibid
[126] Gary B. Born, International Commercial Arbitration, Second Edition, 2014, at 2449
[127] UN, UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 at 10. The full version of this document is available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last accessed on March 17, 2022)

The right to take interim measure is also recognized by Arbitration Rules of the International Chamber of Commerce (commonly known as ICC) it is indicated that:[128]

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral at the request of a party, may order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

This provisions of the ICC seems to grant the contracting parties the power to disempower the tribunal from entertaining and providing interim relief. This is more or less in line with the basic tenet of arbitration: freedom of contracting parties. The Convention is silent whether or not the application should be brought in written only or it's also permitted to bring oral application.[129]

The International Center for Dispute Resolution also provides for the power of arbitration tribunal to give interim orders.[130] It is quite interesting to note the fact that once a request for interim measures was addressed by the tribunal, any party will be barred from bringing the same claim before judicial authority and such act is deemed to be incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.[131]

3.3.2.2. Under the London Court of International Arbitration

The London Court of International Arbitration gives the discretion power to the parties either to request interim relief before judicial authority for seeking interim measure that the arbitral tribunal would have power to order provided that the relief sought was bought before the formation of the arbitration tribunal and in a very exceptional cases after the commencement of arbitration proceedings.[132] Moreover, this arbitration procedure ruled out the possibility of ex parte proceeding entertaining relief sought by the any party in connection with interim order.[133]

[128] International Chamber of Commerce, Arbitration and Mediation Rules, Article 28 of the
[129] Patricia Shaughnessy, Pre-arbitral Urgent Relief: The New SCC Emergency Arbitration Rules, Journal of International Arbitration, Vol. 27, Issue 4 (2010) at 344
[130] International Dispute Resolution Procedures (including mediation and arbitration rules) Article 24 of the Interim measures
[131] Ibid, Article 24(3)
[132] Article 25.3 of London Court of International arbitration rules (2020)
[133] Ibid, Article 25.1 indicated that the "Arbitration Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to response." (underline supplied)

The most widely quoted and referred international rule of arbitration is that of the UNCITRAL model rule. Under Article 17.2 of the Model Law it's indicated that:[134]

An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- Maintain or restore the status quo pending determination of the dispute;
- Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- Preserve evidence that may be relevant and material to the resolution of the dispute.

It is neither possible nor necessary to discuss interim measure as addressed in international institution arbitration. The writer will pick some prominent institutional arbitration and examine their content accordingly.

3.3.2.3. Interim Measure under the ICC Rules of Arbitration

The International Chamber of Commerce (ICC) is one of the prominent international arbitration institutions. ICC rules of arbitration highly relies on the freedom of the contracting parties. Unless there is contrary agreement between the parties, the tribunal as a matter of principle is mandated to issue interim measure it deem appropriate.[135]

Despite the fact that the role of court in the arbitration proceedings is that of supplementary rather than subsidiarity in the whole proceeding, court still can have a positive role to play.[136]

One instance in which the court consider the role in an arbitration is the intervention by a court to give interim order. This under the roles of arbitration under ICC cannot be consider as violation of arbitration tribunal. On top of this, the move shall not be considered as the violation of court proceeding for the tribunal to order this would be considered as intervention in the power of the

[134] Article 17 of the UNCITRAL Model Law
[135] E.J. Cohe, The Rules of Arbitration of the International Chamber of Commerce, International and Comparative Law Quarterly, Volume 14 No.1 (1965) at 139
[136] Ibid

tribunal to consider as intervention in the power of the tribunal.[137] However, any interim order by the court should be notify to the arbitration tribunal. Under ICC rules of Arbitration, a party that is in need of urgent interim or conservatory measure can request the establishment of emergency arbitration and request for emergency measures. Taking of measures by in an emergency arbitration is before the establishment of a tribunal.[138]

3.3.2.4. Interim Order under the AAA Rules

Unlike the interim order provisions under the ICC, under AAA rules of arbitration, the criteria for interim measure is not stated.[139] However, under the rule of AAA, interim measure is ordered if and only if there is irreparable and immediate loss or damage that results from the absence of emergency measure. Like the rules under ICC, the tribunal can order something that the office deems necessary and appropriate. The rule of AAA adopts what rather to be a complementary role of the court in the issuance of interim measure. The fact that interim order is issued by the court doesn't amount to the violation of the jurisdiction and autonomous of the court.[140]

The disputant parties can have can request the tribunal to amend the content of the interim order. Despite such request by the party, modification is permitted only on changed circumstances.

3.3.2.5 Interim measure under WIPO

The same is true indicated under WIPO rules of arbitration according to which the disputant parties can seek relief from the tribunal of interim measure.[141] In the process of entertaining the issue of interim, the tribunal should consider to hear the opinion of the other party. This is to ensure the equality of parties in the arbitration and the impartiality of the proceeding.[142] However, taking into account the urgent nature of interim measure, the tribunal should conduct the heading via online platforms rather than seeking person presence of the other party.[143] This

[137] Yves Derains, New Trends in the Practical Application of ICC Rules of Arbitration, Northwester Journal of International Law and Business, Volume 3 Issue 1 (1981) pp. 43-48
[138] Ibid
[139] Igor M. Borba, International Arbitration: A Comparative study of AAA and ICC rules, A Thesis submitted to Marequtee University (2009)
[140] Ibid
[141] WIPO, Guide to WIPO Arbitration
[142] Ibid
[143] Phillip Landolt and Alejandro Garcia, Commentary on WIPO Arbitration Rules (2017)

rules of arbitration is silent on the possibility of interim order given in the absence of the other party, which is the possibility of ex parte hearing.

CHAPTER FOUR

INTERIM MEASURES UNDER THE NEW ARBITRATION AND CONCILIATION WORKING PROCEDURE PROCLAMATION NO. 1237/21 AND STANDS OF FEDERAL COURTS

Proclamation 1237/21 (here in after the Proclamation) has dedicated a whole section to Interim Measures. Accordingly, Section Four of the Proclamation, Articles 20-27 are meant to deal with Interim and Precautionary Measures.

4.1. Interim Measures by Arbitral Tribunals

Article 20 of Proclamation 1237/21 empowers arbitral tribunals to take interim measures. An arbitral is allowed by the Proclamation to issue an order for interim measures unless the parties have agreed otherwise and have, by their agreement denied the arbitral tribunal to issue an order for interim measures.

Pursuant to the provisions of Article 20 of Proclamation 1237/21, an arbitral tribunal may only issue an order for interim measure/s upon a request made by one of the contracting parties. Furthermore, Article 20(3) also provides that an arbitral tribunal may issue an order of injunction on its own initiative to "stop anything that may create an obstacle to the arbitration proceeding or bring about imminent danger".

However, the mere request of one of the contracting parties for an interim order doesn't seem to be enough for the order to be issued. Article 20 of the Proclamation also provides that an arbitral tribunal only issues an order for interim measure when the tribunal deems the issuing of the order to be necessary and the requested interim measure relates to the subject matter of the dispute in the arbitration proceedings.

4.1.1 Purposes of and Requirements for Interim Measure Orders to be issued by Arbitral Tribunals

The Proclamation did not give unfettered discretion to arbitral tribunals. As stated earlier, an arbitral tribunal issues an interim order when it deems necessary and the request relates to the

dispute being arbitrated. Article 20 (2) of Proclamation 1237/21 has listed the purposes for which arbitral tribunals may issue interim measure orders. The Proclamation lists the following as objectives of interim measure orders:

a) To preserve relevant evidence;
b) To properly preserve or maintain goods that are part of the dispute; to preserve under the custody of third party or to sell perishable goods;
c) To preserve assets and funds against which an arbitration decision may be given; and
d) To allow the continuation of the existing conditions or to restore the status quo pending the resolution of the dispute.

In light of the provisions of Sub-article (1) of Article 21 of Proclamation 1237/21, an arbitral tribunal, before it places orders of interim measures, should also be convinced that irreparable damage is likely to happen if an order is not issued or the impact it may have on the person the against whom the order is issued.

4.1.2 An Opportunity to be heard

In accordance with the provisions of Article 21(2) of the Proclamation an arbitral tribunal is duty bound to give the other party (the party that did not request for the order of an interim measure) an opportunity to be heard "while rendering its decision". The writer believes that the legislator must have thought that the other party must be heard before the tribunal renders its decision on the request filed and an interim measure order is placed.

By way of exception, the Proclamation in Article 22(2) provides that an arbitral tribunal may issue an order for precautionary measure without notifying the other party on condition it believes with sufficient cause that such notification would hinder the implementation of the interim measure. However, though not obligatory, the tribunal may still give the other party an opportunity to respond to the request filed for a precautionary measure in accordance with Article 22(3) of the Proclamation.

4.1.3 Security

The issue of whether or not the party requesting the placement of an interim order should furnish security is dealt with by the Proclamation. It doesn't seem to be compulsory for an arbitral

tribunal to force the party requesting an order for interim measure to provide security. Article 21(3) of the Proclamation provides: "The contracting party who has requested the tribunal for an order provisional interim measure may be required by the tribunal to provide sufficient security to cover the damage that may be caused by the order."

In Article 22(5) of the Proclamation, it is provided that the arbitral tribunal may order the party who requested the order of precautionary measure to provide security for the damage that may be caused by such order.

Article 21(4) of the Proclamation puts the issue being considered in the form of compensation. It provides: "The contracting party who has requested for an order of provisional interim measure may be liable for compensation in relation to damage caused by the interim measure if it is believed that the measure should not have been granted under the circumstance then prevailing".

Similarly, Article 22(6) of the Proclamation provides that the party who requested the order of precautionary or interim measure shall be responsible for the damage caused by the order where it is proved that the order was not appropriate.

In similar vein Sub-article (4) of Article 25 provides: "The court to which a request has been made to have an order for interim measure enforced in accordance with Sub-article (3) of Article 25 "shall order the contracting party to provide security where no decision has been given by the tribunal concerning security and where it finds it necessary to protect the interest of the party who has requested for the enforcement of the interim order or third parties. The request made shall be served on the other contracting party."

4.1.4 Modification, Temporary Suspension and Reversal of Interim Measures

In line with the provisions of Article 23 (1) of the Proclamation, an arbitral tribunal is given the power to modify, temporarily suspend or even reverse the order it has placed for interim measure. This, the tribunal may do, either on its own initiative by informing the parties ahead of its action or upon the request of the contracting parties.

On the other hand, per the provisions of Sub-article (2) of Article 26 of the Proclamation, the court before which a request for the enforcement of an order for interim measure has been made, may not revise the substance of the interim measure in the process of making its decision either

to grant or refuse the request for enforcement. Especially, this provision seems to deny the court the right to revise the substance of the order for interim measure to justify the granting of the request for enforcement.

4.1.5 Notification

Article 24 of the Proclamation deals with notification. The provision, in its Sub-article (1), gives the arbitral tribunal the discretion to order, presumably the contracting party that requested the placement of an interim measure, to promptly notify it if there is any change in relation to the order of precautionary or interim measure.

Sub-article (2) of Article 24 also imposes a duty on the contracting party that requested for an order of precautionary measure to notify the tribunal any change of conditions that have been the causes for issuing an order of precautionary measure or extension of the same until the other contracting party provides his defense at the tribunal.

Similarly, Sub-article (5) of Article 25 of the Proclamation imposes a duty to notify on the contracting party that applied to a court of jurisdiction to have an order for an interim measure enforced. It provides: "The contracting party who has requested for the enforcement of interim measure shall inform the court promptly of any modification, temporary suspension or reversal of the interim measure."

4.1.6 Recognition and Enforcement of an Order of Interim Measure

One of the most important provisions in Section Five of Proclamation 1237/21 is Article 25 as the latter deals with the recognition and enforcement of an order of interim measure. In Sub-article (1) it is provided: "Without prejudice to recognition and enforcement of foreign awards, an order of interim measure issued by a tribunal shall be binding, irrespective of the country in which it was issued." To begin with, this provision duly recognizes the enforcement of foreign arbitral awards. The provision further clearly provides that "an order of interim measure issued by a tribunal shall be binding, irrespective of the country in which it was issued." This gives interim orders placed by arbitral tribunals the statuses of orders placed by courts. As a result, interim orders tendered by arbitral tribunals shall be binding not only on the contracting parties but also on any person in relation to who the order may be implemented.

The other point worth noting in the provisions of Sub-article (1) of Article 25 of the proclamation is that the order for an interim order shall be binding on everybody concerned irrespective of the country in which it was issued. The writer suspects that that this may have been triggered by the ratification by Ethiopia of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Pursuant to Sub-Article (2) of Article 25 of the Proclamation, where an order for interim measure cannot be enforced, one of the contracting parties may apply to a court for the enforcement of such order. Per the provisions of Sub-article (3) of Article 25, in situations where the order for an interim measure was placed by an arbitral tribunal in a domestic arbitration in Ethiopia, the petition to have the order enforced shall have to be submitted to a court which would have had jurisdiction had it not been submitted to the tribunal. On the other hand, where the order is issued by a foreign tribunal, the Federal High Court shall have jurisdiction over the case.

4.1.7 Refusal of the Request for Recognition and Enforcement of an Order of Interim Measure by the Court

It is not automatic for courts to recognize and enforce orders for interim measures placed by arbitral tribunals sitting outside of Ethiopia in foreign countries. By the same token, neither is it automatic for an Ethiopian court to enforce orders for interim measures that have been placed by arbitral tribunals in domestic arbitrations in Ethiopia. Article 26 of the Proclamation has set out guiding principles on the basis of which Ethiopian courts may decline the request to have an order enforced and accordingly refuse to grant the request for enforcement. The following are the grounds set out by the Proclamation for refusal:

a) Where the provisions with respect to refusal of award, in particular loss of capacity of contracting party, absence of a valid arbitration agreement, where the subject matter of the order is not subject to arbitral submission or the tribunal has no jurisdiction or the order is beyond the scope of the tribunal;
b) Where the decision of the tribunal with respect to security has not been complied with;
c) Where the decision rendered with respect to interim measure has been modified, temporarily suspended or reversed;

d) Where the court has no jurisdiction; or

e) Where the recognition or enforcement of the interim measure conflict with public morality or Government Policy.

Sub-article (a) seems to be using the grounds to refuse the enforcement of awards for the purpose of refusing to enforce orders for interim measures. Accordingly, Sub-article (a) sets out the following five independent grounds to refuse the enforcement of an order for interim measure.

i) Loss of capacity of contracting party; or
ii) Absence of a valid arbitration agreement; or
iii) Where the subject matter of the order is not subject to arbitral submission; or
iv) The tribunal has no jurisdiction; and
v) The order is beyond the scope of the tribunal.

Though the other four grounds in Sub-article (a) are fairly clear grounds to refuse the enforcement of an order for interim measure, the last ground lacks clarity in that it is not clear if there is distinction between the last ground and ground (iv). The last ground in Sub-article (a) may be taken as relating to the situation where the order for interim measure given does not relate to the dispute being arbitrated.

Sub-article 1 (b) of Article 26 of the Proclamation gives emphasis to the issue of security. In cases where the tribunal has placed an order that the party requesting for an interim or a precautionary measure should furnish security and the concerned party failed to comply with the order; then the court may refuse to enforce the request for the enforcement of the interim or precautionary measure.

Similar to the observation made about the last ground in Sub-article 1(a) of Article 26, the ground stated in Sub-article 1(c) also lack clarity. The writer argues it lacks clarity because except where the order for interim measure placed earlier on has been totally reversed, or temporarily suspended, it is not clear why a court should refuse to enforce an order for interim measure just because the order has been modified. It seems it would rather be appropriate for the court to enforce the order as modified instead of totally refusing to enforce it.

Like the ground discussed under Sub-article 1(c) of Article 26, the grounds for refusal mentioned in Sub-article 1(e) of Article 26 also lacks clarity. In the writer's view, it would be difficult for courts to clearly know "public morality" and "Government policy" and to accordingly refuse the enforcement of an order for interim measure using these as yardstick. It is doubtful if judges in courts of law would be expected to know public morality and Government policy as a matter of judicial notice. As judges in courts would, primarily, be guided by law it seems it would be difficult for them to know government policies that have not yet been translated into laws.

4.2 Interim Measures Placed by Courts of Law

Two provisions of Proclamation 1237 Articles 9 and 27 clearly provide that interim measures may be placed by courts. Article 9 of the Proclamation under the title: "Arbitration Agreement and Provisional Interim Measure taken by Courts" states: "with respect to matters falling under the arbitration agreement, the contracting parties may request the court interim measures to be taken before the arbitration proceeding is initiated or during the proceedings. This shall not be considered as violation of the arbitration agreement by the contracting parties and as intervention by the court."

This is a very important provision in that it enables the parties, especially the party preparing to initiate the arbitral proceedings, to petition a court of law to secure an order for interim measure before an arbitral tribunal is constituted. The provision, however, also states that the parties may also petition a court of law to secure an order for interim measure whilst an arbitral proceeding is going on.

The importance of Article 9 becomes glaring in situations when the party wishing to initiate an arbitral proceeding has appointed his arbitrator and has notified the other to do the same but the other party refuses to appoint his arbitrator. In such circumstances, the likely action would be to apply to the court to force the other party appoint his arbitrator which event would be time taking. In the meanwhile, the interest of the party initiating the arbitral process might be jeopardized whilst waiting for the constitution of a tribunal unless an order for interim measure is made. So, thanks to Article 9 of the Proclamation, she may petition a court to secure an order for an interim measure.

Article 9 of the Proclamation also provides that the involvement of courts of law in arbitral proceedings either before the constitution of a tribunal or in the course of an arbitral proceeding shall not be considered as violation of the arbitration agreement of the parties nor as an intervention by the court. Article 9 of the Proclamation ensures contracting parties that they may secure orders for interim measures both from courts of law and the arbitral tribunals they would be constituting.

Thanks to the provisions of Article 27 of the Proclamation, contracting parties may request a court for an order of interim measure irrespective of the place of the arbitration of the arbitral tribunal. This provision alleviates the problem that would have ensued around refusal by courts on the ground that the arbitration proceeding is taking place or will take place outside of the "local jurisdiction" of the concerned court.

4.3. Examining Court Cases Entertained After the Promulgation of Proclamation 1237/21

The writer has been trying to look for cases/petitions submitted to courts post the promulgation of Proclamation 1237/21 and decided by the courts by applying the relevant provisions of the Proclamation.

The writer has, accordingly, been able to find some cases/petitions ruled on by the Federal First Instance Court Commercial and Investment Division Benches and the Federal High Court the summary of which are presented here below.

File No. 00699

Plaintiff …… Beijing Urban Construction Group Co. Ltd

Defendant …… Ethiopian Roads Administration (not summoned)

- The Plaintiff filed its suit requesting the Court to enter a ruling ordering the Defendant to appoint its arbitrator and to order the two party-appointed arbitrators to jointly appoint a presiding arbitrator. Furthermore, the Plaintiff requested the Court to place an interim order pending the constitution of the arbitral tribunal.
- Before going into the merits of the case and summoning the Defendant, the Court made it a point to check if it has jurisdiction to entertain the case. The Court accordingly ruled

that in principle, it has jurisdiction on the request relating to appointment of an arbitrator. However, the court declined to assume jurisdiction arguing that the amount for which an interim order is being requested falls outside of the material jurisdiction of the FFIC. The Court, in particular, emphasized that initial jurisdiction should be seen in the light of having an order executed. The court finally declined jurisdiction even on the appointment of an arbitrator stating that both issues should be considered together and be ruled on by the FHC.

Computer File No. 00626

Plaintiff …… Mr. Yoave Turner

Defendant …… Ms. Lensa Waqshum Borena

- The FFIC Construction and Investment Bench seized with this case was requested by the Plaintiff to place an interim order of injunction pending the constitution of an arbitral tribunal to look into the merits of the case. The Court positively accepted the request for an interim order and placed the order. However, the court stated that the Plaintiff failed to work towards having an arbitral tribunal constituted for over 40 days after the placement of the interim order and in the meanwhile the Defendant petitioned the Court to either lift the interim order or alternatively to place an order that the Plaintiff should furnish adequate security commensurate with the amount of money subjected to injunction.
- The Court, by and large, based its reasoning on the relevant provisions of Proclamation 1237/21 and stated that the Court should go in accordance with those provisions. The court said that it should place interim order in accordance with the progress of the constitution of the desired arbitral tribunal.
- The FFIC reasoned that in line with the agreement concluded between the parties, the Plaintiff is given 30 days to amicably resolve the dispute and is given additional 15 days to appoint his arbitrator. The Plaintiff couldn't observe the deadline set in the contract for no good reason. The court reasoned that the Plaintiff abused the interim order.
- The Court accordingly decided to lift the interim order it placed for the purpose of the order was to fill the gap until the constitution of an arbitral tribunal but the Plaintiff didn't make appropriate effort to have a tribunal constituted.

Computer File No. 00548

Plaintiff …… Abdusemed Ibrahim Gato

Defendant ……... Ahmed Ali Oumeredin

- The original Petition by the Plaintiff related to seeking the assistance of the court to constitute an arbitral tribunal. The Court, by entertaining the arguments of both parties and on the basis of the agreement between the parties and the relevant provisions of Proclamation 1237/21 finally decided that an arbitral tribunal be established. The Court further ruled that the defendant shall appoint his arbitrator within fifteen days as of the date of the decision and in case the Defendant fails to comply with that let the Registrar of the FFIC appoint an arbitrator for him. The Court also stated in its Decree that the two arbitrators appointed by the parties or one by a party and the other one by the Registrar of the Court shall jointly appoint a presiding arbitrator and if the two arbitrators fail to agree on a presiding arbitrator, the registrar of the Court shall go ahead and appoint a presiding arbitrator.
- The aspect of the case directly relevant to interim measures relates to the petition submitted by the Plaintiff months after the Court decided that an arbitral tribunal shall have to be constituted. The Plaintiff, by a petition filed on Yekatit 07/2015, requested the Court that an injunction order be placed for his benefit as he was fearful that the Defendant might be tampering with the company documents the inspection of which the Plaintiff was denied.
- The Court, accordingly, placed the requested order arguing that Article 9 of Proclamation 1237/21allows a court to place an interim order both before and after the constitution of an arbitral tribunal.

File No. 302195

Petitioner …….. Ethiopian Roads Administration

Respondent …… China National Chemical Communication Group (Ltd.)

- In this case again, the Petitioner requested the Court to place an interim order pending the formation of an arbitral tribunal at the Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute.
- The Respondent was summoned to give its opinion on the Petition and accordingly submitted its written opinion.
- The Court, like in other similar earlier cases based its ruling on the issue surrounding jurisdiction. It declined to entertain the petition and give the desired injunction order arguing that the case, as revealed by the Petitioner itself, would involve Birr 1,000,000,000 and this amount is much above the threshold of Birr 10,000,000 up to which the FFIC would have material jurisdiction. The Court, accordingly, by majority,

denied the petition ruling that the case should have been presented to the High Court and not to itself.

- The minority reasoned that the Court ought to have placed the requested interim order in spite of the fact that the case involved an amount well above the jurisdictional threshold of the Court. The Petition ought to have been regarded as a case the value of which cannot be estimated in financial terms.

Computer File No. 02880

Applicants…… 1) Ato Mohammed Ahmed Said
2) Ato Kedir Mussa Usman
3) Wajiz Engineering PLC
Respondent…… Ato Salah Ahmed Abdurahman

- The Applicants petitioned the Court for an interim order to secure an injunction pending the constitution of an arbitral tribunal. The Court never raised the concern of having or not having jurisdiction despite the fact that the petitioners did mention that the amount of damages sustained by them amounts to Birr 650,000,000.
- The Court, accordingly, granted the request of the petitioners and injunctions were placed on many properties and bank accounts

Computer File No. 01999

Plaintiff …… China Railway 14 Bureau Group Co. Ltd Ethiopia Branch

Defendant …….. Ethiopian Roads Authority Administration

- The case relates to a petition for injunctions to be placed on the payments of the proceeds of two rounds Advance Payment Guarantee Bonds furnished by Dashen Bank S.C. pending the constitution of an arbitral tribunal.
- The two Guarantee Bonds were in the amount of $12,910,629.76 and $6,453,810.44 respectively.
- Like in many of the cases disposed of by other benches in the division, the Court resorted to the issue of jurisdiction and formulated its reasoning on the basis of Articles 23(3) and 25(3) of Proclamation 1237/21.
- The Court was of the opinion that petitions for interim orders should be submitted to the court having jurisdiction in the light of Articles 11(1) and 14 of Proclamation, 1234/21 and Article 25(3) of Proclamation 1237/21.
- The Court, accordingly, denied the petition stating that the Petition ought to have been submitted to the Federal High Court.

It is interesting to note that out of the six cases the writer came across, summarized above, that were presented to the various benches of the Commercial and Investment Division Benches of the Federal First Instance Court; three (Files No. 00699, 302195 and 01999) were rejected by the Court on the ground that the Petitions involve cases the amounts of which are well above the material jurisdiction of the Court. The various benches of the court seized with petitions for interim measures based their stance for rejecting the petitions on the provisions of Articles 11(1) and 14 of Proclamation 1234/21 and Article 25(3) of Proclamation 1237/21.

On the other hand, in the remaining three files, (Files No 00626, 02880 and 00548) the various benches of the Court that were seized with the petitions never raised the issue of jurisdiction. They essentially argued that petitions for interim measures have to be treated as cases whose material values cannot be determined and expressed in monetary terms per Article 11(1) of Proclamation 1237/21 and Article 18 of the Civil Procedure Code. The Benches, accordingly granted the petitions.

4.3.1 Cases/Petitions Ruled on by the Various Benches of the FFIC Commercial and Investment Division

File No 00699

Plaintiff …… Beijing Urban Construction Group Co. Ltd

Defendant …… Ethiopian Roads Administration (not summoned)

- The Plaintiff filed its suit requesting the Court to enter a ruling ordering the Defendant to appoint its arbitrator and to order the two party-appointed arbitrators to jointly appoint a presiding arbitrator. Furthermore, the Plaintiff requested the Court to place an interim order pending the constitution of the arbitral tribunal.
- Before going into the merits of the case and summoning the Defendant, the Court made it a point to check if it has jurisdiction to entertain the case. The Court, accordingly ruled that in principle, it has jurisdiction on the request relating to appointment of an arbitrator. However, the court declined to assume jurisdiction arguing that the amount for which an interim order is being requested falls outside of the material jurisdiction of the FFIC. The Court, in particular, emphasized that initial jurisdiction should be seen in the light of having an order executed. The court finally declined jurisdiction even on the appointment of an arbitrator stating that both issues should be considered together and be ruled on by the FHC.

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Plaintiff …… Mr. Yoave Turner

Defendant …… Ms. Lensa Waqshum Borena

- The FFIC Construction and Investment Bench seized with this case was requested by the Plaintiff to place an interim order of injunction pending the constitution of an arbitral tribunal to look into the merits of the case. The Court positively accepted the request for an interim order and placed the order. However, the court stated that the Plaintiff failed to work towards having an arbitral tribunal constituted for over 40 days after the placement of the interim order and in the meanwhile the Defendant petitioned the Court to either lift the interim order or alternatively to place an order that the Plaintiff should furnish adequate security commensurate with the amount of money subjected to injunction.
- The Court, by and large, based its reasoning on the relevant provisions of Proclamation 1237/21 and stated that the Court should go in accordance with those provisions. The court said that it should place interim order in accordance with the progress of the constitution of the desired arbitral tribunal.
- The FFIC reasoned that in line with the agreement concluded between the parties, the Plaintiff is given 30 days to amicably resolve the dispute and is given additional 15 days to appoint his arbitrator. The Plaintiff couldn't observe the deadline set in the contract for no good reason. The court reasoned that the Plaintiff abused the interim order.
- The Court accordingly decided to lift the interim order it placed for the purpose of the order was to fill the gap until the constitution of an arbitral tribunal but the Plaintiff didn't make appropriate effort to have a tribunal constituted.

Computer File No 00548

Plaintiff …… Abdusemed Ibrahim Gato

Defendant …….. Ahmed Ali Oumeredin

- The original Petition by the Plaintiff related to seeking the assistance of the court to constitute an arbitral tribunal. The Court, by entertaining the arguments of both parties and on the basis of the agreement between the parties and the relevant provisions of Proclamation 1237/21 finally decided that an arbitral tribunal be established. The Court further ruled that the defendant shall appoint his arbitrator within fifteen days as of the date of the decision and in case the Defendant fails to comply with that let the Registrar of the FFIC appoint an arbitrator for him. The Court also stated in its Decree that the two arbitrators appointed by the parties or one by a party and the other one by the Registrar of the Court shall jointly appoint a presiding arbitrator and if the two arbitrators fail to agree on a presiding arbitrator, the registrar of the Court shall go ahead and appoint a presiding arbitrator.

- The aspect of the case directly relevant to interim measures relates to the petition submitted by the Plaintiff months after the Court decided that an arbitral tribunal shall have to be constituted. The Plaintiff, by a petition filed on Yekatit 07/2015, requested the Court that an injunction order be placed for his benefit as he was fearful that the Defendant might be tampering with the company documents the inspection of which the Plaintiff was denied.
- The Court, accordingly, placed the requested order arguing that Article 9 of Proclamation 1237/21allows a court to place an interim order both before and after the constitution of an arbitral tribunal.

File No. 302195

Petitioner …….. Ethiopian Roads Administration

Respondent …… China National Chemical Communication Group (Ltd.)

- In this case again, the Petitioner requested the Court to place an interim order pending the formation of an arbitral tribunal at the Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute.
- The Respondent was summoned to give its opinion on the Petition and accordingly submitted its written opinion.
- The Court, like in other similar earlier cases based its ruling on the issue surrounding jurisdiction. It declined to entertain the petition and give the desired injunction order arguing that the case, as revealed by the Petitioner itself, would involve Birr 1,000,000,000 and this amount is much above the threshold of Birr 10,000,000 up to which the FFIC would have material jurisdiction. The Court, accordingly, by majority, denied the petition ruling that the case should have been presented to the High Court and not to itself.
- The minority reasoned that the Court ought to have placed the requested interim order in spite of the fact that the case involved an amount well above the jurisdictional threshold of the Court. The Petition ought to have been regarded as a case the value of which cannot be estimated in financial terms.

Computer File No. 02880

Applicants…….. 1) Ato Mohammed Ahmed Said
2) Ato Kedir Mussa Usman
3) Wajiz Engineering PLC
Respondent…… Ato Salah Ahmed Abdurahman

- The Applicants petitioned the Court for an interim order to secure an injunction pending the constitution of an arbitral tribunal. The Court never raised the concern of having or not having jurisdiction despite the fact that the petitioners

did mention that the amount of damages sustained by them amounts to Birr 650,000,000.

- The Court, accordingly, granted the request of the petitioners and injunctions were placed on many properties and bank accounts

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- Like in many of the cases disposed of by other benches in the division, the Court resorted to the issue of jurisdiction and formulated its reasoning on the basis of Articles 23(3) and 25(3) of Proclamation 1237/21.
- The Court was of the opinion that petitions for interim orders should be submitted to the court having jurisdiction in the light of Articles 11(1) and 14 of Proclamation, 1234/21 and Article 25(3) of Proclamation 1237/21.
- The Court, accordingly, denied the petition stating that the Petition ought to have been submitted to the Federal High Court.

It is interesting to note that out of the six cases the writer came across, summarized above, that were presented to the various benches of the Commercial and Investment Division Benches of the Federal First Instance Court; three (Files No. 00699, 302195 and 01999) were rejected by the Court on the ground that the Petitions involve cases the amounts of which are well above the material jurisdiction of the Court. The various benches of the court seized with petitions for interim measures based their stance for rejecting the petitions on the provisions of Articles 11(1) and 14 of Proclamation 1234/21 and Article 25(3) of Proclamation 1237/21.

On the other hand, in the remaining three files, (Files No 00626, 02880 and 00548 the various benches of the Court that were seized with the petitions never raised the issue of jurisdiction. They essentially argued that petitions for interim measures have to be treated as cases whose material values cannot be determined and expressed in monetary terms per Article 11(1) of Proclamation 1237/21 and Article 18 of the Civil Procedure Code. The Benches, accordingly granted the petitions.

4.3.2 Cases/Petitions Ruled on by the Federal High Court

Computer file No 293123

Appellant …… Ethiopian Roads Authority

Respondent ……. Akir Construction (Ex Parte)

- This relates to a construction case between the Ethiopian Roads Administration (ERA) and a Contractor known as "Akir Construction". In line with the agreement reached between ERA and the Contractor, the case was initially to be submitted to the adjudication of an arbitral tribunal. Whilst the case was going to be submitted to an arbitral tribunal, ERA submitted a Petition to the Federal First Instance Court for an injunction to have the properties of the contractor attached pending the award to be handed down by the arbitral tribunal. The Court to which the petition was submitted, by a majority decision, ruled that it doesn't have jurisdiction to place the requested injunction. The Court of First Instance based its ruling by taking into consideration the amount involved in the case which was, to be exact, Birr 150,529,154.74. The Court reasoned that any case involving more than Birr 10,000,000 in line with the Federal Courts Proclamation No 1234/21 should be submitted to the Federal High Court.
- The Petitioner in the lower court, ERA, lodged an appeal to the FHC Lideta Construction Bench on the ruling of the FFIC arguing that the Petition was submitted to the FFIC on the basis of Article 14(3) of Proclamation No 1237/21 and Article 18 of the Civil Procedure Code as well as Articles 23, 93, and 25 of Proclamation 1237/21. The Appellant argued that the FFIC based its erroneous ruling on provisions of Proclamation 1237/21 that govern injunctions to be given by an arbitral Tribunal after it has been duly constituted and not by a court.
- Though the Court of appeal did order the Respondent to appear, the Respondent failed to appear and the case proceeded ex-parte.
- The FHC decided the appeal in favor of the Appellant by stating that the Petition submitted by ERA for an interim order of injunction has nothing to do with the material jurisdiction of courts pursuant to Proclamation 1234/21. Accordingly, the High Court remanded the case back to the FFIC instructing the latter to give its ruling on the Petition submitted by ERA for an injunction.

Computer File No 288797

Petitioner …… China CMC Engineering Limited

Respondent ……. United Construction PLC

- This case relates to an interim order given by an arbitration tribunal constituted pursuant to the Rules of Arbitration of the Addis Ababa Chamber of Commerce and Sectorial Associations to adjudicate the case between The Plaintiff, United Construction PLC and the Defendant China CMC Engineering Limited. Following the Petition filed by the

Plaintiff, the arbitral tribunal entered a ruling for an interim order and the Defendant objected to the order arguing that the interim order was given in its absence and that it was not given an opportunity to reflect on the petition. Despite the objection of the Defendant, the Arbitral Tribunal went ahead and placed an interim order.

- The Defendant in the case before the Arbitral Tribunal (Petitioner in front of this Court) filed a petition in front of the Federal High Court to have the interim order revoked. The High Court served the Plaintiff before the Arbitral Tribunal (Respondent in front of this Court) with summons to appear and defend. The respondent appeared in front of the High Court and defended its case submitting the evidence it has.
- The Court was seized with the issue it framed i.e. as to whether the Court has jurisdiction to revoke the interim order placed by the Arbitral tribunal.
- The High Court gave due considerations to the relevant provisions of the Arbitration and Conciliation Working Procedure Proclamation No. 1237/21. The Court in particular carefully and cautiously dealt with Articles 5, 20 and 23 of the Proclamation and finally dismissed the petition submitted by the Petitioner reasoning that the power to amend, modify or dismiss interim orders placed by arbitral tribunals rests with the tribunals themselves and hence, this court does not have jurisdiction to grant the petition.

File No. 293311

Appellant ……. Ethiopian Roads Administration

Respondent …… China National Chemical Communication Construction Group (Ltd.)

- This was a case originally submitted to the FFIC. The lower Court, however denied the Petition filed by the Appellant alleging that it doesn't have jurisdiction.
- The Appellant in its memo of appeal strongly and emphatically argued that the stand of the lower Court was erroneous and that the Court ought to have regarded the petition for injunction as a case whose value cannot be expressed in monetary terms.
- The High Court reasoned out that Federal Courts Proclamation No 1234/21 pursuant to the provisions of Article 11(2) among the provisions of Article 5(1) (a) - (e) none provides that The Federal High shall have the jurisdiction to entertain petitions for injunctions. The High Court further stated that all other matters falling outside of the list stated in article 11 are given to the FFIC and this can be discerned from Article 14. This, the Court further reasoned, is also corroborated by the provisions of Article 18 of the Civil Procedure Code as the current FFIC is equated with the former Awraja Court.
- The High Court also observed that the Petitioner, in front of the FFIC, did not ask for a relief relating to the amount the case involved. The High Court said, the Petitioner only requested for an injunction.

- The High Court, finally decided to overturn the majority ruling of the FFIC and said that the FFIC does have jurisdictional power to entertain petitions for injunctions.

The case was, accordingly, remanded back to FFIC for it to give its ruling on the petition filed by the present Appellant.

Unfortunately, the writer didn't come across cases/petitions that have been taken to the Federal Supreme Court Cassation Bench. It is hoped that the Cassation Bench will put the issue of which court has jurisdiction to place interim orders to rest.

4.3.3 Reflections on the Cases/Petitions Ruled on by the FFIC Commercial and Investment Division Benches

In cases/petitions submitted for interim orders, especially injunctions, time is of the essence. Unless appropriate and timely measures are taken, monies and properties might be tampered with to the disadvantage of a petitioner. This being the general truth, the stand being taken by some benches of the FFIC is disturbing for they have been declining jurisdiction on the basis of the value of the case for which interim order is being sought. As the badly needed interim measure cannot be taken merely because of the stand being taken by some Benches of the Federal First Instance Court, the interest of the parties seeking justice via arbitral adjudication have been adversely affected as constitution of arbitral panels is also proving to be not only time-taking but also because constitution of arbitral panels in very many instances in Ethiopia cannot materialize without the order of a Court.

The stand being taken by some Benches in the Commercial and Investment Division of the Federal First Instance Court serves as an encouragement to many recalcitrant parties to arbitration agreements who refuse to appoint their arbitrators until they are forced to do so through the coercive power of a court. Moreover, recalcitrant parties benefit at least through buying time both in relation to having a tribunal constituted and in delayed placement of interim measures especially injunction orders.

The parties to arbitration agreements would definitely need the assistance of courts pending the constitution of arbitral tribunals. If the various benches in the Commercial and Investment Division of the FFIC continue to decline entertaining petitions for interim orders; the petitioners

would be subjected to irreparable damages for constituting arbitral tribunals might, as stated earlier, be time-taking.

Pending the binding ruling that would be handed down by the Federal Supreme Court Cassation Bench, it is important that the FFIC sees to it that uniform stands are taken by all its benches on essentially the same subject matters. From the cases, summarized above, it is clear that there is no uniformity among the various benches in the FFIC's Commercial and Investment Division on matters pertaining to petitions for interim orders.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

The term ADR refers to procedures of settling disputes by means other than litigation. It encompasses a variety of ways to resolve disputes without conventional court trial, including: negotiation, mediation, arbitration and other hybrid forms which share common departure from the formal court room procedure. They are all included to save legal and managerial time and money and possibly to lead to a more satisfactory process. There are different types of ADR.

Under the Civil Procedure Code, issuances of temporary injunction is Ethiopia is more of discretion of the court. As stated under Article 154 of the Civil Procedure Code, "…the court may by order grant such injunction…as it thinks it." For the court to order temporary injunction order, there should irreparable damage, no temporary injunction is issued unless it's clear that the petitioner is going to suffer irreparable injury before trail is held. The injury threatened must be a kind which cannot be redressed by an award of damages. In other words, if the damage is not reparable by compensation for damage, it's irreparable. As any other suit, one who prays for injunctive relief should have a vested interest in the subject matter of the suit. Unless a party has a sufficient interest in the relief sought, no temporary injunction is granted. In the process of temporary injunction notice is also required since the affected person has a constitutional right of due process of law.

However, exceptions have accommodated in certain circumstances. For instance, in a much expedited instances injunctive relief can be issued *exparte* with no notice and without the opportunity to be heard. The usual rule of evidence is not followed in case of temporary injunction. A party can being a motion for temporary injunction based on the affidavit as an evidence. The affidavit must be either affirmed as true to knowledge or from information received provided the source of information is disclosed, or as to what that applicant believes to be true. The applicant must state his case fully and must disclose all material facts. The court weights the credibility of the affidavit submitted in support of the claim. Thus, the affidavit must be specific, detail and clear, otherwise the court may refuse to accept it as an evidence.

Ethiopia recently enacted a new arbitration proclamation. One of the advancement of the proclamation with respect to arbitration is scope. Unlike the Civil Code and the Civil Procedure Code of Ethiopia, which were mainly designed for domestic arbitration, the proclamation is promulgated to regulate both domestic and international arbitration. Except for the recognition and enforcement of foreign arbitral awards, the pertinent provisions of the Codes on arbitration do not distinguish between domestic and international arbitration. However, the proclamation is contemplated to regulate not only domestic arbitration but also international arbitrations. Though Ethiopia is recently a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, cognizant of the growing importance of international arbitration as a means of settling international commercial disputes, the proclamation sets out indications from which an international arbitration issue may arise. According to Article 4(1) of the proclamation an arbitration is international "where the principal business place of the contracting parties are in two different countries at the time of conclusion of the agreement" or where the substantial part of the obligation of the commercial or contractual relationship is to be performed or the subject matter of the dispute arise in other state than Ethiopia. Arbitration can also be an international where the parties expressly agreed that the subject matter of the arbitration agreement relates to more than one country. Generally, international arbitration entails arbitration between parties which have place of business in different countries, parties to an international transaction, or parties to an arbitration agreement according to which a foreign place of arbitration is designated.

Thus, interim order may be coming from either domestic or foreign arbitration tribunals. The Ethiopian court may refuse the recognition and enforcement of foreign interim order where absence of a valid arbitration agreement, where the decision of the tribunal with respect to security has not been complied with, where the decision rendered with respect to security has not been complied with, where the decision rendered with respect to interim measure has been modified, temporarily suspended or reversed, where the court has no jurisdiction and where the recognition or enforcement of the interim measure conflict public morality or government policy.

It is not clear that where the court in Ethiopia can refuse recognition and enforcement of foreign interim order in case where the underline contract is non-arbitrable under Ethiopia law.

The role of the court in the arbitration proceeding in general and interim order in particular is positive involvement. The Ethiopian new arbitration proclamation adopts rather complementary principle whereby the contracting parties can still apply for the court and arbitration tribunal. The fact that the court assume jurisdiction don't necessary means there is intervention in the arbitration proceeding. The proclamation is not clear if both the court and the tribunal entertain the case and comes up with rather contradictory decision.

5.2 Recommendations

The writer would like to put forward the following by way of recommendations:

1) Among the different benches of the Commercial and Investment Division of the Federal first Instance Court, there is division on the issue of assuming or declining jurisdiction to entertain petitions for interim measures pending the constitution of arbitral tribunals. In situations where the courts decline jurisdiction, the interest of concerned parties to arbitration agreements would be adversely affected as no interim measure would be placed until after the desired arbitral tribunal is constituted. It is recommended that the Federal First Instance Court should do something to ensure uniform understanding and application of the relevant provisions of Proclamation 1237/21 among the various benches of its Commercial and Investment Division pending the reaching of petitions for correction as basic error of law by the Cassation Bench of the Federal Supreme Court.
2) Proclamation No 1237/21 is silent as to which court shall have jurisdiction when contracting parties in arbitrations wish to file petitions for interim orders The Proclamation raises the point of jurisdiction in Article 25(3) only in relation to enforcement of orders for interim measures. It is, therefore, recommended that Proclamation 1237/21 be amended to resolve the issue of which Federal Court shall have initial jurisdiction when parties file petitions to have orders for interim measures placed pending the constitution of arbitral tribunals.

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LAWS

1. Arbitration and Conciliation, Working Procedure Proclamation, Proclamation No. 1237/2021
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ANNEXES

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መዝገቡ በዕለቱ ተመርምሮ የሚከተለዉ ብይን ተሰጥቷል፡፡

ብይን

ለብይኑ መነሻ የሆነዉ ከሳሽ ሐምሌ 5-2014 ዓ.ም በተጻፈ የክስ አቤቱታ ከተከሳሽ ጋር ባላቸዉ የመንገድ ፕሮጀክት ንድፍ እና ስራ ዉል መነሻነት በግራቀኛችን መካከል የተፈጠረው አለመግባባት በግልግል ዳኛ ጉባዔ ታይቶ አልባት ያገኝ ዘንድ በአጠቃላይ የውል ሁኔታ እና የውል ልዩ ሁኔታ አንቀጽ 20.6 መሰረት የግልግል ዳኛ ጉባዔ ይቋቋም ዘንድ ተከሳሽ አንድ የግልግል ዳኛ መርጦ ለከሳሽ እንዲያሳውቅና በተከሳሽ የተመረጠው የግልግል ዳኛ በከሳሽ ከተመረጠው የግልግል ዳኛ ጋር በጋራ በመሆን የመሀል ዳኛውን መርጠው የግልግል ጉባዔው እንዲቋቋም ትእዛዝ እንዲሰጥልኝና የግልግል ጉባዔ በጉዳዩው የመጨረሻ ውሳኔ እስኪሰጥ አስፈላጊውን የአጠባበቅ እርምጃ እንዲሰጥልን በማለት በመጠየቃቸዉ ነዉ፡፡ ጊዜያዊ መጠባበቂያ ትዕዛዝ እንዲሰጣቸዉ የጠየቁትም የውል ማስከበሪያ ዋስትና (performance bond ብር 182,070,000 / አንድ መቶ ሰማኒያ ሁለት ሚልየን ሰባ ሺህ/ እና 1,183,926.89 /አንድ ሚልየን አንድ መቶ ሰማኒያ ሶስት ሺህ ዘጠኝ መቶ ሃያ ስድስት ከ89 ሳ./ ዶላር፣ የቅድመ-ክፍያ ዋስትና /advance payment guarantee/ ብር 364,140,000 /ሶስት መቶ ስልሳ አራት ሚልየን አንድ መቶ አርባ ሺህ/ እና በዶላር 2,367,853.79 /ሁለት ሚልየን ሶስት መቶ ስልሳ

ፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

ሰባት ሺህ ስምንት መቶ ሃምሳ ሶስት ከ 79 ላ/ የኢትዮጵያ ንግድ ባንክ ለተከሳሽ ገቢ እንዳያደረግ የሚል ነዉ።

ፍርድ ቤቱም የከሳሽን አቤቱታ መነሻ በማድረግ ተከሳሽ መጥሪያ እንዲደርሰዉ ከማድረጉ በፊት ፍርድ ቤቱ የቀረበዉን ክስ የመመልከት ስልጣን ያለዉ መሆን አለመሆኑን መርምሮታል። ከሳሽ የጠየቁት ዳኝነት ዉስጥ እንደኛዉ ገላጋይ ጉባዔ እንዲቋቋም የሚጠይቅ ነዉ። ገላጋይ ዳኛ በመሾም የግልግል ጉባዔ እንዲቋቋም ማድረግ ወጤቱ ግራ ቀኙ ያደረጉትን ዉል መነሻ በማድረግ የግልግል ጉባዔ እንዲቋቋም ከማድረግ ያለፈ በገንዘብ ላይ የሚወስነዉ ነገር ባለመሆኑ ክርክሩ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 18 መሰረት ግምት በሌለዉ ክርክር ዓይነት የሚቀርብ ስለሆነ ይህ ፍርድ ቤት ጉዳዩን ተመልክቶ የመመልከት ስልጣን እንዳለዉ ግልፅ ነዉ።

የግልግል ጉባዔ እንዲቋቋም አብሮ የተጠየቀዉን የመጠባበቂያ ትዕዛዝ በተመለከተም የመጠባበቂያ ጥያቄያቸዉ ላይ ዉሳኔ ለመስጠት በቅድሚያ ፍርድ ቤቱ ጉዳዩን የመመልከት ስልጣን ያለዉ መሆን አለመሆኑ ሊታይ የሚገባዉ ሆኖ ተገኝቷል።

ስለጊዜያዊ የመጠባበቂያ የእግድ ትዕዛዝ የሚደነግገዉ የግልግል ዳኝነት እና እርቅ አሰራር ሰርዓት አዋጅ ቁጥር 1237/2013 አንቀጽ 9 ድንጋጌ ተዋዋይ ወገኖች የግልግል ዳኝነት ሂደቱ ከመጀመሩ በፊት ወይም ሂደቱ ከተጀመረ በኋላ የግልግል ዳኝነት ስምምነቱ መሰረት በማድረግ ጊዜያዊ የመጠባበቂያ እርምጃ ትዕዛዝ እንዲሰጥ ለፍርድ ቤቱ ማመልከት እንደሚችል ከመደንገጉ ዉጪ አቤቱታዉ የሚቀርብዉ ለየትኛዉ ፍርድ ቤት እንደሆነ በግልፅ አልተመላከተም። በሌላ በኩልም የዚሁ አዋጅ አንቀጽ 23(3) ስር በግልግል ጉባዔዉ የተሰጠ ጊዜያዊ የመጠባበቂያ ትዕዛዝ የሚፈጸመዉ ጉዳዩን ለግልግል ዳኝነት ጉባዔ በይቀርብ ኖሮ ጉዳዩን ለማዬት የስር ነገር ስልጣን ባለዉ ፍርድ ቤት ስለመሆኑ ተመላክቷል። የተሰጠ ትዕዛዝ ወይም ዉሳኔ እንዲፈጸም ከሚደረግበት አግባብ አንፃር ከታዬም አፈፃፀም የሚከተለዉ የስረ-ነገር ስልጣንን ስለመሆኑ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁ 75788 አስገዳጅ የሕግ ትርጉም ሰጥቶበት ያደረ ጉዳይ ነዉ። በአዋጅ ቁጥር 1237/2013 አንቀጽ 25(3) ጊዜያዊ የመጠባበቂያ ትዕዛዝ በገላጋይ ዳኛ በተሰጠ ጊዜ ይህንን ትዕዛዝ የሚያስፈጽመዉ ጉዳዩ

ፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

ለገላጋይ ዳኛ ባይቀርብ ኖሮ ጉዳዩን ለማየት የስራ-ነገር ስልጣን ያለዉ ፍርድ ቤት እንደሆነ ማስቀመጡ የትዕዛዙ አፈፃፀም የስራ-ነገር ስልጣንን የሚከተል መሆኑን የሚያሳይ ነዉ። ፍርድ ቤት የሚሰጠው ጊዚያዊ የመጠባበቂያ እርምጃ ትዕዛዝ በተለያዩ ምክንያቶች ሳይፈፀም ቢቀር ትዕዛዙ እንዲፈፀም ጥያቄው የሚቀርበው ጉዳዩን የማየት ስልጣን ላላው ፍርድ ቤት ስለመሆኑ ከድንጋጌው ይዘትና መንፈስ የምንገነዘበው ስለሆነ ይህ ፍርድ ቤት ጊዚያዊ የመጠባበቂያ ትዕዛዝ ይሰጥልኝ የሚለውን የከሳሽን የዳኝነት ጥያቄ የማየት ስልጣን የለውም።

እግድ እንዲሰጥ የሚጠየቀዉ ዳኝነት ከሚሰጠዉ ዳኝነት ወይም ከሚተላለፈዉ የእግድ ትዕዛዝ አንጻር ግምት የሌለዉ ክርክር የሚመስል ቢሆንም የእግድ ትዕዛዝ በባህሪዉ ለተወሰነ ጊዜም ቢሆን ግምት ባላቸዉ ንብረቶች ወይም መጠኑ ተለይቶ በሚታወቅ ገንዘብ ላይ የሚፈጥረዉ መብት ወይም የሚጥለዉ ግዴታ አለዉ። ፍርድ ቤቶች ንብረት እንዳይንቀሳቀስ ወይም ገንዘብ ላይ እግድ በሚሰጡበት ወቅት ለጊዜዉም ቢሆን ግምት ያለዉን ወይም ግምቱ የታወቀ ነገር ላይ እየወሰኑ እንዳሉ የሚያረጋግጥ ስለሆነ የእግድ ትዕዛዝ የግድ የፍርድ ቤቶችን የስራ-ነገር ስልጣን ሊከተል የሚገባ ነዉ። ክሳሽ እየጠየቁት ያሉት እግድ ለዉል ማስከበሪያ እና ለቅድመ ክፍያ የተያዘ ገንዘብ ለተከሳሽ ገቢ እንዳይደረግ የሚል ሲሆን ይህ የገንዘቡ መጠን የውል ማስከበሪያ ዋስትና (performance bond ብር 182,070,000 / አንድ መቶ ሰማኒያ ሁለት ሚልየን ሰባ ሺህ/ እና 1,183,926.89 /አንድ ሚልየን አንድ መቶ ሰማኒያ ሶስት ሺህ ዘጠኝ መቶ ሃያ ስድስት ከ89 ሳ./ ዶላር፣ የቅድመ-ክፍያ ዋስትና /advance payment guarantee/ ብር 364,140,000 /ሶስት መቶ ስልሳ አራት ሚልየን አንድ መቶ አርባ ሺህ/ እና በዶላር 2,367,853.79 /ሁለት ሚልየን ሶስት መቶ ስልሳ ሰባት ሺህ ስምንት መቶ ሃምሳ ሶስት ከ 79 ሳ./ ነዉ። ፍርድ ቤቱ የሚሰጠዉ የእግድ ትዕዛዝ በተጠቀሰዉ ገንዘብ መጠን ላይ ዉጤት የሚኖረዉ ወይም ለተወሰነ ጊዜም ቢሆን መብት እና ግዴታ ሊፈጥር የሚችል እንደሆነ ግልፅ ነዉ። ይህ ጉዳይ ለግልግል ዳኝነት ባይቀርብ ኖሮ በፌደራል ፍርድ ቤት ማቋቋሚያ አዋጅ ቁጥር 1234/2013 አንቀጽ 11(1) እና በአዋጅ ቁጥር 1237/2013 አንቀጽ 25(3) መሰረት ሊዳኝ የሚችለዉ በፌደራል ከፍተኛ ፍርድ ቤት ነዉ። ስለሆነም ይህ ፍርድ ቤት በአዋጅ ቁጥር 1234/2013 አንቀጽ 14 መሰረት ለመመልከት ስልጣን ያለዉ እስከ ብር

አስር ሚሊዮን የሚመለከቱ ጉዳዮችን ስለሆነ አመልካች ጊዜያዊ መጠባበቂያ እንዲሰጥላቸዉ የጠየቁበት ጉዳይ ደግሞ ከአስር ሚሊዮን ብር በላይ በመሆኑ ይህ ፍርድ ቤት የቀረበዉን አቤቱታ ተቀብሎ የመጠባበቂያ ትዕዛዝ የመስጠት ስልጣን የለዉም። ከሳሽ የጠየቁት ዳኝነት ዉስጥ ግልግል ጉባዔ እንዲቋቋም መወሰን የዚህ ፍርድ ቤት ስልጣን ቢሆንም በአንድ ላይ የተጠየቀዉ የመጠባበቂያ ትዕዛዝ ትዕዛዙ ከሚያርፍበት የገንዘብ መጠን አንፃር ከዚህ ፍርድ ቤት ስልጣን በላይ በመሆኑ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 17(2) መሰረት ጉዳዩ ሊታይ የሚገባዉ ከፍተኛ ግምት ባለዉ የፌደራል ከፍተኛ ፍርድ ቤት ስለሆነ ይህ ፍርድ ቤት ጉዳዩን ተመልክቶ የመወሰን ስልጣን የለዉም በማለት ብይን ተሰጥቷል።

ትዕዛዝ

- ይህ ፍርድ ቤት ከሳሽ ከጠየቁት የመጠባበቂያ ትዕዛዝ ከሚያርፍበት ገንዘብ አንፃር ስልጣን የሌለዉ በመሆኑ ስልጣን ላለዉ የፌደራል ከፍተኛ ፍርድ ቤት መዝገቡ በሬጅስትራር በኩል ይተላለፍ።
- የብይን ግልባጭ ለጠየቀ ወገን ይሰጥ።
- በብይኑ ቅር የተሰኘ ወገን ይግባኝ የማለት መብት አለዉ።
- መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ።

የክ/መ/ቁ 00626

ሰኔ 29 ቀን 2014 ዓ.ም

የፌ/መ/ደ/ፍ/ቤት ንግድና ኢንቨስትመንት ምድብ 3ኛ ንግድ ችሎት

ዳኛ - ጌራወርቅ ይትባረክ

ከሣሽ - ሚስተር ዩዓቭ ተርነር

ተከሣሽ - ወ/ት ሌንሣ ዋቅሹም ቦረና

ት ዕ ዛ ዝ

- በአዋሽ ባንክ ፊንፊኔ ቅርንጫፍ በሂሣብ ቁጥር 02308418282300 የሚገኝ በተጠሪ ስም ያለ ገንዘብ ካለ ተጣርቶ በዶላር የተቀመጠ 505,860 /$/ ዶላር ድረስ የታገደ መሆኑን ትዕዛዙ በአስቸኳይ በአመልካች በኩል ለባንኩ ደርሶ ባንኩ አግዶ ውጤቱን ለፍ/ቤቱ እንዲልክ በጥብቅ ታዟል። በአስቸኳይ ይፃፍ።
- ውጤት ለመጠባበቅ ለሀምሌ 08 ቀን 2014 ዓ.ም /4:00/ ተቀጠረ።

የማይነበብ የዳኛ ፊርማ አለበት

/ኤ.አ
30/10/14

የክ/መ/ቁ 00626
ነሐሴ 24 ቀን 2014 ዓ.ም

የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት
በንግድና ኢንቨስትመንት ምድብ 3ኛ ንግድ ችሎት

ዳኛ- ጌራወርቅ ይትባረክ

ከሳሽ፡- ሚስተር ዬዓብ ተርነር ..... አልቀረቡም።

ተከሳሽ፡- ሌንሣ ዋቅሹም ቦረና ..... ጠበቃ በረከት ቡሽራ ቀረቡ።

መዝገቡ ለዛሬ የተቀጠረው በተከሳሽ አቤቱታ ላይ ለምርመራ ሲሆን አቤቱታው ተመርምሮ ተከታዩን ውሳኔ ሠጥቷል።

ውሳኔ

ለዚህ ውሳኔ መነሻው ከሳሽ ሰኔ 29 ቀን 2014 ዓ.ም ጽፈው ባቀረቡት አቤቱታ መነሻበት ፍርድ ቤቱ በአዋጅ ቁጥር 1237/2013 አንቀጽ 9 መሰረት የዕግድ ትዕዛዝ ሰጥቶ መዝገቡን ከዘጋ በኋላ ተከሳሽ ነሐሴ 09 ቀን 2014 ዓ.ም ጽፈው ያቀረቡት አቤቱታ ነው። ከሳሽ ያቀረቡት ክስ ዝርዝር ስንመለከት ተጠሪ በንግድ ምዝገባ ቁጥር KKAAA0014234/2013 የተመዘገበ ብሉ ናይል ኮሞዲቲስ ኤክስፖርት /Blue Nile Commodities Export Oil Seeds/ የተባለ የግል የንግድ ድርጅት እንዳላቸው በመግለጽ እመልካች የእስራኤል ሃገር ባለሀብት ስለሆኑ እና ከተጠሪ ጋር የእርሻ ምርቶች፣ ማሽነሪዎች እና የተለያዩ ዕቃዎች የማቅረብ ውል እ.ኤ.አ በየካቲት 4 ቀን 2022 እ.ም እንደተፈራረሙ ፤ በውሉ መሠረት አመልካች የግዥ ትዕዛዝ በመስጠት እና ለግዥው ሙሉ ዋጋውን በዶላር ከውጭ ለተጠሪ የሚልክ ሲሆን፤ ተጠሪ ደግሞ በተሠጣቸው የግዥ ትዕዛዝ እና በተላከላቸው ገንዘብ ልክ የተለያዩ የእርሻ ምርቶችን ለአመልካች

እንደሚልኩ ፤ በዚሁ ስምምነታቸውን መሠረት አመልካች 863,250.00 ዶላር ለተጠሪ እንደላኩ ፤ ተጠሪ በተላከላቸው ዶላር መጠን የእርሻ ምርቶችን ለአመልካች የመላክ የውል ግዴታ ቢኖርባቸውም 357,390 ዶላር ብቻ ልከው፣ በቀሪው ገንዘብ ግን ምርቶችን ለመላክ ፈቃደኛ እንዳልሆኑ ፤ ተጠሪ በስምምነታቸው መሠረት ምርቶቹን እንዲልኩ ቢጠየቁም ፈቃደኛ ባለመሆናቸው ተጠሪን አግኝቶ ጉዳዩን በሠላማዊ ድርድር ለመጨረስ አመልካች ቢሞክሩም ተጠሪ ፈቃደኛ እንዳልሆኑ ፤ በአመልካች እና ተጠሪ መካከል በተደረገው ውል አንቀጽ 13 መሠረት በአመልካች እና ተጠሪ መካከል አለመግባባት ከተፈጠረ ጉዳዩ በግልግል ጉባኤ እንደሚታይ ስለተደነገገ አመልካችም በላኩት ዶላር ልክ ባልተላከላቸው የምርት ልዩነት 505,860 ዶላር መጠን ላይ ጉዳዩን ለግልግል ጉባኤ ክስ ለማቅረብ በዝግጅት ላይ እንደሆኑ ፤ ይኹን እንጂ ተጠሪ ከአመልካች የተላከላቸውን ገንዘብ በአዋሽ ባንክ ፊንፊኔ ቅርንጫፍ በሂሣብ ቁጥር 02308418282300 የተቀመጠውን ብር ለማውጣት እና ለማሸሽ በዝግጅት ላይ እንዳሉ አመልካች ስለደረሱበት ተጠሪ ገንዘቡን ከባንክ ቢያወጡት አመልካች እጅግ ከፍ ያለ የማይመለስ ጉዳት እንደሚደርስባቸው ፤ የግልግል ዳኝነትን እና የዕርቅ አሠራር ሥርዓትን ለመደንገግ በወጣው አዋጅ ቁጥር 1237/2013 አንቀጽ 9 መሠረት ተዋዋይ ወገኖች የግልግል ዳኝነት ሂደቱ ከመጀመሩ በፊት ወይም ሂደቱ ከተጀመረ በኋላ ጊዜያዊ የመጠባበቂያ እርምጃ (Interim Measures) እንዲወሠድ ለፍርድ ቤት ማመልከት ስለሚችሉ ተጠሪ በአዋሽ ባንክ ፊንፊኔ ቅርንጫፍ በሂሣብ ቁጥር 02308418282300 ከተቀመጠው ገንዘብ ውስጥ 505,860 የአሜሪካ ዶላር ድረስ ሳያወጡት ባለበት ታግዶ እንዲቆይ የእግድ ትዕዛዝ በአፋጣኝ እንዲሰጥ ዳኝነት ጠይቀው የሰነድ ማስረጃ አያይዘው አቅርበዋል።

ፍርድ ቤቱም የከሳሽን አቤቱታ መርምሮ በቀን 08/11/2014 ዓ.ም በዋለው ችሎቱ እግድ የሰጠ ሲሆን ተከሳሽ የተሰጠው እግድ እንዲነሳ በቀን 09/12/2014 ዓ.ም የተጻፈ አቤቱታ አቅርበዋል። ዝርዝሩን ስንመለከት በአዋጅ ቁጥር 1237/2013 አንቀጽ 9 መሰረት የተሰጠው ዕግድ ትዕዛዝ መነሻ በማድረግ ከሳሽ ከ40 ቀን በላይ የግልግል ጉባኤ እንዲሾም ያላደረጉ እንደሆነና ዕገዱን በመጠቀም በተከሳሽ ላይ ጫና በመፍጠር ለተከሳሽ ተገቢ ያልሆኑ የድርድር ሀሳቦችን በማቅረብ እንዲቀበሉ በማስገደድ ላይ እንደሚገኙ ፤ እግዱን የወሰዱትም በእውነትም የግልግል ጉባኤ ለማሾም ሳይሆን ተከሳሽን አስገድደው የማፈለግ ሀሳብ እንዲቀበሉ ለማድረግ በመሆኑ ፤ ተከሳሽ በታገደው ገንዘብ ለሰራተኛ ገንዘብ መክፈል ባለመቻላቸው ከፍተኛ ኪሳራ ተዳርገው እንደሚገኙ እና ለዕለት ወጪም ጭምር እየተቸገሩ እንደሚገኙ ፤ በአዋጅ ቁጥር 1237/2013 አንቀጽ 23 መሰረት የዕግድ ትዕዛዝ ሊሰረዝ ሊሻሻል ወይም ሊታገድ ስለሚችል እንዲሰረዝላቸው ፤ ፍርድ ቤቱ ዕግዱን የማያነሳበት በቂ ምክንያት ካለም በአዋጁ አንቀጽ 22(5) መሰረት የዕግድ ትዕዛዙ ምክንያት በተከሳሽ ላይ ለሚደርስ ጉዳት ኪሳራ ከሳሽ በቂ ዋስትና እንዲጠራ እንዲደረግ በሚል አመልክተዋል። ተከሳሽ ያቀረቡት አቤቱታ ለከሳሽ ደርሷቸው በቀን 17/12/2014 ዓ.ም በተጻፈ ያቀረቡትን አስተያየት መኖሩን ተመልክቷል።

ፍ/ቤቱም በተከሳሽ የቀረበውን አቤቱታ እና የከሳሽ አስተያየት በመመልከት በከሳሽ አመልካችነት የተሰጠው ዕግድ ትዕዛዝ ሊነሳ ይገባል ወይስ አይገባም? የሚል ጭብጥ በዋነኝነት በመያዝ ሌሎች ተያያዥ ነጥቦች በተያዘው ጭብጥ ስር ምላሽ የሚያገኙ ሆነው መዝገቡን አግባብነት ካላቸው ሀጐች ጋር በማገናዘብ እንደሚከተለው መርምሯል።

በመሰረቱ በህግ እግበብ የተደረጉ ውሎች በተዋዋይ ወገኖች ላይ የህግ ያህል አስገዳጅነት እንዳላቸው በፍ/ብ/ህግ ቁጥር 1731/1/ ስር በግልጽ ተደንግጎ እንመለከታለን። ከዚህም በመነሳት ተዋዋይ ወገኖች በገቡት የውል ስምምነት የመገዛት ፤ በውሉ መሠረት በየበኩላቸው ግዴታዎቻቸውን የመፈፀም ሀላፊነት ያለባቸው ሲሆን አንደኛው ተዋዋይ ወገን የራሱን ግዴታ ከተወጣ በኋላ ሌላኛው ተዋዋይ በውሉ መሠረት መፈፀም ያለበትን ተግባር ሳይፈጽም ከቀረ ወይም ውሉን ካላከበረ ወይም ከጣሰ ሌላኛው ተዋዋይ ወገን ውሉን መሠረት በማድረግ ጥያቄውን ማቅረብ ይችላል።

በሌላ በኩል ተዋዋዮች በውላቸው በመካከላቸው አለመግባባት ቢፈጠር ይህ አለመግባባት በምን መልኩ ታይቶ መፈታት እና መወሰን እንዳለበት ለመስማማት ይችላሉ። ይህም አማራጭ የግጭት መፍቻ መንገድ ሲሆን ተዋዋዮች በዚህም መሰረት ስምምነት ካደረጉ በመካከላቸው አለመግባባት ከተፈጠረ ይህ አለመግባባት/አለመስማማት መፈታት ያለበት በውሉ ላይ በተቀመጠው የሙግት ወይም አለመግባባት መፈቻ መንገድ እና በተቀመጠው የጊዜ ገደብ ብቻ ሊሆን የሚገባ ነው። ይህም ሚመነጨው የግራቀኙ ውል ስምምነት የህግ ያክል ውጤት በመካከላቸው እንዲኖር ስለሚያደርገው ነው።

በተያዘው ጉዳይ ከሳሽ እና ተከሳሽ ባደረጉት ውል አንቀጽ 13 መሰረት በመካከላቸው ግጭት ከተነሳ ጉዳዩን በቅድሚያ በውይይትና በድርድር ለመፍታት ተገቢውን ጥረት እንዲያደርጉ ግዴታቸው ስለመሆኑ ተመልክቷል።

ይህ የግዴታ ጊዜ አለመስማማቱን በውይይትና በድርድር ሊወሰድ የሚገባው የመጨረሻ የጊዜ ገደብ ሰላሳ (30) ቀናት ሲሆን በዚህ ጊዜ ውስጥ ጉዳዩን መፍታት ሳይችሉ ቢቀሩ ወደግልግል ዳኝነት ጉባኤ መሄድ

እንደሚችሉና ፤ በግልግል ዳኛ ጉባኤ የሚታይ ከሆነ ከአስራ አምስት (15) ቀን አስቀድሞ በየፊናቸው የራሳቸውን ግልግል ዳኛ በመሾም በማሳወቅ ሰብሳቢ ወይም አደራዳሪ የግልግል ዳኛ በቀጣይ አምስት (5) ቀን እንዲመረጥ ማድረግ ይገባል።

በመሆኑም ይህ የተዋዋይ ወገኖች መብትና ግዴታ በዋነኝነት ከግልግል ዳኝነትን እና የዕርቅ አሠራር ሥርዓትን ለመደንገግ ከወጣው አዋጅ ቁጥር 1237/2013 ጋር ተጣጥሞ መታየት የሚገባው ሲሆን በአዋጁ አንቀጽ 9 መሠረት ስልጣን ያለው ፍርድ ቤቱ የአመልካችን ጉዳት ለመቀነስ ፤ ግልግል ጉባኤውን ለመረዳት እንዲሁም አመልካች በግልግል ጉባኤው በሚሰጠው ውሳኔ የፍርድ ባለመብት ቢሆን ፍርድ ማስፈፀሚያ እንዲገኝ ጊዜ መጠባበቂ ዕግድ ሊሰጥ እንደሚችል ይደነግጋል።

በዚህ ሂደት ውስጥ የሚያልፉ ተስማሚ ወገኖች በዚሁ አንቀጽ አግባብ ተዋዋይ ወገኖች የግልግል ዳኝነት ሂደቱ ከመጀመሩ በፊት ወይም ሂደቱ ከተጀመረ በኋላ ጊዜያዊ የመጠባበቂያ እርምጃ (Interim Measures) እንዲወሠድ ፍርድ ቤት መጠየቅ የሚችሉ ስለመሆኑ ተመልክቷል። ስለሆነም ተዋዋይ ወገን በፍርድ ቤት ጊዜያዊ የመጠባበቂያ እርምጃ ወይም (Interim Measures) እንዲወሰድ የሚያደርገው ከተዋዋይ ወገኑ ጋር ባደረገው የውል ስምምነት መሰረት ለገላጋይ ዳኛ የሚያቀርበውን የግልግል ጉባኤ የመሰየም ሂደት በጠበቀ መልኩ ሊሆን ይገባል።

በመሆኑም በዚህ መዝገብ የተያዘውን ጉዳይ ስንመለከት በከሳሽ እና በተከሳሽ መካከል አለመስማማት ስለተፈጠረ በግልግል ጉባኤ እንዲሰየም ከሳሽ ለዚህ ፍርድ ቤት ጊዜያዊ የመጠባበቂያ እርምጃ ወይም (Interim Measures) እንዲሰጥ የጠየቁበት ማለትም ክስ ያቀረቡበትን ቀን ስንመለከት በፍርድ ቤቱ

ምድብ ሬጅስትረር ወደቾሎት ዳኛ ተመርቶ ክሱ የቀረበው ሰኔ 29 ቀን 2014 ዓ.ም ስለመሆኑ መዝገቡ ያስረዳል። ከሳሽ ከተከሳሽ ጋር እንደሚሉት አለመስማማት አለ ቢባል በውላቸው መሰረት አስቀድመው ጉዳዩ በድርድር እና በውይይት እንዲታይ ማድረግ የውል ግዴታ ያለባቸው ሲሆን የጊዜ ገደቡም ከላይ እንደተመለከተው ሰላሳ ቀን ነው። በዚህ ጊዜ ውስጥ ውጤት ካላገኙ የራሳቸውን ገላጋይ ዳኛ መርጠው የሚያሳውቁ የመጨረሻው ቀን አስራ አምስት (15) ቀናት ናቸው። ይህም ማለት ከሳሽ ከተከሳሽ ጋር ተፈጥሯል ባሉት አለመስማማት በወይይት ወይም በድርድር ጉዳዩን ለመጨረስ መጠቀም ያለባቸው ሰላሳ ቀንና ካልሆነ ገላጋይ ዳኛ የራሳቸውን ሰይመው ማሳወቅ አስራ አምስት ቀን ስለሆነ በድምሩ በአርባ አምስት ቀናት ውስጥ ቢያንስ የራሳቸውን ገላጋይ ዳኛ መርጠው ለተከሳሽ በማሳወቅ በተመሳሳይ ተከሳሽ ግዴታውን እንዲወጣ ማድረግ ይጠበቅባቸዋል። ለዚህ ጊዜም ፍርድ ቤቱ በጉዳዩ ላይ ጣልቃ ሳይገባ በግልግል ዳኝነትን እና የዕርቅ አሠራር ሥርዓትን ለመደንገግ ከወጣው አዋጅ ቁጥር 1237/2013 አንቀጽ 9 መሰረት ጊዜያዊ የመጠባበቂያ እርምጃ (Interim Measures) እንዲወሠድ ትዕዛዝ መስጠቱ ተገቢነት ያለው ሲሆን በዚህ ጊዜ ውስጥ ይህን ጊዜያዊ እግድ ወይም እርምጃ ተጠቅሞ ከፍርድ ቤቱ ትዕዛዝ ያሰጠው ወገን ግዴታውን ሊወጣ ይገባል።

ተከሳሽ የዕግድ ትዕዛዝ እንዲነሳላቸው በጠየቁት አቤቱታ ከሳሽ አስተያየት የሰጡት በቀን 17/12/2014 ዓ.ም ሲሆን ክሱ ከቀረበበት ከላይ ከተመለከተው ከቀን 29/10/2014 ዓ.ም ጀምሮ ያለው ጊዜ ሲታይ ጉዳዩ በድርድር ወይም በወይይት የማድረግ ካልሆነም ገላጋይ ዳኛ የራሳቸውን በመሰየም ለተከሳሽ የማሳወቅ በድምሩ የአርባ አምስት ቀን ጊዜ ያለፈው መሆኑን ሲያመለክት በዚህ ጊዜ ውስጥ ከሳሽ የውል

ግዴታቸውን መሰረት በማድረግ ቢያንስ ውይይት አድርገው ወይም ከድርድር በኋላ ውጤት ከሌለው የራሳቸውን ገላጋይ ዳኛ ሰይመው የሚያሰውቁበት ጊዜ አልፏል። ወይም ይህ ጊዜ ያለፋቸው በበቂ ተብሎ በሚገመት ምክንያት ስለመሆኑ በአስተያየታቸው አልገለጹም። ከሳሽ በዚህ ረገድ ያመለከቱት ይህ የውል ጊዜያቸው ገና መሆኑን ጠቅሰው ወደፊት እናቀርባለን የሚል ክርክር ውላቸውንና ህግን መሰረት ያደረገ ሆኖ አልተገኘም።

በተቃራኒው ከሳሽ ሐምሌ 29 ቀን 2014 ዓ.ም በጽሑፍ ባቀረበት አቤቱታ ውስጥ አመልካች አለመግባባቱ በስምምነት ለመጨረስ ጥረት እንዳደረጉ ፤ ይሁን እና ተጠሪ ፈቃደኛ መሆን እንዳልቻሉ ቀጣዩ ሂደት የግልግል ጉባኤ ማቋቋም መሆኑን በመገልጽ ለፍርድ ቤቱ አቤቱታ አቅርበው አቤቱታም በእውነት የቀረበ መሆኑን ለፍርድ ቤቱ አረጋግጠው አቅርበው እያለ አሁን ላይ ተከሳሽ አቤቱታ ካቀረቡ ቦኋላ አስተያየት ሲሰጡ እንደገና ወደ ኃላ ተመልሰው ከዕግድ በኃላ ድርድር ጀምረናል በሚል የሰጡትንአስተያየት ፍርድ ቤቱ ተገቢነት ያለው ሆኖ አላገኘውም። ይህም ቀድሞ እግድ እንዲሰጥላቸው ካቀረቡት ማመልከቻ እና አሁን አስተያየት ከሰጡበት ላይ በግልጽ መገንዘብ ተችሏል። ይህ ሁሉ የሚሳየው አመልካች ጊዜዊ መጠባበቂ ዕግዱን ማግኘቱን እንጂ በፍጥነት ወደ ግልግል ጉባኤ የመግባት ፍትሕ የማግኘት ዕቅድ እንደሌለው ፍርድ ቤቱ ግንዛቤ ወስዷል።

በአጠቃላይ ከሳሽ በፍ/ብሔር ህግ አንቀጽ 1731 መሰረት ውሉ በግራቀኙ መካከል አስገዳጅ በመሆኑ በውሉ የተመለከተው ስርዓት እና አካሄድ ተግባራዊ ሊያደረጉ የሚገባ በመሆኑ ከተከሳሽ ጋር የተፈጠረው አለመግባባት በተቀመጠው ጊዜ ገደብ ውስጥ ለውይይትም ሆነ ለድርድር እንዲሁም ገላጋይ ዳኛ

የመሰየም ሂደት ውስጥ መሆናቸውን እስተያየት ሲሰጡ ያላስረዱና ማስረጃ ያላቀረቡበት በመሆኑ በፍርድ ቤቱ ዕግድ የሰጠበት አግባብ በውል ስምምነታቸውና ምክንያታዊ በሆነ ጊዜ ውስጥ የስምምነቱ አካል የሆነው የግልግል ጉባኤ እስኪሰየም ብቻ በመሆኑ ከሳሽ የውል ግዴታቸውን ተወጥተው ጊዜያዊ ርምጃውን ያልተጠቀሙበት በመሆኑ የተሰጠው እግድ ሊነሳ የሚገባ ነው ተብሎ ተወስኗል።

ትዕዛዝ

1. ፍርድ ቤቱ በዚህ መዝገብ ቁጥር በቀን 07/11/2014 እና በቀን 29/10/2014 ዓ.ም የሰጠው የእግድ ትዕዛዝ ተነስቷል። ለሚመለከተው አካል ይጻፍ።
2. ወጪና ኪሣራን በተመለከተ ግራቀኙ የየራሳቸውን ይቻቻሉ ተብሏል።
3. ግራቀኙ ሲጠይቁ የውሳኔ ግልባጭ ይሰጣቸው።
4. መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ።

የከ/መ/ቁ 00548
ሐምሌ 26 ቀን 2014 ዓ.ም

የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት
በንግድና ኢንቨስትመንት ምድብ 3ኛ ንግድ ችሎት

ዳኛ- ጌራወርቅ ይትባረክ

ከሳሽ፡- አብዱሰመድ ኢብራሂም ጋቶ ..... ጠበቃ አብዱልሀኪም ጀማል ቀረቡ።

ተከሳሽ፡- አህመድ አሊ ኡመረዲን ..... ጠበቃ ይሄይስ ገ/ፃዲቅ ቀረቡ።

መዝገቡ የተቀጠረው ለምርመራ ሲሆን ከተባለ በኋላ ተከሳሽ ፍርድ ቤቱ ፍርድ ሀተታውን መግለጽ ሲጀምር የግልግል ዳኝነት ጉባኤ እንዲሾም ደንበኛዬ ፈቅደዋል በሚል የገለጹ ቢሆንም ማናቸውም ቀን የፍርድ ቤቱ አቤቱታ ማቅረብ የሚቻልበት መሆኑ እየታወቀ ፍርድ ሲነበብ በቃል ብቻ የቀረበ በመሆኑ ፍርድ ቤቱ መስማማታቸው መግለጻቸው እንደተጠበቀ ሆኖ መዝገቡን መርምሮ የሚከተለው ፍርድ ተሠጥቷል።

ፍርድ

ለዚህ ፍርድና ውሳኔ መነሻ የሆነው ከሳሽ በቀን 24/10/2014 ዓ.ም በተፃፈ የክስ አቤቱታ የግልግል ዳኛ እንዲሾም በሚል በተጠሪ ላይ ያቀረቡት ክስ ነው። ዝርዝሩን ስንመለከት ተጠሪ ጂ-ግሎባል ጋዝና ኬሚካል ኃ/የተ/የግ/ማህበር በተባለ ድርጅት ውስጥ ባለአክሲዮንና የማህበሩ ዋና ስራ አስኪያጅ መሆናቸውን በመግለጽ አመልካችም እንደዚሁ የማህበሩ ባለድርሻና ምክትል ስራ አስኪያጅ እንደሆኑ ፤ እንደምክትል ስራ አስኪያጅነታቸውም ሆነ እንደ አንድ ተራ የማህበሩ አባል ከድርጅቱ ማግኘት የሚገባቸውን አገልግሎቶች ለማግኘት እንዳልቻሉ ፤ በተለይም በቅርቡ ማህበሩ እ.አ.አ የ2020/2021 በጀት ዓመት የትርፍ ክፍፍልን ለማህበሩ ምጣኔ ሀብት ማሳደጊያነት ለማዋል ያስተላለፈውን ውሳኔ የያዘ ቃለ ጉባዔ

የክ/መ/ቁ 00548
ሐምሌ 26 ቀን 2014 ዓ.ም

በሰነዶች ማረጋገጫና ምዝገባ አገልግሎት ፊት ቀርበው ከመፈረማቸው በፊት በህግና በማህበሩ መተዳደሪያ ደንብ በተፈቀደላቸው መሰረት የማህበሩን ሂሳብና ሰነዶች በድርጅቱ ጽ/ቤት ተገኝተው ለመመልከት ሞክረው የነበረ ቢሆንም እርሳቸውም ሆነ ይዘውት የቀረቡት የሂሳብ ባለሙያ ከበር እንኳ በተጠሪ ትዕዛዝ በጥበቃዎች እንዳይገቡ የተከለከሉ በመሆኑ ቃለ ጉባዔው ያልተፈረመ ከመሆኑም በላይ በህግና በማህበሩ መተዳደሪ ደንብ የተጠበቀላቸው መብት እንደተጣሰ ፤ ጉዳዩን በስምምነት ለመፍታት በማሰብ አስታራቂ ሽማግሌዎችን ቢልኩም የሽማግሌዎቹ ጥረት ሳይሳካ እንደቀረ ፤ አመልካች የመብቶቻቸውን መጣስ ተከትሎ ከድርጅቱ ስራ አስኪያጅ ጋር የተፈጠረውን አለመግባባት በማህበሩ መተዳደሪያ ደንብ አንቀጽ 12 እና በግልግል ዳኝነትና የእርቅ አሰራር አዋጅ ቁጥር 1237/2014 ድንጋጌዎች መሰረት የግልግል ጉባዔ ለማቅረብ በማሰብ በ22/10/2014 አዘጋጅተው በስማቸውና በድርጅቱ ስም የላኩተን የግልግል ጉባዔ መሰየሚያ ደብዳቤ ቢልኩም በተጠሪ ትዕዛዝ ደብዳቤውን ወደ ድርጅቱ ጽ/ቤት ይዘው የሄዱት ምስክሮቻችን እንዲመለሱ እንደተደረገ ፤ አመልካች በ2ኛ ተጠሪ ማህበር መተዳደሪያ ደንብ አንቀጽ 12 መሰረት አቶ አብዱልዋሲ ይሱፍ መንዲዳ የተባሉ የግልግል ዳኛ የመረጡ በመሆኑ 1ኛ ተጠሪ በፍርድ ቤት ትዕዛዝ ቀርበው የበኩላቸውን የግልግል ዳኛ እንዲመርጡና ሁለቱ ዳኞች ሰብሳቢ ዳኛ መርጠው የግልግል ዳኝነት ጉባዔ እንዲሰየም እንዲወሰንላቸው ፤ ተጠሪ ውሳኔው በተሰጠ በ15 ቀናት ውስጥ ግልግል ዳኛቸውን የማይመርጡ ቢሆን በአመልካች ጠያቂነት የተጠሪ ግልግል ዳኛ እንዲመረጥና በፍርድ ቤቱና በአመልካች የተመረጡት ዳኞች ሰብሰቢ መርጠው የግልግል ዳኝነት ጉባዔ እንዲሰየም እንዲወሰንላቸው ፤ ተጠሪ ለዚህ ክርክር ምክንያት በመሆናቸውና ክሱ እንዳያስፈልግ አመልካች ያደረጉትን ጥረት መ ሰረት አድርጎ ለዚህ የግልግል ዳኝት ጉባዔ ይሰየምልን ክስ አመልካች ያወጡትን የወጪና ኪሳራ

ዝርዝር በቁርጥ አለያም አመልካች ዝርዝር እንዲያቀርቡ በማዘዝ ተጠሪ እንዲተኩላቸው እንዲወስንልን በሚል ዳኝነት ጠይቀዋል። የሰውና የሰነድ ማስረጃነትም ከመግለጫ ጋር አያይዘው አቅርበዋል።

በፍርድ ቤቱ ትዕዛዝ መሰረት መጥሪያ ከከሳሽ ክስ እና ማስረጃ ዝርዝር ጋር የደረሳቸው ተከሳሽ በሐምሌ 08 ቀን 2014 ዓ.ም በተጻፈ መ/መልስ አቅርበዋል። ተከሳሽ የመጀመርያ ደረጃ የክስ መቃወሚያ በማለት በከሳሽ ክስ አከራካሪ ሁኔታ በማያስከትል ሁኔታ እና ግልጽ በሆነ አጻጻፍ ስላለመቅረቡ በሚል ከሳሽ በክሳቸው ላይ በአንድ በኩል አጣሁ የሚሉት መብት በቀጥታ ከማህበሩ የተጠየቀ መሆኑን ገልጸው በሌላ በኩል ደግሞ ክስ ያቀረቡት በተከሳሽ ላይ እንደ አንድ ማህበርተኛ እንደሆነ ፤ ከሳሽ ራሳቸው በክሳቸው ላይ የግልግል ጉባኤ መሰየምያ ደብዳቤ በተከሳሽ እና በማህበሩ ስም መላካቸውን እንዲሁም ስለራሳቸው እና ተከሳሽ ስራ አስኪያጅነት የገለጹ በመሆኑ ከዚህ ክሳቸው ተከሳሽ ክስ የቀረበብኝ እና አለ የተባለው አለመግባባት ከስራ አስኪያጅነቴ (ከድርጅቱ) ጋር በተያያዘ ይሁን እንደ አንድ ማህበርተኛ መረዳት እንዳዳገታቸው ፤ የፍ/ሥ/ሥ/ሕ/ቁ. 216 (1) ማናቸውም ለፍርድ ቤት የሚቀርብ ክስ ሁሉ ክሱ የቀረበለት ፍርድ ቤት ጉዳዩን በሚገባ መርምሮ ትክክለኛውን ፍርድ ለመስጠት በሚያስችለው በዚያው ነገር ሌላ አከራካሪ ጉዳይ በማያስከትል ሁኔታ እና ግልጽ በሆነ አጻጻፍ መቅረብ እንዳለበት የሚደነግግ ሲሆን የከሳሽ ክስ ግን ፍርድ ቤቱ ጉዳዩን አከራክሮ ፍርድ ሊሰጥ በሚችልበት ግልጽነት ያልቀረበ እንዲሁም ተከሳሽ ጉዳዩን ተረድቼ ምላሽ ልሰጥ በማልችልበት ሁኔታ የቀረበ በመሆኑ የተከበረው ፍርድ ቤት የከሳሽን ክስ ውድቅ አድርጎ ከበቂ ኪሳራ ጋር እንዲያሰናብተኝ ፤ ይህ ባይሆን ከሳሽ በተከሳሽ ላይ እንደ ማህበርተኛ ይሁን በድርጅቱ ስራ አስኪያጅነቴ ክስ ያቀረቡት ግልጽ በሚያደርግ መልኩ አቤቱታቸውን አሻሽለው እንዲያቀርቡ እና በከሳሽ ላይ ለደረሰው መጉላላት በቂ ኪሳራ እንዲከፍሉ እንዲታዘዝልኝ እንዲሁም

በሁለተኛ ነጥብ ከሳሽ ዳኝነት የጠየቁት ከማን ላይ ስለመሆኑ ግልጽ ስላላመሆኑ በሚል ከሳሽ በአቤቱታቸው ላይ በተደጋጋሚ (ቢያንስ ሁለት ግዜ) የሚጠይቁት ዳኝነት ከ2ኛ ተጠሪ መሆኑን ገልጸው በአቤቱታቸው ተራ ቁጥር 3(1) ላይ ደግሞ 1ኛ ተጠሪ የግልግል ዳኛ እንዲመርጡ እንዲገደዱላቸው ዳኝነት መጠየቃቸው ተከሳሽ/ተጠሪ አንድ ብቻ በሆነበት ሁኔታ ዳኝነታቸው በማያሻማ ሁኔታ መረዳት እንደማይቻል ፤ ተጠሪ አንደኛም ሆነ ሁለተኛ ስላልሆኑ እና ጉዳዩ የማይመለከታው በመሆኑ የከሳሽን ክስ ውድቅ አድርጎ ከበቂ ኪሳራ ጋር እንዲያሰናብታቸው ፤ በሶስተኛ ነጥብ በክሱ ውስጥ የሚያገባቸው ወገኖች ሳይገቡ ስለመቅረታቸው በሚል ከላይ በተራ ያቀረቡት መቃወሚያዎች እንደጠጠበቁ ሆነው ከሳሽ በከሳቸው ላይ ከተከሳሽ ጋር አለ ያሉት አለመግባባት ግራ ቀኙ ማህበርተኛ ከሆኑበት ከላይ የተጠቀሰው ድርጅት ጋር የተያያዘ መሆኑን እና አለመግባባቱም በማህበርተኞች መካከል መሆኑን እንደገለጹ ፤ ሆኖም ከከሳሽ የሰነድ ማስረጃ ተራ ቁ. 3 መረዳት እንደሚቻለው የማህበሩ አባላት ከሳሽ እና ተከሳሽ ብቻ ሳይሆኑ ሌሎች ሁለት ግለሰቦችም እንደሆኑና የማህበሩ ባለአክስዮኖችን በተመለከተ የሚነሳ በማህበርተኞች ወይም በመረጧቸው ገላጋዮች የሚፈታ ጉዳይ ሁሉንም ማህበርተኞች እንጂ ከሳሽ እና ተከሳሽን ብቻ የሚመለከት ባለመሆኑ 1ኛ/ አዜብ አብዱላሂ ፤ 2ኛ/ ናዋል አብዱላሂ በፍ/ሥ/ሥ/ሕ/ቁ. 39 (2) መሰረት ወደ ክርክሩ እንዲገቡ ትእዛዝ እንዲሰጥ አመልክተዋል። በአማራጭ በፍሬ ጉዳዩ ላይ በተከሳሽ የቀረበ መልስ ብለው ከሳሽ በግላቸው እንድ የግልግል ዳኛ የመሰየም መብት የሌላቸው ስለመሆኑ በሚል አጭር ርዕስ ከሳሽ የግልግል ጉባኤ ይቋቋምልኝ ለሚለው አቤቱታቸው የመብቴ ምንጭ ነው ያሉት ከሳሽ እና ተከሳሽ ማህበርተኛ የሆኑበት የ ጂ ግሎባል ጋዝ እና ኬሚካል ኃ/የተ/የግ/ማህበር መተዳደርያ ደንብ እንቀጽ 12 ቢሆንም የግልግል ጉባኤ መሰየምን በተለይ በሚደነግግበት ንኡስ ቁጥር 2 ቃል በቃል የሚለው "...

በአባላት መካከል የሚነሳ አለመግባባት በአባላት ለተመረጡ ሁለት ገላጋዮች ይቀርባል" እንጂ (ማህበሩ ወደፊት ሌሎች አባላት ሌኖሩት እንደሚችሉ ታሳቢ ያደረገ በመሆኑ) መስራች ሁለቱ አባላት ማህበሩ ውስጥ ሌሎች አባላት ቢጨመሩም እንኳን አንድ አንድ ገላጋይ የመምረጥ መብት ይዘው ይኖራሉ የሚል እንዳልሆነ ፤ የመተዳደርያ ደንቡ በተፈረመበት እና ማህበሩ በተቋቋመበት ግዜ የማህበሩ አባላት ሁለት ብቻ የነበሩ በመሆኑ (የከሳሽ የሰነድ ማስረጃ ቁ. 1 እና 2) ከሳሽ አለመግባባት ኖሮ ቢሆን አንድ ገላጋይ የመሰየም መብት ይኖራቸው የነበረ ቢሆንም በአሁኑ ወቅት ግን የአባላት ቁጥር ቢያንስ (እንደ ከሳሽ የሰነድ ማስረጃ ቁ. 3) አራት እንደደረሰ ፤ የከሳሽ የራሳቸው ድርሻ ከሃምሳ በመቶ እንደወረደ ፤ ሌላኛው መስራች አባል ከማህበሩ እንደወጡና ሌሎች ሶስት አዳዲስ አባላት (ተከሳሽን ጨምሮ ወደ ማህበሩ እንደገቡ ፤ ከላይ የተጠቀሰው የማህበሩ መተዳደርያ ደንብ አንቀጽ 12 ለከሳሽ ከሁለት የግልግል ዳኞች አንዱን የመሰየም መብት ሰጥቶ ሌሎች ሶስት የማህበሩ አባላት ግን በጋራ አንድ የግልግል ዳኛ ብቻ እንዲሰይሙ የሚያስገድድ ሊሆን እንደማይችልና የከሳሽ የሽምግልና ዳኛ ስያሜ ህገወጥ ነው ሊባል እንደሚገባ ፤ አለመግባባት አለ ከተባለ የማህበሩን አባላት በሙሉ የሚመለከት ስለመሆኑ በሚል በከሳሽ እና በተከሳሽ መካከል አለ ተብሎ በከሳሽ የተጠቀሰው አለመግባባት ጂ ግሎባል ጋዝ እና ኬሚካል ኃ/የተ/የግ/ማህበር ውስጥ ከሳሽ ካላቸው ድርሻ ጋር የተያያዘ ስለመሆኑ በከሳሽ እንደተጠቀሰ ፤ ከላይ በዝርዝር እንደተገለጸው ደግሞ የማህበሩ አባላት ከሳሽ እና ተከሳሽ ብቻ ሳይሆኑ ቢያንስ ሌሎች ሁለት ባለአክስዮኖችም ጭምር ስለሆኑ በከሳሽ እና ተከሳሽ መካከል ብቻ የሚፈታ ማህበርተኞች ካላቸው የአክስዮን ድርሻ እና ካቋቋሙት ማህበር እንቅስቃሴ ጋር የተያያዘ አለመግባባት ሊኖር እንደማይችል ፤ ከዚህ አንጻር አለመግባባት አለ ከተባለ እና የግልግል ዳኛ ይሾም የሚባል ከሆነ የግልግል ዳኞች ሊሾሙ

የሚገባው በማህበሩ አባላት የጋራ ውሳኔ እንጂ በከሳሽ እና ተከሳሽ ብቻ አለመሆኑን ፍርድ ቤቱ እንዲረዳላው ፤ ከላይ በቀረበው የሀግ እና የፍሬ ነገር ክርክር መሰረት ከሳሽ ቀድሞውኑ በህግ ፊት ተቀባይነት ያለው የግልግል ዳኛ ሹመት ያላደረጉ በመሆኑ እና ተከሳሽም በተናጥል የግልግል ዳኛ እንዲሾም ሊያስገድዱ ስለማይችሉ የከሳሽን አቤቱታ ውድቅ በማድረግ እንዲሁም ተከሳሽ በዚህ ክስ ምክንያት ያወጣሁትን የጠበቃ አበል እና ሌሎች ወጪ እና ኪሳራዎች ከሳሽ እንዲተኩ እንዲወሰን ፤ ፍርድ ቤቱ የግልግል ዳኛ ተሹሞ ፤ አለ የተባለው አለመግባባት ሊታይ ይገባል የሚል ቢሆን ከላይ በዝርዝር በተገለጹት የህግ እና የፍሬ ነገር ምክንያቶች የከሳሽን የግልግል ዳኛ ሹመት ውድቅ በማድረግ የማህበሩ አባላት በሙሉ ሁለት የግልግል ዳኞች በጋራ እንዲመርጡ እና ተከሳሽ በዚህ ክስ ምክንያት ያወጣሁትን ወጪ እና ኪሳራዎች ከሳሽ እንዲተኩ እንዲወሰን በሚል ዳኝነት ጠይቀዋል። ተጠሪ ከመልሳቸው ጋር የከሳሽ የሰነድ ማስረጃ የተከሳሽም መሆኑን በመግለጽ የሰው ምስክር ጠቅሰው እያይዘው አቅርበዋል።

በመቀጠልም ፍርድ ቤቱ ክስ በሰማበት ቀን ከሳሽ ቀርበው በመቃወሚያ ላይ ክስ ከሳቸው ግልግል ዳኝነት ብቻ ለማቋቋም በሚል እንደሆነና ዝርዝር የሚቀረብው በግልግል ጉባኤ በሚኖረው ዳኝነት እንደሆነ ፤ አለመግባባቱን በግልጽ እንዳመለከቱ ፤ በስራ አስኪያጅነታቸው መሆኑን በዳኝነታቸው ከላይ በግልጽ እንዳለከቱ ፤ አንደኛ እና ሁለተኛ ተጠሪ የሚለው የአጻጻፍ ስህተት ብቻ እንደሆነ ፤ አንቀጽ 12 ስምምነታቸው ግልጽ እንደሆነና ግልጽ አይደለም ቢባል አለመግባባት ባለባቸው አባላት ሊቀርብ እንደሚችል ፤ ሌሎች አባላት እንኳን ሊጠሩ የሚገባ እንዳልሆነ በዋነኝነት አስረድተዋል። በመቃወሚያው ላይ ተከሳሽ ማጠቃለያ ሀሳብ ሲሰጡ በስራ አስኪያጅነት የሚለው ቢያዝም ከድርጅት ስራ አስኪያጅ የሚነሳ አለመግባባት በግልግል ዳኝነት ይታያል የሚል እንደሌለ ፤ በስራ አስኪያጅ ሀላፊነት ከሆነ በግልግል

የሰ/መ/ቁ 00548
ሐምሌ 26 ቀን 2014 ዓ.ም

ዳኝነት ሊገደዱ እንደማይችሉና በስራ አስኪያጅ ሀላፊነት የሚለው ስምምነታቸው እንደማያሳይ ፤ ማንኛውም አለመግባባት ሳይሆን ስምምነቱ በማህበር አባላት ሲሆን ብቻ እንደሆነ ፤ በአዲሱ አዋጅ ቁጥር 1234 የግልግል ዳኝነት ጥያቄ በጠባቡ መተርጎም እንዳለበት ፤ በአባላት መካከል አለመግባባት በሚል ማስቀመጡ ማህበሩ ሲቋቋም ሁለት አባላት ብቻ የነበሩ በመሆናቸው አባላት ሲገቡ የመምረጥ መብት እንዳላቸው ፤ የከሳሽ የሰየሙት ሀገወጥ እንደሆነ በመግለጽ አስረድተዋል።

እንዲሁም በፍሬ ጉዳይ ላይ ግራቀኙ በዋነኝት በጹኁፍ ያቀረቡትን በቃል በመግለጽ አስመዝግበዋል።

አጠቃላይ የግራቀኙ ያስመዘገቡት ቃል ከመዝገቡ ጋር ሰፍሮ ስለሚገኝ ድጋሚ በብይን ፍርድ ሀተታው ላይ ማስፈሩ አስፈላጊ ሆኖ አልተገኘም።

እንግዲህ በዚህ መዝገብ የተያዘው ክርክር ይዘትና ሂደት አጠር ባለ መልኩ ሲታይ ከላይ የተመለከተውን ሲመስል ፍርድ ቤቱም ከተከሳሽ መቃወሚያ እና ከግራቀኙ የፍሬ ጉዳይ ክርክር በመነሳት፡-

- የከሳሽ ክስ ግልጽነት የጎደለው ፤ በማን ላይ መቅረብ የሚገባው መሆኑን ሳይለይ ፤ በጉዳዩ ላይ የሚያገባቸው ሰዎች ሳይካተቱ የቀረበ ክስ ነው ሊባል ይገባል ወይስ አይገባም? ወይም በፍርድ ቤቱ ትዕዛዝ ወደክርክሩ የግድ ሊገቡ ይገባል? ወይስ አይገባም?
- ከሳሽ ግልግል ዳኛ እንዲሰየም ጠይቀው በራሳቸው የመሰየም መብት አላቸው ወይስ የላቸውም? የግልግል ዳኝነት ጉባኤ ሊቋቋም ይገባል ወይስ አይገባም? የሚለውን ነጥቦች በዋና ጭብጥነት በመያዝ ሌሎች ነጥቦች በተያዘው ጭብጥ ስር ምላሽ የሚያገኙ ሆነው ግራ ቀኙ ያቀረቡትን ክርክርና ማስረጃ ለጉዳዩ አግባብነት ካላቸው የህጉ ክፍሎች ጋር በማገናዘብ ከዚህ እንደሚከተለው መርምሯል።

በቅድሚያ ፍርድ ቤቱ ተከሳሽ ያነሷቸውን መቃወሚያ ነጥቦች እንደሚከተለው መርምሯል።

እንደመረመረውም ማንኛውም ሰው በፍርድ ቤት ወይም በሌላ በህግ ስልጣን በተሰጠው አካል ቀርቦ በፍርድ ታይቶ ሊወሰን የሚችልን ጉዳይ ክስ ወይም አቤቱታ በማቅረብ ፍትህ የማግኘት ህገ-መንግስታዊ መብት እንዳለው በኢፌዲሪ ህግ አንቀፅ 37 (1) ስር ተመልክቷል። ነገር ግን ማንኛውም ሰው ክስ ለማቅረብ ህገ-መንግስታዊ መብት አለው ሲባል ክሱ የቀረበላቸው ፍርድ ቤቶችም ሆነ ሌላ በህግ አግባብ የተቋቋመ ፍትህ ሰጪ አካል የቀረበላቸውን ክስና አቤቱታ ሁሉ ተቀብለው ያከራክራሉ ውሳኔም ይሰጣሉ ማለት ሳይሆን ከሳሽ በቅድሚያ ክስ በቀረበበት ጉዳይ ላይ መብትና ጥቅም ያለው መሆኑን ማሳየት ፣ ከሳሽ ከተከሳሽ ላይ የሚጠይቀው መብትና ጥቅም እንዳለው ማረጋገጥ ፣ ክስ የቀረበበት ጉዳይም በፍርድ ታይቶ ሊወሰን የሚችል ፣ ክሱ የቀረበለት ፍርድ ቤትም ጉዳዩን አይቶ ለመወሰን ስልጣን ያለው እና ጉዳዩ ካሁን በፊት በውሳኔ ወይም በእርቅ ያልተቋጨ ወይም በመታየት ላይ ያልሆነ ፣ በህግ ተወስኖ የተቀመጠው የክስ ማቅረቢያ ጊዜውም ያላለፈ መሆን ይኖርበታል። ይህንም ከፍ/ብ/ሥ/ሥ/ህ/ቁ 4 ፣ 5 ፣ 8 ፣ 9 ፣ 33(2)(3) ፣ 231 (1)(ሀ)(ለ) እና 244 ድንጋጌወች ይዘት ለመረዳት ይቻላል። በሌሎች መሰረታዊ ህጎችም እነዚህንና መሰል የመጀመሪያ ደረጃ መቃወሚያወች ተደንግገው ይገኛሉ።

በፍርድ ቤቱ የቀረበውን የከሳሽን ክስ ስንመለከት ከሳሽ ከተከሳሽ ጋር ባላቸው አለመግባባት የግልግል ጉባኤ በፍርድ ቤቱ እንዲቋቋምላቸው አመልክተዋል። ተከሳሽ በበኩላቸው በመቃወሚያቸው የክሱን ግልጽነት በማንሳት ግልጽ አይደለም በሚል ተቃውመዋል። ሆኖም ፍርድ ቤቱ ክስ በሰማበት ቀን ከነበረው ክርክር ጭምር እንዳረጋገጠው ከሳሽ ተከሳሽን ተጠሪ በማድረግ እንደምክትል ስራ አስኪያጅነታቸው ማግኘት የሚገባቸውን አገልግሎት ከሳሽ በሚሰጡት ትዕዛዝ ጭምር መብታቸው እንደተጣሰ መግለጻቸው

ክሱን በቀጥታ ያቀረቡት ማህበሩ ላይ ሳይሆን ራሳቸው ተጠሪ በስራአስኪያጅነት ሀላፊነታቸው እንደሆነ ለማረጋገጥ ተችሏል። ከዚህ ባሻገር ተከሳሽ በክስ መስማት ወቅት በስራ አስኪያጅነት ስልጣናቸው ወይም ሀላፊነታቸው ጋር የሚያያዝ አለመግባባት በግልግል ዳኝነት ይታያል የሚል ስምምነት እንደሌለ ተከራክረዋል። ሆኖም ተከሳሽ የጠቀሱትና ከሳሽ ያቀረቡት የሰነድ ማስረጃ የማህበሩ መተዳደሪያ ደንብ አንቀጽ 12 ስለግልግል በሚል ርዕሱ በአባላት መካከል የሚነሳ አለመግባባትን በግልግል ዳኝነት እንደሚታይ የሚያመለክት ሆኖ እናገኘዋለን። ከዚህም በተጨማሪ በማህበሩ ሀጋዊ ሀልውና ወቅት በአባላት መካከል በሚል ንዑስ አንቀጽ 1 የሚደነግግ መሆኑ ሲታይ ማህበሩ ሀልውና ኖሮት የሚሰራው በስራአሰኪያጁ ወይም ሀጋዊ ወኪል መሆኑ እንደተጠበቀ ሆኖ አባላት እስከሆኑ ድረስ በመካከላቸው ከማህበሩ ስራ ጋር በተያያዘ የሚነሳ አለመግባባት በመረጡት መንገድ እንደሚፈታ ማስቀመጣቸው በዚህ ረገድ ተከሳሽ ያነሱትን መቃወሚያ ተገቢነት የሌለው በመካከላቸው ያለውን የማህበሩን መተዳደሪያ ደንብ መሰረት ያላደረገ እንደሆነ ያስረዳል። በመሆኑም ተከሳሽ በዚህ ረገድ ግልጽነት ይጎድለዋል በሚል ያቀረቡትን መቃወሚያ ፍርድ ቤቱ አልተቀበለውም። ከዚህ ውጪ ተከሳሽ በመቃወሚያ ነጥባቸው 1ኛ እና 2ኛ ተጠሪ እያሉ በክሱ ያቀረቡትን አንስተው የተቃወሙ ቢሆንም ከሳሽ ክስ በሚሰማበት ወቅት የአጻጻፍ ስህተት (PAIN SLIP ወይም A mistake in handwriting) ሆኖ ስለተገኘ ክስ ውድቅ ለማድረግም ሆነ መሰረታዊ ጉዳይ ሆኖ ለማሻሻል በቂ ምክንያት ሆኖ ስላተገኘ ፍርድ ቤቱ አልተቀበለውም።

በሌላኛው መቃወሚያ በክሱ ውስጥ የሚያገባቸው ወገኖች ሳይገቡ ስለመቅረታቸው በሚል ያነሱትን መቃወሚያ ስንመለከት ከላይ እንደተጠቀሰው የማህበሩ መተዳደሪያ ደንብ አንቀጽ 12 ስለግልግል በሚል ርዕሱ በአባላት መካከል የሚነሳ አለመግባባትን በግልግል ዳኝነት እንደሚታይ የሚደነግግ ሆኖ

እናገኘዋለን። ይህም ማለት አባላት ባላቸው ድርሻ ወይም የሼር መጠን ልክ በሚል ሳይሆን በአባላት መካከል ያሉ አለመግባባቶችን በሚል ማስቀመጡ ሁሉም አባል የግድ ሊሆን ስለማይገባ በዚህ ረገድ የቀረበው መቃወሚያ ነጥብ ፍርድ ቤቱ ሳይቀበለው አልፎታል።

በሁለተኛ ጭብጥ የተያዘውን ስንመለከት የፍሬ ጉዳይ ክርክር ሆኖ እናገኘዋን። በዚህም መሰረት ፍርድ ቤቱ መዝገቡን መርምሯል።

በመሰረቱ በህግ አግባብ የተደረጉ ውሎች በተዋዋይ ወገኖች ላይ የህግ ያህል አስገዳጅነት እንዳላቸው በፍ/ብ/ህግ ቁጥር 1731/1/ ስር ተመልክቷል። ከዚህም በመነሳት ተዋዋይ ወገኖች በገቡት የውል ስምምነት የመገዛት፤ በውሉ መሠረት በየበኩላቸው ግዴታዎቻቸውን የመፈፀም ግዴታ ያለባቸው ሲሆን አንደኛው ተዋዋይ ወገን የራሱን ግዴታ ከተወጣ በኋላ ሌላኛው ተዋዋይ በውሉ መሠረት መፈፀም ያለበትን ተግባር ሳይፈጽም ከቀረ ወይም ውሉን ካላከበረ ወይም ከጣሰ ሌላኛው ተዋዋይ ወገን ውሉን መሠረት በማድረግ ጥያቄውን ማቅረብ ይችላል።

በሌላ በኩል ተዋዋዮች በውላቸውን በመካከላቸው አለመግባባት ቢፈጠር ይህ አለመግባባት በምን መልኩ ታይቶ መፈታት እና መወሰን እንዳለበት ለመስማማት ይችላሉ። በዚህም መንገድ ከተስማሙ በኋላ አለመግባባቱ ቢፈጠር አለመግባባቱ መታየት እና መፈታት ያለበት በስምምነቱ ላይ በተቀመጠው አማራጭ የሙግት መፍቻ መንገድ በመሆኑ እንደኛው ተዋዋይ ወገን አለመግባባት ተፈጥሯል የሚል ከሆነ ይህን ጥያቄ ማቅረብ ያለበት ውሉን መሠረት በማድረግ ሊሆን ይገባል በዚህ ጊዜ ፍ/ቤቱ በግራ ቀኙ መካከል የተፈጠረውን አለመግባባት አይቶ መወሰን የማይችል በመሆኑ እና ስልጣንም የሌለው በመሆኑ ጥያቄውን ለፍ/ቤት ሊቀርብ አይችልም።

በተያዘው ጉዳይ በግራቀኙ የተፈጠረውን አለመግባባት በማህበሩ መተዳደሪያ ደንብ አንቀጽ 12 ስር በመካከላቸው አለመግባባት ከተነሳ ጉዳዩን በሰላማዊ መንገድ ለመጨረስ ካልሆነ በግልግል ዳኝነት ሊመራ እና ሊታይ እንደሚገባ በግልጽ ተመልክቷል። ከዚህ የስምምነት ቃል መረዳት እንደሚቻለው በከሳሽ እና ተከሳሽ መካከል ውሉን መሰረት አድርጎ የሚነሳ አለመግባበት በሰላማዊ መንገድ ሊፈታ ካልቻለ ወደ ግልግል ዳኝነት መሄድ እንደሚቻል ነው።

በውሉ ላይ አለመግባባቱ ከእማራጭ የሙግት መፍቻ መንገዶች አንዱ በሆነው በግልግል ዳኝነት ታይቶ መወሰን እንዳለበት ከተቀመጠ በልዩ ሁኔታ በህግ አለመግባባቱ ታይቶ መወሰን ያለበት በግልግል ዳኝነት ጉባኤ ሊሆን ይገባል ። በውሉ ላይ ገላጋይ ዳኛው ተመርጦ በግልጽ ካልተቀመጠ እና እንደኛው ተዋዋይ ወገን አለመግባባቱ በውሉ መሠረት በግልግል ዳኝነት ታይቶ እንዲወሰን ለማድረግ የበኩሉን የግልግል ዳኛ ካልመረጠ ሌላኛው ተዋዋይ ወገን የግልግል ዳኞች ጉባኤ እንዲሠየም ለፍ/ቤቱ ጥያቄውን ማቅረብ ይችላል። ከዚህ ውጪ አለመግባባት ስለመኖሩ ተከሳሽ በግልጽ ባልካዱበት ሁኔታ በማናቸውም ረገድ አለመግባባቱ መኖሩን አይቶ የሚወስነው ግልግል ዳኝነት ጉባኤው በመሆኑ በግልግል ዳኝነት እና የዕርቅ አሰራር ስርዓት አዋጅ ቁጥር 1234/2013 አንቀጽ 5 በግልጽ በጉዳዩ ላይ የፍርድ ቤት ጠልቃገብነት የሚከለክል በመሆኑ ተከሳሽ የግልግል ጉባኤ እንዳይቋቋም ወይም የከሳሽ የራሳቸውን መሾማቸው መቃወማቸው ህግንና ስምምነትን መሰረት ያደረገ ሆኖ አልተገኘም።

ከዚህ በተጨማሪ በተያዘው ጉዳይ ከሳሽ ተከሳሽ በመልሳቸው ያነሱት ክርክር እንደተጠበቀ ሆኖ ከሳሽም የራሳቸውን ገላጋይ ዳኛ ሊሾሙ አይገባም በማለት ያቀረቡት ክርክር ስምምነቱንና ከላይ የተጠቀሰውን የግልግል ዳኝነት እና የዕርቅ አሰራር ስርዓት አዋጁን መሰረት ያደረገ ባለመሆኑ ውድቅ የተደረገ ሲሆን ፍርድ

የኮ/መ/ቁ 00548
ሐምሌ 26 ቀን 2014 ዓ.ም

ቤቱ ፍርድ ለመስጠት ግራቀኙን ከሰየመ በኋላ ተከሳሽ በጠበቃቸው አማካኝነት በግልግል ዳኝነት እንዲፈታ አሁን ላይ ደንበኛዬ ተስማምተዋል ማለታቸው ከላይ ፍርድ ቤቱ የሰጠውን ፍርድ የሚያጠናክር ሆኖ ተገኝቷል። በአጠቃላይ ተከሳሽ በቀረበባቸው ክስ እንደተመለከተውና ግልግል ጉባኤ እንዲቋቋም ፍቃደኛ መሆናቸውን በመጨረሻ በመግለጻቸው በግራቀኙ መካከል የተፈጠረውን አለመግባባት አይቶ የሚወስን የግልግል ዳኞች ጉባኤ ሊቋቋም ይገባል ተብሎ ተከታዩ ውሳኔ ተሰጥቷል።

ውሣኔ

1. በከሳሽና ተከሳሽ አባል በሆኑበት ጂ.ግሎባል ጋዝና ኬሚካል ኃ/የተ/የግ/ማህበር መተዳደሪያ ደንብ አንቀጽ 12 መሰረት በመካከላቸው የተፈጠረውን አለመግባባት አይቶ የሚወስን እንድ የግልግል ዳኞች ጉባኤ እንዲቋቋም ተወስኗል።
2. በከሳሽ በኩል አቶ አብዱልዋሲ ይሱፍ መንዲዳ የተባሉ የግልግል ዳኛ እንዲሆኑ የተመረጡ በመሆናቸው ተከሳሽ የራሳቸውን ገላጋይ ዳኛ በ15 ቀናት ውስጥ እንዲመረጡ ተወስኗል። ተከሳሽ በዚህ ጊዜ ውስጥ መምረጥ ካልቻሉ በፍርድ ቤቱ ሬጅስትራር በኩል የተከሳሽ ገላጋይ ዳኛ እንዲሾም ተብሏል። የግልግል ጉባዔውን ሰብሳቢ ሁለቱ በጋራ እንዲመርጡ ፤ነገር ግን ሁለቱ ገላጋይ ዳኞች በ15 ቀናት ውስጥ ሰብሳቢውን መመረጥ ካልቻሉ በእንደኛው ወገን አመልካችነት ሠብሳቢው ዳኛ በፍ/ቤቱ ሬጅስትራር በኩል ይሾም።
3. ወጪና ኪሣራን በተመለከተ ተከሳሽ ፍርድ እስተሰጠበት ቀን ድረስ በመቃወም ጠበቃ ወክለው ሲከራከሩ የቆዩ በመሆናቸው ወጪና ኪሳራ ሊተኩ ስለሚገባ ለዳኝነት የከፈሉትን ብር 90፤ ለቴምብር ቀረጥ እና ተያያዥ መሰል ወጪዎች በቁርጥ ብር 500 ፤ የጠበቃ ሀግ አገልግሎት አበል ክፍያ

የፌ/መ/ቁ 00548
ሐምሌ 26 ቀን 2014 ዓ.ም

በተመለከተ የክርክሩን ይዘትና የቀረበውን ክርክር ግምት ፤ የጉዳዩን የውስብስብነት መሆን አለመሆኑ መጠን ጉዳዩ የፈጀውን ጊዜ ከግምት ውስጥ በማስገባት እንዲሁም የቀረበውን የጥብቅና ውለ በማመዛዘን በቁርጥ ብር 7,000፤ በአጠቃላይ በድምሩ ብር 7,590 (ሰባት ሺህ አምስት መቶ ዘጠኝ ብር) ይህ ውሳኔ ከተሰጠበት ቀን ከዛሬ ጀምሮ ከሚታሰብ ሀጋዊ ወለድ ዘጠኝ በመቶ (9%) ተከሣኝ ለከሣሽ ይክፈሉ። ታሟል። ይፈጸም።

ትዕዛዝ

- ግራ ቀኙ ሲጠይቁ የፍርድና ውሳኔው ግልባጭ ይሰጣቸው።
- ቅር ለተሠኘ ይግባኝ መብት ነው።
- መዝገቡ ውሳኔ ያገኜ በመሆኑ ተዘግቷል ወደ መዝገብ ቤት ይመለስ።

የክ/መ/ቁ 00548
የካቲት 07 ቀን 2015 ዓ.ም

የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት
በንግድና ኢንቨስትመንት ምድብ 3ኛ ንግድ ችሎት

ዳኛ- ጌራወርቅ ይትባረክ

ከሳሽ፡- አብዱሰመድ ኢብራሂም ጋቶ ..... ጠበቃ አብዱልሀኪም ጀማል ቀረቡ።

ተከሳሽ፡- አህመድ አሊ ኡመረዲን ..... አልተጠሩም።

መዝገቡ ከተዘጋ በኋላ ሊቀርብ የቻለው ከሳሽ በዛሬው ቀን በተጻፈ እና በቃለመሐላ በተረጋገጠ አቤቱታ እግድ እንዲሰጥላቸው በማመልከታቸው ነው። ፍርድ ቤቱም የከሳሽ ጠበቃ ቀርበው እንዲያስረዱ ባዘዘው መሰረት ቀርበው እግዱ አስቸኳይ እንደሆነ በአቤቱታቸው እንዳመለከቱ እና ካልተሰጠ ሰነድ የሚጠፋባቸው መሆኑን በቃ አስረድተዋል።

በመሆኑም ያቀረቡትን አቤቱታ አግባብነት ካለው የህግ ድንጋጌ አንጻር እንደሚከተለው መርምሮ ትዕዛዝ ሠጥቷል።

ትዕዛዝ

1. ከሳሽ ለዚህ ፍርድ ቤት አስቀድመው ባቀረቡት የክስ አቤቱታ መነሻነት ፍርድ ቤቱ ሀምሌ 26 ቀን 2014 ዓ.ም ፍርድና ውሳኔ መስጠቱ ይታወሳል። ለውሳኔው መነሻ የሆነው የግልግል ጉባኤ እንዲቋቋም የቀረበው ክስ ይዘቱ የማህበሩን ሂሳብና ሰነዶች በድርጅቱ ጽ/ቤት ተገኝተው ለመመልከት የጠየቁ ቢሆንም የተከለከሉ በመሆኑ በማንሳት ነው። ፍርድ ቤቱም በከሳሽና ተከሳሽ አባል በሆኑበት ጂ-ግሎባል ጋዝና ኬሚካል ኃ/የተ/የግ/ማህበር መተዳደሪያ ደንብ አንቀጽ 12 መሰረት በመካከላቸው

የተፈጠረውን አለመግባባት አይቶ የሚወስን አንድ የግልግል ዳኞች ጉባኤ እንዲቋቋም መወሰኑ ይታወሳል።

ከላይ አሁን ላይ ያቀረቡት የዕግድ አቤቱታን ፍርድ ቤቱ በግልግል ዳኝነትና የእርቅ አሰራር አዋጅ ቁጥር 1237/2014 ድንጋጌ አንቀጽ 9 አንጻር ሲመለከተው ድንጋጌው ይዘቱም ተዋዋይ ወገኞች የግልግል ዳኝነት ሂደቱ ከመጀመሩ በፊት ወይም ከተጀመረ በኋላ የግልግል ዳኝነት ስምምነቱን መሠረት በማድረግ ጊዜያዊ የመጠባበቂያ እርምጃ ትዕዛዝ ሊሰጥ እንደሚችል እና ይህም ፍርድ ቤቱ በጉዳዩ ፤ይ ጣ/ገብነትን እንደፈጸመ እንደማያስቆጥረው በግልጽ ተደንግጓል። በመሆኑም ፍርድ ቤቱ የግልግል ጉባኤ ከመጀመሩ በፊት ብቻ ሳይሆን ከተጀመረም በኋላ ፍርድ ቤቱ ጊዜያዊ የመጠበቂያ እርምጃዎች Provisional Interim Measure ሊሰጥ እንደሚችል በግልጽ ደንግጎ እንመለከታን።

ከዚህ አንጻር የቀረበውን አቤቱታ ስንመለከተው በእርግጥም ክሱ የነበረው ከማህበር አባልነት መብት ጋር ሰነዶችን የማየት እና የመመርመር መብት ጋር በተነሳ አለመግባባት መሆኑ ሲያመለክት በግልግል ጉባኤ ሂደት የሚጠው ውሳኔም ሆነ ትዕዛዝ እንደተጠበቀ ሆኖ አሁን ላይ የቀረበው እግድ ትዕዛዝ መመልከት ተገቢ ይሆናል።

በመሆኑም ከላሽ ባቀረቡት አቤቱታ ጥያቄ ፍርድ ቤቱ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 154 እና ተከታይ ድንጋጌዎች አንጻር እግድ ሊሰጥ የሚገባ ይሆናል። እግድ በባህሪው የሚሰጠው ሁለት አይነት ውጤት የሚያስከትል መሆኑ ሲረጋገጥ ሲሆን ከፍትሐብሄር ስነ-ስርዓት ህጉ የምንረዳው ከርከር የሚደረግበት ንብረት ፤ ሊጠፋ ፤ ሊበላሽ ወይም ሊሸሽ ይችላል ተብሎ ሲታመን አልያም ደግሞ ተከራካሪው ወገን ቢወሰንለት የሚያስፈጽምበት ንብረት እንዲኖረው በሚል ዕግድ እንደሚሰጥ እንረዳለን። ከዚህ አንጻር

እሁንም የቀረበው አቤቱታ የሂሳብና ሌሎች ሰነዶች በመሸሽ ላይ ወይም በመጥፋት ላይ መሆናቸው በቃለመሓላ የተረጋገጠ በመሆኑ እያንዳንዱ ሰነዶች ላይ ተቆጥረው እና ተከብረው ሊቆዩ የሚገባ መሆኑ ስለታመነበት ከላይ በተጠቀሰው የአዋጁ እና የስነስርዓት ድንጋጌው መሰረት እግዱ ሊሰጥ ይገባል ተብሏል።

2. በመሆኑም ከላይ በተራ ቁጥር 1 በተሰጠው ትዕዛዝ መሰረት በከሳሽና ተከሳሽ አባል በሆኑበት ጂ-ግሎባል ጋዝና ኬሚካል ኃ/የተ/የግ/ማህበር ውስጥ የሚገኙ ማህደሮች ማለትም ምን ያክል ቦክስ ወይም ሌላ አይነት ፋይል እንዳለ ተረጋግጦ የእያንዳንዱ ፋይል ውስጥ የሚገኘው ሰነድ ተለይቶ ተቆጥሮና ብዛቱ ተመዝግቦ እንዲቀመጥ ፍርድ ቤቱ እግድ ትዕዛዝ ሰጥቷል። ትዕዛዙ እንዲያስፈጽም ለወረዳው ጽ/ቤት ፤ ለአካባቢው ፖሊስ ጣቢያ እና ለራሱ ለጂ-ግሎባል ጋዝና ኬሚካል ኃ/የተ/የግ/ማህበር ሰራተኞች ይሰጥና የወረዳው ጽ/ቤት ከፖሊስ ጋር በመተባበር ግራቀኙ በተገኙበት እንዲፈጽም እና ውጤቱን እንዲልክ በጥብቅ ታዟል። ይጻፍ የፈጸም። ከሳሽ ለሚጠይቁት በመሸኛ ይጻፍ።

3. መዝገቡ ተዘግቷል። ወደ መዝገብ ቤት ይመለስ።

የማይነበብ የዳኛ ፊርማ አለበት።

Both FFI & Hcrt.

5

በኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

የልደታ ምድብ 1ኛ ኮንስትራክሽን ችሎት — የመ/ቁ፡- 302195 — ገፅ- 5
ቀን፡- ሚያዚያ 28-2014 ዓ.ም

ዳኞች፡- ፍቃዱ አንዳርጌ

ፋሲካ ዳኜ

ምትኩ ታፈሰ

አመልካች፡- የኢትዮጵያ መንገዶች አስተዳደር-ነገረ ፈጅ ጌትነት ኢርኮ...ቀረቡ

ተጠሪ፡- ቻይና ናሽናል ኬሚካል ኮምንኬሽን ግሩፕ (LTD)...አልቀረቡም

መዝገቡ ለዛሬ የተቀጠሩ ለምርመራ ሲሆን ተመርምሮ የሚከተለው ብይን ተሰጥቷል፡፡

ብይን

ለብይኑ መነሻ የሆነዉ አመልካች በቀን 29/07/2014 ዓ.ም የተሻፈ የእግድ አቤቱታ በማቅረቡ ነዉ፡፡ የአቤቱታዉ ይዘት በአጭሩ በአመልካች እና ተጠሪ መካከል ግንቦት 15 ቀን 2009 ዓ.ም በተደረገ የመንገድ ግንባታ ዉል ጋር በተያያዘ የሚነሳ አለመግባባትን የአዲስ አበባ ንግድና የዘርፍ ማህበራት ምክር ቤት የግልግል ደንብ ተግባራዊ እንዲሆን እና አለመግባባቱ በግልግል ዳኝነት ታይቶ ውሣኔ እንዲሰጥ በተደረገው ስምምነት መሰረት ውሉ ተፈርሞ ወደስራ ከተገባ በኃላ ተጠሪ በፈጸመው አይነተኛ እና መሰረታዊ የውል ጥሰት ምክንያት አመልካች የግንባታ ስራ ውል ስምምነቱን አቋርጧል፡፡ ይህንንም ተከትሎ በግንባታ ውሉ ጠቅላላ እና ልዩ ሁኔታ ድንጋጌዎች አንቀጽ 20.6 በተዘረጋው ድንጋጌ አግባብ በአዲስ አበባ ንግድና የዘርፍ ማህበራት ም/ቤት የግልግል ደንብ መሰረት ለሚደራጅ የግልግል ዳኝነት ጉባዔ በተቋራጩ ላይ በግምት ከብር1,000,000,000 (አንድ ቢሊየን) በላይ የገንዘብ መጠን ያለው ክስ ለማቅረብ የሰነድ ማስረጃ የማሰባሰብና ምስክሮች የመለየት ስራ እያከናወንን ስለሆነ የግልግል ዳኝነት አስኪቋቋም ሂደቱ ጊዜ የሚወስድ በመሆኑ ተጠሪ ንብረቱን ቢያሸሽ ወይም ለሶስተኛ ወገን ቢያዘዋውር በአመልካች ላይ ጉዳት ሊደርስ ስለሚችል ጉዳዩ ዉሳኔ እስኪያገኝ ድረስ በተጠሪ ተሽከርካሪዎች እና ማሽነሪዎች ላይ እግድ እንዲሰጠኝ በማለት የቀረበ አቤቱታ ነዉ፡፡ ከአቤቱታዉ ጋርም

በኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

የልደታ ምድብ 1ኛ ኮንስትራክሽን ችሎት

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እግድ እንዲሰጥባቸዉ በማለት 35 ማሽነሪዎች፣ 66 ተሽከርካሪዎች እና 25 መሳሪያዎችን ዝርዝር አቅርቧል።

ፍርድ ቤቱም የቀረበዉን አቤቱታ መነሻ በማድረግ በግልግል ዳኝነትነት እና እርቅ አሰራር ስርዓት አዋጅ ቁጥር 1237/2013 አንቀጽ 9፣20 እና 21 መሰረት ጊዜያዊ መጠባበቂያ ወይም የእግድ ትእዛዝ መጠባበቂያ ትዕዛዝ ጥያቄዉ ላይ ዉሳኔ ከመስጠቱ በፊት ተጠሪ ከቀረበዉ አቤቱታ ላይ አስተያየቱን እንዲያቀርብ መጥሪያ ልኳል። በዚሁ መሰረት ተጠሪ በቀን 18/08/2014 ዓ.ም የተፃፈ አስተያየት ያቀረበ ሲሆን ይዘቱም፣ ተጠሪ አመልካች እንደሚሉው ንብረቶችን ለማሸሽ ወይም ወደ ሦስተኛ ወገን ለማዘዋወር ያደረገው እንቅስቃሴ ሳይኖር በንብረቶቹ ላይ እግድ እንዲሰጥ አመልካች ያቀረበው አቤቱታ አግባብነት የለውም፣አመልካች የእግድ ትዕዛዝ የሚሰጥ ከሆነ ለንብረቶቹ በቂ ዋስትና እንዲያስይዝ ሊደረግ ይገባል በማለት ነው።

ፍርድ ቤቱ ለክስ መስማት በተያዘው ቀነ ቀጠሮ የግራ ቀኙን አስተያየት ሲጠይቅ በጽሁፍ ካቀረብነው ውጭ የተለየ ነገር የለንም በማለት አስመዝግበዋል። በመሆኑም አመልካች ያቀረበውን የእግድ ትዕዛዝ ይሰጥልኝ ዳኝነት ጥያቄ ከተጠቢዉ ሕግ ጋር በማገናዘብ መርምሮታል። እንደመረመረዉም አመልካች እየጠየቁ ያሉት ዳኝነት ከተጠሪ ላይ የብር 1,000,000,000 (አንድ ቢሊየን) ጥያቄ ያላቸዉ መሆኑን በመግለጽ በማለት 35 ማሽነሪዎች፣ 66 ተሽከርካሪዎች እና 25 መሳሪያዎችን በመዘርዘር ነዉ። አመልካች እየጠየቁት ያሉት እግድ የብር1,000,000,000 (አንድ ቢሊየን) ጥያቄ እንዳለቸዉ በመግለጽ እንደመሆኑ እግድ የጠየቁባቸዉ ማሽነሪዎች፣ተሽከርካሪዎች እና የኮንስትራክሽን መሳሪያዎች ግምት የእያንዳንዱ ተገልያ ባይቀርብም ከተጠሪ አለን የሚሉትን ገንዘብ ለማስፈፀም እንደሆነ ተደርጎ ግምት ይወሰዳል። በዚህም ምክንያት አመልካች በጠየቁት ጥያቄ ልክ የመጠባበቂያ ጥያቄያቸዉ ላይ ዉሳኔ ለመስጠት በቅድሚያ ፍርድ ቤቱ ጉዳዩን የመመልከት ስልጣን ያለዉ መሆን አለመሆኑ ሊታይ የሚገባዉ ሆኖ ተገኝቷል።

ፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

የልደታ ምድብ 1ኛ ኮንስትራክሽን ችሎት

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ስለጊዜያዊ የመጠባበቂያ የእግድ ትዕዛዝ የሚደነግገዉ የግልግል ዳኝነት እና እርቅ አሰራር ስርዓት አዋጅ ቁጥር 1237/2013 አንቀጽ 9 ድንጋጌ ተዋዋይ ወገኖች የግልግል ዳኝነት ሂደቱ ከመጀመሩ በፊት ወይም ሂደቱ ከተጀመረ በኋላ የግልግል ዳኝነት ስምምነቱ መሰረት በማድረግ ጊዜያዊ የመጠባበቂያ እርምጃ ትዕዛዝ እንዲሰጥ ለፍርድ ቤቱ ማመልከት እንደሚችል ከመደንገጉ ዉጪ አቤቱታዉ የሚቀርብዉ ለየትኛዉ ፍርድ ቤት እንደሆነ በግልፅ አልተመላከተም፡፡ በሌላ በኩልም የዚሁ አዋጅ አንቀጽ 23(3) ስር ብግልግል ጉባዔዉ የተሰጠ ጊዜያዊ የመጠባበቂያ ትዕዛዝ የሚፈጸመዉ ጉዳዩን ልግልግል ዳኝነት ጉባዔ በይቀርብ ኖሮ ጉዳዩን ለማዬት የስር ነገር ስልጣን ባለዉ ፍርድ ቤት ስለመሆኑ ተመላክቷል፡፡ የተሰጠ ትዕዛዝ ወይም ዉሳኔ እንዲፈጸም ከሚደረግበት አግባብ አንፃር ከታዬም አፈፃፀም የሚከተሰዉ የስረ-ነገር ስልጣንን ስለመሆኑ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁ 75788 አስገዳጅ የሕግ ትርጉም ሰጥቶበት ያደረ ጉዳይ ነዉ፡፡ በአዋጅ ቁጥር 1237/2013 አንቀጽ 25(3) ጊዜያዊ የመጠባበቂያ ትዕዛዝ በገላጋይ ዳኛ በተሰጠ ጊዜ ይህንን ትዕዛዝ የሚያስፈጽመዉ ጉዳዩ ለገላጋይ ዳኛ ባይቀርብ ኖሮ ጉዳዩን ለማየት የስረ-ነገር ስልጣን ያለዉ ፍርድ ቤት እንደሆነ ማስቀመጡ የትዕዛዙ አፈፃፀም የስረ-ነገር ስልጣንን የሚከተል መሆኑን የሚያሳይ ነዉ፡፡ እግድ እንዲሰጥ የሚጠየቀዉ ዳኝነት ከሚሰጠዉ ዳኝነት ወይም ከሚተላለፈዉ የእግድ ትዕዛዝ አንጻር ግምት የሌለዉ ክርክር የሚመስል ቢሆንም የእግድ ትዕዛዝ በባህሪዉ ለተወሰነ ጊዜም ቢሆን ግምት ባላቸዉ ንብረቶች ወይም መጠኑ ተለይቶ በሚታወቅ ገንዘብ ላይ የሚፈጥረዉ መብት ወይም የሚጥለዉ ግዴታ አለዉ፡፡ ፍርድ ቤቶች ንብረት እንዳይንቀሳቀስ እግድ በሚሰጡበት ወቅት ለጊዜዉም ቢሆን ግምት ያለዉን ወይም ግምቱ የታወቀ ነገር ላይ እየወሰኑ እንዳሉ የሚያረጋግጥ ስለሆነ የእግድ ትዕዛዝ የግድ የፍርድ ቤቶችን የስረ-ነገር ስልጣን ሊከተል የሚገባ ነዉ፡፡ አመልካች እየጠየቁት ያሉት እግድ የብር 1,000,000,000 (አንድ ቢሊየን) ጥያቄ እንዳለቸዉ በመግለጽ እንደመሆኑ እግድ የጠየቁባቸዉ ግምት አያንዳንዱ ተገልያ ባይቀርብም ከተጠሪ አለን የሚሉትን ገንዘብ ለማስፈፀም እንደሆነ ተደርጎ ይታመናል፡፡ ይህ ጉዳይ ለግልግል ዳኝነት ባይቀርብ ኖሮ በፌደራል ፍርድ ቤት ማቋቋሚያ አዋጅ ቁጥር 1234/2013 አንቀጽ 11(10 እና በአዋጅ ቁጥር 1237/2013 አንቀጽ 25(3) መሰረት ሊዳኝ የሚችለዉ በፌደራል

ፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

የልደታ ምድብ 1ኛ ኮንስትራክሽን ችሎት የመ/ቁ፡- 302195 ገፅ- 8
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ከፍተኛ ፍርድ ቤት ነዉ፡፡ ስለሆነም ይህ ፍርድ ቤት በአዋጅ ቁጥር 1234/2013 አንቀጽ 14 መሰረት ለመመልከት ስልጣን ያለዉ እስከ ብር አስር ሚሊዮን የሚመለከቱ ጉዳዮችን ስለሆነ አመልካች ጊዜያዊ መጠባበቂያ እንዲሰጥላቸዉ የጠየቁበት ጉዳይ ደግሞ ከአስር ሚሊዮን ብር በላይ በመሆኑ ይህ ፍርድ ቤት የቀረበዉን አቤቱታ ተቀብሎ የመጠባበቂያ ትዕዛዝ የመስጠት ስልጣን የለዉም በማለት የአመልካችን አቤቱታ ውድቅ በማድግ በአብላጫ ብይን ሰጥቷል፡፡

ትዕዛዝ

- አመልካች ባቀረበው የእግድ ይሰጥልኝ አቤቱታ ጸኝነት የጠየቀበት የገንዘብ መጠን ከፍርድ ቤቱ ስልጣን በላይ ስለሆነ ፍርድ ቤቱ በአቤቱታው ላይ የእግድ ትዕዛዝ የመስጠት ስልጣን የለውም በማለት አቤቱታው ውድቅ ተደርጓል፡፡
- በብይኑ ቅር የተሰኘ ወገን ይግባኝ የማለት መብት አለዉ፡፡
- መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ፡፡

በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

የልደታ ምድብ 1ኛ ኮንስትራክሽን ችሎት የመ/ቁ፡- 302195 ገፅ- 9
ቀን፡- ሚያዚያ 28-2014 ዓ.ም

የልዩነት ሀሳብ

እኔ ከላይ ስሜ በተራ ቁጥር 2 ስር የተሰየምኩት ዳኛ ጊዜያዊ የመጠባበቂያ ትዕዛዝ ለማስጠት የሚቀርብ ክስ የክሱ ግምት እንደማይታወቅ ክርክር የሚቆጠር ክርክር በመሆኑ የክሱ ግምት በገንዘብ ደረጃ የማይታወቅን ክርክር ደግሞ የማዬት የስረ ነገር ስልጣን ያለው የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ለመሆኑ በአዋጅ ቁጥር 1234/2013 አንቀፅ 14(3) እና በፍ/ብ/ስ/ስ/ህ/ቁ 18 ስር የተመለከተ በመሆኑ ይህ ፍርድ ቤትም ከሳሽ ባቀረበው የትዕዛዝ ይሰጥልኝ ክስ ላይ ስልጣን እንዳለው ተቆጥሮ በከሳሽ ጥያቄ ላይ ተገቢውን ትዕዛዝ ልንሰጥበት ይገባ ነበር በሚል በሀሳብ ተለይቻለሁ። ምክንያቱም የግልግል ዳኛን ለማሾም የሚቀርብ ክስ ግራ ቀኙን ገላጋይ ዳኛ ከተሾመላቸው በኋላ ሊያከራክራቸው የሚችለው የገንዘብ መጠን ግምት ውስጥ ሳይገባ የገላጋይ ዳኛ ይሾምልኝ ጥያቄው የገንዘብ ግምት እንደሌለው ክርክር ተቆጥሮ በፌ/መ/ደ/ፍ/ቤት የሚታይ ነው። ስለሆነም የገላጋይ ዳኛ ከተሾመ በኋላ ግራ ቀኙ የሚከራከሩበት የገንዘብ መጠን ከ10 ሚሊዮን በላይ ቢሆንም ፍርድ ቤቱ የጋላጋይ ዳኛ ይሾምልኝ ጥያቄ ሊቀርብለት የገላጋይ ዳኛ እስኪሾም ድረስ ከ10 ሚሊዮን በላይ የገንዘብ ግምት ያለው ንብረት ላይ እግድ እንደሚሰጥ ሁሉ ተከራካሪወች በራሳቸው የግልግል ዳኛ ጉባኤ ለማቋቋም በሚንቀሳቀሱበት ጊዜ የግልግል ዳኛ ጉባኤ እስኪሾሙ ድረስ ጊዜዊ የእግድ ትዕዛዝ እንዲሰጥላቸው ሊጠይቁም የእግድ ትዕዛዝ ሊሰጥላቸው ይገባ ነበር።

በሌላም በኩል በገላጋይ ዳኛ የሚሰጥ ውሳኔን አፈፃፀም በተመለከተ ግን የግዴታ የገላጋይ ዳኛ ለመሾም ስልጣን ባለው ፍርድ ቤት የሚፈፀም ሳይሆን ጉዳዩ ለገላጋይ ዳኛ ባይቀርብ ኖሮ ክርክሩን ለማዬት ስልጣን ላለው ፍርድ ቤት ቀርቦ ሊፈፀም እንደሚገባ የአዋጁ አንቀፅ 51(1) ደንግጓል። ይህም ማለት ለክርክሩ መነሻ የሆነው የገንዘብ መጠን ከግምት ውስጥ የሚገባው ጉዳዩ በገላጋይ ዳኛ ውሳኔ ከተሰጠበት በኋላ ውሳኔውን ለማስፈፀም የአፈፃፀም ክስ በቀረበ ጊዜ እንጅ ጋላጋይ ዳኛ ለማሾም በቀረበ ክስ ላይ ፍርድ ቤቱ የስረ ነገር ስልጣኑን ለመወሰን የገንዘብ መጠኑን ከግምት ውስጥ ማስገባት እንደማይችል አስረጅ ነው።

ፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት

በተመሳሳይ መልኩ በስራ ባልደረቦቼ በተጠቀሰው በአዋጁ አንቀፅ 25/3 ስር ገላጋይ ዳኛ ተቋቁሞ ጉባኤው ጊዜያዊ የመጠባበቂያ እርምጃ (ትዕዛዝ) ከሰጠ በኋላ ትዕዛዙ ሳይፈፀም ቢቀር የጉባኤው ትዕዛዝ የሚፈፀመው ክርክሩ በገላጋይ ዳኛ ባይታይ ኖሮ ነገሩን ለማዬት የስረ ነገር ስልጣን ባለው ፍርድ ቤት ነው መባሉ በተቋቋመው የግልግል ጉባኤ የተሰጠው ጊዜያዊ የመጠባበቂያ ትዕዛዝ ባልተፈፀመ ጊዜ እንዴት ይፈፀማል የሚለውን የሚመለከት እንጅ ጊዜያዊ የመጠባበቂያ ትዕዛዝ ለማስጠት ለፍርድ ቤት ክስ በቀረበ ጊዜ የፍርድ ቤቱ ስልጣን የሚወሰነው ለአለመግባባቱ መነሻ በሆነው የገንዘብ መጠን ልክ ነው ከሚል መደምደሚያ ላይ የሚያደርስ አይደለም የሚል እምነት አለኝ። ምክንያቱም ይህ ፍርድ ቤት ከላይ በጠየቀው አግባብ ጊዜያዊ የመጠባበቂያ እርምጃ ለመስጠት ህጉ የሚፈቅድለት ስለመሆን አለመሆኑ መርምሮ ተገቢ ነው የሚለውን ውሳኔ ከሚሰጥ በስተቀር ወደ ፊት በሚቋቋመው የገላጋይ ዳኛ ፊት ቀርቦ አካራካሪ በሆነው የገንዘብ መጠን ላይ ፍርድ ቤቱ ከወዲሁ አከራክሮ የሚሰጠው ውሳኔ ስለሌለ ክርክሩ ሊጀመርም የክስ ግምቱ በማይታወቅ የክርክር ዓይነት የሚመደብ ያደርገዋል የሚል እምነት አለኝ።

ስለሆነም ምንም እንኳ የአዋጁ አንቀፅ 9 ተከራካሪወች በስምምነታቸው መሰረት ገላጋይ ዳኛ እስኪቋቋምላቸው ድረስ ጊዜያዊ የመጠባበቂያ እርምጃ እንዲሰጥላቸው ጥያቄያቸውን ለፍርድ ቤት ማቅረብ ይችላሉ ሲል በድንጋጌው ፍርድ ቤት የተባለው የትኛው ፍርድ ቤት እንደሆነ በግልፅ ባያመላክትም ክርክሩ የገንዘቡ መጠን እንደማይታወቅ ክርክር ተቆጥሮ በአዋጅ ቁጥር 1234/2013 አንቀፅ 14(3) እና በፍ/ብ/ስ/ስ/ህ/ቁ 18 መሠረት ይህ ፍርድ ቤት ጉዳዩን የስረ ነገር ስልጣን እንዳለው ቆጥሮ በጉዳዩ ላይ የግራ ቀኙን ክርክር ሰምቶና አከራክሮ ሊወስን ይገባ ነበር እላለሁ።

በፌ/ከፍተኛ ፍ/ቤት የልደታ ምድብ

2ኛ ኮንስትራክሽን ይግባኝ ችሎት

ዳኞች፡- ንዋይ ነጌሶ

ደርበው ተዋበ

ጌታሁን ገ/መስቀል

ይ/ባይ፡- የኢትዮጵያ መንገዶች አስተዳደር- ነ/ፊጅ እዮብ አስናቀ ቀረቡ

መ/ስጭ፡- ቻይና ናሽናል ኬሚካል ኮሙዩኒኬሽን ኮንስትራክሽን- ጠበቃ ዳዊት አበበ ቀረቡ

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጠ

ፍርድ

ይግባኝ ባይ በ22/09/2014 ዓ.ም በተጻፈ የይግባኝ አቤቱታ በሥር የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ከመ/ስጭ ጋር በገባው የግንባታ ውል መሰረት ከአታት ማዞሪያ- ጉንችሬ- ዲቡ- ኮሴ- ጌጂ- ሌራ የመንገድ ዲዛይንና ግንባታ ሥራ ለመስራት ተዋውሎ የነበረ መሆኑን፤ መ/ስጭ እንደውሉ ባለመፈጸሙ ምክንያት ይ/ባይ ውሉን ያቋረጠ መሆኑን፤ የውሉን መቋረጥ ተከትሎም በውላቸው መሰረት የግልግል ጉባኤ ተቋቁሞ ጉዳዩ እስከሚታይ ድረስ መ/ስጭ ያለውን ንብረት ሊያሸሽ ስለሚችል በአዋጅ ቁ. 1237/2013 አንቀጽ 9 እና 27 መሰረት የመ/ስጭ ንብረቶች እንዲታገዱ አቤቱታ አቅርቦ የነበረ ቢሆንም የሥር ፍ/ቤት በአብላጫ ድምጽ በሰጠው ብይን ግን የተጠየቀው እግድ እስከ ብር 1,000,000,000 የሚደርስ ጥያቄ ያለው መሆኑን የሚያመለክት በመሆኑ ጉዳዩ ሊዳኝ የሚችለው በፌዴራል ከፍተኛ ፍ/ቤት ነው፤ ጉዳዩን ለማየት የሥረ ነገር ስልጣን የለኝም ሲል የሰጠው ብይን ይሻርልኝ የሚል የይግባኝ አቤቱታ አቅርቧል። የሥር ፍ/ቤት በአብላጫ ድምጽ የሰጠው ብይን ስህተት ያለበት ነው የሚልበትን ምክንያትም ሲዘረዝር የጠየቅነው ዳኝነት እግድ ይሰጥልን የሚል ሲሆን

በፌ/ከፍተኛ ፍ/ቤት የልደታ ምድብ

2ኛ ኮንስትራክሽን ይግባኝ ችሎት

እንዲህ አይነት ጥያቄዎች ደግሞ በፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 አንቀጽ 14 (3) እና የፍ/ሥ/ሥ/ሕ/ቁ 18 መሰረት ግምታቸው የማይታወቁ ክርክሮችን ተቀብሎ የመዳኘት ስልጣን ያለው የፌ/መጀመሪያ ደረጃ ፍ/ቤት ሆኖ እያለ ስልጣኑ የፌ/ከፍተኛ ፍ/ቤት ነው መባሉ ስህተት መሆኑን፣ የአዋጅ ቁ. 1237/2013 አንቀጽ 23 93) እና 25 (30 ላይ የተጠቀሰውን ድንጋጌ በማንሳትም የደረሰበት ድምዳሜ ስህተት መሆኑን፣ ይህ ድንጋጌ ውሳኔ ለማስፈጸም ሚቀርብ ጉዳይን የሚመለከት እንጂ የግልግል ጉባኤ ከመቋቋሙ በፊት የሚጠየቅ የጥንቃቄ እርምጃዎችን የሚመለከት አለመሆኑን በመግለጽ ቅሬታውን አቅርቧል።

ፍ/ቤቱም የእግድ ትዕዛዝ ይሰጥልኝ በሚል የቀረበ አቤቱታን ሥልጣን የለኝም በሚል በአብላጫ ድምጽ የሥር ፍ/ቤት የወሰነውን ውሳኔ አግባብነት ለማጣራት መ/ሰጭን ያስቀርባል የሚል ትዕዛዝ ሰጥቶ መ/ሰጭ መልሱን እንዲያቀርብ አድርጓል።

መ/ሰጭም በ17/12/2014 ዓ.ም በሰጠው መልስ ይግባኝ ባይ በክስ አቤቱታው ላይ በግልጽ ከመልስ ሰጭ የሚፈልገው የገንዘብ መጠን ከብር 1,000,000,000 (አንድ ቢሊየን ብር) በላይ መሆኑን የሚገልጽ ስለሆነ ከብር 10,000,000 (አስር ሚሊየን ብር) በላይ የሆኑ ጉዳዮች ደግሞ በአዋጅ ቁ 1234/2013 አንቀጽ 11 (1) እና አንቀጽ 5 (ረ) እና (ሰ) መሰረት የሚታዩት በፌዴራል ከፍተኛ ፍ/ቤት ስለሆነ የሥር ፍ/ቤት ሥልጣን የለኝም ማለቱ ተገቢ ነው። ይ/ባይ እግድ ይሰጥልኝ ከማለት ባለፈ የግልግል ጉባኤ እንዲቋቋም ያደረገው ጥረት የለም፣ በይገባኝ ባይ እጅ በቂ ዋስትና ያለ ስለሆነ ንብረቶቹ ሊታገዱ የማይገባ መሆኑን፣ እግድ ይታገድ ቢባል እንኳን ይ/ባይ በቂ ዋስትና ሊያሲዝ ይገባ የነበረ መሆኑን በመግለጽ መልሱን አቅርቧል።

ይ/ባይም በ27/01/2015 ዓ.ም የመልስ መልስ ያቀረበ ሲሆን የይግባኝ አቤቱታውን በማጠናከር ተከራክሯል።

በፌ/ከፍተኛ ፍ/ቤት የልደታ ምድብ

2ኛ ኮንስትራክሽን ይግባኝ ችሎት

ፍ/ቤቱም የስር ፍ/ቤት የቀረበለትን የእግድ አቤቱታ ተቀብሎ ለማስተናገድ የሚያስችል የሥረ-ነገር ሥልጣን አለው ወይስ የለውም? የሚለውን ጭብጥ በመያዝ እንደሚከተለው መርምሮታል።

ለጉዳዩ መነሻ የሆነው ጉዳይ የሥረ-ነገር የዳኝነት ሥልጣንን የሚመለከት ጉዳይ ነው። በግልግል ዳኝነትና በእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ. 12372013 አንቀጽ 9 መሰረት የግልግል ውል ያደረገ ማንኛውም ወገን ዋነውን ጉዳይ ለመዳኘት የሚችል ገላጋይ ዳኛ እስከሚሾም ድረስ ጊዜያዊ የመጠባበቂያ እርምጃዎች እንዲሰጥለት ለፍ/ቤት ሊያመለክት ይችላል በሚል ደንግጎ ይገኛል። ይህ ድንጋጌ ጉዳዩ የሚቀርበው በየትኛው ደረጃ ላለ ፍ/ቤት እንደሆነ በግልጽ የማያመለክት ቢሆንም ከሥረ-ነገር ሥልጣን አሳማና ጽንሰ-ኃሳብ አንጻር፣ የፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 እና የፍ/ብሔር ሥነ-ሥርዓት ሕጉ ግምት የሌላቸው ጉዳዮችን የመዳኘት ስልጣን አስመልክቶ ካስቀመጣቸው ድንጋጌዎች አንጻር ትርጉም ሊሰጥበት የሚገባ ጉዳይ ነው።

ለፍ/ቤቶች የሚሰጠውን የሥረ- ነገር ስልጣን በሕግ በሚወሰንበት የፍ/ቤቶችን አቅም ወይም ብቃት (Competency) እና የጉዳዮችን ውስብስብነት (complexity of cases) ታሳቢ በማድረግ እንደሆነ ከሥረ-ነገር ስልጣን ጽንሰ ኃሳብ የምንረዳው ጉዳይ ነው። በፌዴራል ፍ/ቤቶች አዋጅ ቁ 1234/2013 እስከ ብር 10,000,0000 (አስር ሚሊየን ብር) ድረስ ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት፣ ከብር 10,000,000 (አስር ሚሊየን ብር) በላይ ደግሞ ለፌዴራል ከፍተኛ ፍ/ቤት፣ እንዲሁም የተወሰኑ ግምት የሌላቸውን ጉዳዮች ለፌዴራል ከፍተኛ ፍ/ቤት ሰጥቶ ከተዘረዘሩት ውጭ ያሉትን ደግሞ በፌ/መጀመሪያ ደረጃ ፍ/ቤት እንዲታዩ ሥልጣን ይልድሎ እናገኘዋለን። ሕጉ ይህን ያደረገበትን ምክንያም ግምት ከመለከት የገንዘብ መጠናቸው ከፍተኛ የሆኑና

በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ከፍተኛ ፍርድ ቤት
The Federal Democratic Republic of Ethiopia
Federal High Court

ቁጥር
No. የይ.መ.ቁ 293311
ቀን
Date ጎንደር 07 ቀን 2015

በፌ/ከፍተኛ ፍ/ቤት የልደታ ምድብ

2ኛ ኮንስትራክሽን ይግባኝ ችሎት

በባህሪያቸው ውስብስበ ናቸው ተብለው የሚታሰቡ ጉዳዮችን ለመዳኘት የተሻለ የዳኝነት ሥራ ልምድና እና እውቀት ያላቸው ዳኞች ይገኙበታል ተብሎ የሚታሰበው የፌ/ከፍተኛ ፍ/ቤት ቢመለከተው ይሻላል ከሚል መነሻ እንደሆነ መገንዘብ ይቻላል።

ከዚህ ጽንሰ ኃሳብ አንጻር የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የቀረበለትን የአግድ ይሰጥልኝ አቤቱታ ተቀብሎ ለመዳኘት የሚያስችል አቅም ወይም ብቃት የለውም ለማለት ይቻላል ወይ የሚለውን መመልከት ያስፈልጋል። የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት በአዋጅ ቁ 1234/2013 በተሰጠው ስልጣን መሰረት ግምት የሌላቸውን ውስበስብ የሆኑ የኩባንያ ይፍረስልኝ እና መሰል ክርክሮችን ተቀብሎ የመዳኘት ስልጣን አለው። ይህም ስልጣን የተሰጠው ፍ/ቤቱ በዚህ ልክ ብቃት ያላቸውን ዳኞች ይዟል ተብሎ ስለሚታመን ነው። እንዲህ አይነት ጉዳዮችን የመዳኘት ብቃት አለው ተብሎ የሚታመን ፍ/ቤት የትዕዛዝ ጉዳዮችን፤ በተለይም የአግድ ትዕዛዝ ይሰጥልኝ ጉዳዮችን ተቀብሎ ለማስተናገድ ብቃት ያንሰዋል ወይም ውስብስብ ይሆንበታል ተብሎ አይታሰብም።

ከዚህም በላይ አሁን በተያዘው ጉዳይ ለዳኝነት የቀረበውን ነጥብ ስንመለከት አግድ ይሰጥልኝ የሚል ነው። ይህም ትዕዛዝ ለማሰጠት በሚቀርብ የትዕዛዝ ፋይል መዝገብ የሚስተናገድ ጉዳይ ሲሆን ለዳኝነት የሚከፈለው ገንዘብም ከብር 25 እንደማይበልጥ ከዳኝነት ገንዘብ አከፋፈል የሕግ ክፍል ማስታወቂያ ቁ. 177/1945 መመሪያ የምንገነዘበው ጉዳይ ነው። ምንም እንኳን ይ/ባይ የመንግስት የአስተዳደር ተቋም በመሆኑ የዳኝነት ገንዘብ ያልከፈለ ቢሆን ዳኝነት የመክፈል ግዴታ ያለበት ተከራካሪ ወገን ግን ለተመሳሳይ ጉዳይ ከብር 25 በላይ ሊከፍልበት የማይችል ጉዳይ ነው። ይህም ጉዳዩ ግምታቸው ያልታወቁ የዳኝነት አይነቶች የሚመደብ ሆኖ እናገኘዋለን። ግምታቸው የማይታወቁ ጉዳዮች የፌዴራል ከፍ/ፍ/ቤት የዳኝነት ስልጣንን

በፌ/ከፍተኛ ፍ/ቤት የልደታ ምድብ

2ኛ ኮንስትራክሽን ይግባኝ ችሎት

በተመለከተ በአዋጅ ቁ. 1234/2013 አንቀጽ 11 (2) መሰረት ከአንቀጽ 5 (1) (ሀ) እስከ (ሠ) ባሉት ድንጋጌዎች ላይ ተጠቅሶ የሚገኝ ሲሆን በዚህ ዝርዝር ውስጥ የፌ/ከፍ/ፍ/ቤት የእግድ ይሰጥልኝ አቤቱታን ተቀብሎ ለማስተናገድ ስልጣን ያለው ስለመሆኑ አልተገለጸም። ይህ ከሆነ ደግሞ በአዋጅ ቁ. 1234 አንቀጽ 11 (2) መሰረት በግልጽ ለፌ/ከፍ/ፍ/ቤት ከተሰጡ ግምታቸው ከማይታወቅ ጉዳዮች ውጭ ያሉ ሌሎች ጉዳዮች በሙሉ ለፌ/መጀመሪያ ደረጃ ፍ/ቤት የተሰጡ መሆናቸውን ከአዋጁ አንቀጽ 14 መገንዘብ ይቻላል። ከዚህ በተጨማሪም ከአዋጁ ጋር በማይቃረን ሁኔታ የፍ/ሥ/ሥ/ሕጉ ተፈጻሚነት ያለው በመሆኑ በፍ/ሥ/ሥ/ሕ/ቁ 18 መሰረት ግምታቸው የማይታወቁ ጉዳዮች በቀድሞው ለአውራጃ ግዛት ፍ/ቤት (በአሁኑ. ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት) እንደሚቀርብ የሚያስገንዝብ ነው።

የሥር ፍ/ቤት የሥረ-ነገር ስልጣን የለኝም ለማለት መነሻ ያደረገው ለግልግል ዳኝነት ይቀርባል ተብሎ የሚታሰበው ጉዳይ ከብር 1,000,000,000 (አንድ ቢሊየን ብር) በላይ ነው በሚል ነው። ይሁን እንጂ ይህ የአንድ ቢሊየን ብር ጉዳይ ገና ወደፊት በሚቋቋመው የግልግል ጉባኤ የሚታይ እንጂ በፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የሚታይ ጉዳይ አይደለም። ይ/ባይ ይህን ብር 1,000,000,000 (አንድ ቢሊየን ብር) በአቤቱታው ላይ የጠቀሰው እንዲታገድለት የሚፈልገውን የገንዘብ ወይም የንብረት መጠን ለማሳየት እንጂ በተጠቀሰው ገንዘብ ልክ ዳኝነት እየጠየቀ አይደለም። ይ/ባይ በዚህ ልክ ዳኝነት ካልጠየቀ ደግሞ ገንዘቡ ከብር 10,000,000 (አስር ሚሊየን ብር) በላይ ስለሆነ ሥልጣን የለኝም ወደሚል ድምዳሜ የሚያደርስ አይሆንም። የሥር ፍ/ቤት ወደዚህ ድምዳሜ ለመድረስ የጠቀሰው ድንጋጌ የፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 አንቀጽ 14 ሲሆን ይህ ድንጋጌ ከአዋጁ አንቀጽ 11 (1) ጋር ተጣምሮ ሲነበብ የፌ/መጀመሪያ ደረጃ ፍ/ቤት እስከ ብር 40,000,000 ድረስ የሚገመቱ ጉዳዮችን ለመዳኘት ስልጣን ያለው መሆኑን የሚገልጽ ድንጋጌ ነው። የድንጋጌው ታሳብ በገንዘብ የሚገመቱ

በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ከፍተኛ ፍርድ ቤት
The Federal Democratic Republic of Ethiopia
Federal High Court

ቁጥር የይ.መ.ቁ 293311
ቀን ኅዳር 07 ቀን 2015
Date Addis Ababa / Addis Ababa

በፌ/ከፍተኛ ፍ/ቤት የልደታ ምድብ

2ኛ ኮንስትራክሽን ይግባኝ ችሎት

ጉዳዮችን የሚመለከት ሆኖ እያለ የሥር ፍ/ቤት ድንጋጌውን ያለቦታው በመጥቀስ ለቀረበለት ግምት ሰሌለውና ትዕዛዝ ይሰጥልኝ ለሚል አቤቱታ ተጠቅሞ ሥልጣን የለኝም ሲል የደረሰበት ድምዳሜ ሊታረም የሚገባው ሆኖ ተገኝቷል።

ሌላው የሥር ፍ/ቤት ሥልጣን የለኝም ወደሚል ድምዳሜ ለመድረስ የተጠቀመው ድንጋጌ በግልግል ዳኝነትና የእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ. 1137/2013 አንቀጽ 25 (3) ሥር የተጠቀሰው ነው። ድንጋጌው ጊዜያዊ የመጠባበቂያ ትዕዛዞችን በፍ/ቤት እውቅና ለማሰጠት ወይም ለማስፈጸም በሚቀርብበት ጊዜ ጉዳዩ ለግልግል ጉባኤ ባይቀርብ ኖሮ ጉዳዩን ተቀብሎ ለማየት ስልጣን ላለው ፍ/ቤት እንደሚቀርብ የሚገልጽ ነው። ይህ ድንጋጌ የትዕዛዝ አፈጻጸምን የሚመለከት በመሆኑ ከቀረበው የትዕዛዝ ይሰጥልኝ አቤቱታ ጋር ቀጥተኛ ግንኙነት የለውም። ከዚህም በላይ አንድን ድንጋጌ በማመሳሰል (By analogy) ተፈጻሚ ለማድረግ ለጉዳዩ አግባብነት ያለው ድንጋጌ ሳይኖር ሲቀር እንደሆነ ከሕግ አተረጓጎም መርህ የምንገነዘበው ጉዳይ ነው። ለጉዳዩ አግባብነት ያለው ድንጋጌ እያለ ሕግን በማመሳሰል (By analogy) ተፈጻሚ ማድረግ የሚቻልበት የሕግ አተረጓጎም መርህ የለም። አሁን በተያዘው ጉዳይ የቀረበው የትዕዛዝ ይሰጥልኝ አቤቱታ ጉዳዩ ግምት የሌለው ክስ ከመሆኑ አንጻር የዳኝነት ስልጣንን በተመለከተ ተፈጻሚ ሊደረጉ የሚገባቸው አግባብነት ያላቸው ድንጋጌዎች የፍ/ሥ/ሥ/ሕ/ቁ 18 እና የፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 አንቀጽ 14 (1) ድንጋጌዎች ናቸው። እነዚህ አግባብነት ያላቸው ድንጋጌዎች እያሉ የሥር ፍ/ቤት ለጉዳዩ እልባት ለመስጠት ሲል አግባብነት የሌለውን ድንጋጌ በማመሳሰል (By analogy) የተረጎመበት መንገድ ተገቢነት የሌለው ሆኖ ተገኝቷል።

ስልክ Tel. 0112751911
ፋክስ Fax 0113 [illegible]
ፖ.ሣ.ቁ

በፌ/ከፍተኛ ፍ/ቤት የልደታ ምድብ

2ኛ ኮንስትራክሽን ይግባኝ ችሎት

በጥቅሱ ከላይ በተጠቀሱት ዝርዝር ምክንያቶች የሥር ፍ/ቤት አብላጫው ድምጽ ሥልጣን የለኝም ሲል የደረሰበት ድምዳሜ ሊታረም የሚገባው ሆኖ ተገኝቷል። በመሆኑም በይግባኝ ባይ አቤቱታ መሰረት ዋናውን የክርክር ጭብጥ ለመዳኘት የሚችል የግልግል ጉባኤ እስከሚቋቋም ድረስ በግልግል ዳኝነትና በእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ 1237/2013 አንቀጽ 9 መሰረት እግድ ይሰጥልኝ በሚል የቀረበውን አቤቱታ ተቀብሎ ለማስተናገድ የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የሥረ-ነገር ሥልጣን አለው ተብሏል።

ውሣኔ

1. የሥር ፍ/ቤት በአብላጫ ድምጽ በመ.ቁ 302195 ሚያዚያ 28 ቀን 2014 ዓ.ም የሰጠው ብይን በፍ/ሥ/ሥ/ሕ/ቁ 348 (1) መሰረት ተሽሯል።
2. ይ/ባይ ያቀረበውን የእግድ ይሰጥልኝ አቤቱታ ተቀብሎ ለማየት የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የሥረ-ነገር ስልጣን ያለው በመሆኑ መዝገቡን በማንቀሳቀስ ተገቢውን ትዕዛዝ ወይም ውሳኔ እንዲሰጥ በፍ/ሥ/ሕ/ቁ 341 መሰረት ታዟል። የውሳኔው ግልባጭ ለፌ/መጀመሪያ ደረጃ ፍ/ቤት ይላክለት።
3. በዚህ መዝገብ ሐምሌ 29 ቀን 2014 ዓ.ም ተሰጥቶ የነበረው እግድ ተነስቷል። የእግድ ትዕዛዙ ለተሳለፈለት አካል የዚህ ትዕዛዝ ግልባጭ ይድረሰው።

ትዕዛዝ

- ወጪና ኪሣራን በተመለከተ ግራ ቀኙ የየራሳቸውን ይቻሉ።
- ይግባኝ መብት ነው፤ መ[illegible]ቷል ለመ/ቤት ይመለስ።

የማይነበብ የሦስት ዳኞች ፊርማ አለበት

ዳኞች ደርበው ተዋበ

ጌታሁን ገ/መስቀል

ፋሲካ ዳኜ

አመልካች ቻይና ሲ.ኤም.ሲ ኢንጅነሪንግ ካምፓኒ ሊሚትድ ነ/ፊጅ አብርሀም ዩሐንስ ቀረቡ

ተጠሪ ዩናይትድ ኮንስትራክሽን ኃ/የተ/የግ/ማህበር ጠበቃ ትዮብስታ ግዛው ቀረቡ

መዝገቡ ለዛሬ የተቀጠረው ግራቀኙ ያደረጉትን የመቃምሚያ ክርክር መርምሮ ለመወሰን ሲሆን በዚህም መሠረት መርምረን ተከታዩን ውሳኔ ሠጥተናል ::

ውሳኔ

ጉዳዩ በግልግል ጉባኤ ጣይቶ የተሰጠ ጊዚያዊ ትዕዛዝ እንዲሻር የቀረበ አቤቶታን የሚመለከት ሲሆን አመልካች በቀን 01/09/2014 ዓ/ም በተጻፈ አቤቶታ ግራቀኙ በመካከላቸው የነበረን የግንባታ ውል መነሻ በማድረግ በተጠሪ ከላሽነት በአመልካች የተከላሽ ከላሽነት ክስ አቅርበው በአዲስ አበባ ንግድ እና ዘርፍ ማህበራት የግልግል ማዕከል ክርክር ያላቸው ሲሆን በቀረበ የመጀመሪያ ደረጃ መቃምሚያ ላይ በክርክር ላይ እያሉ ተጠሪ ለግልግል ጉባኤው ጊዚያዊ ትዕዛዝ ይሰጥልኝ በማለት ገቢ የተደረገ ለቅድሚያ ክፍያ የተሰጠው የዋስትና ገንዘብ እንዲመለስለት ጠይቆ በመቃምሚያው ላይ እና በዚህ ጥያቄ ላይ ብይን ለመሥጠት ቀጠሮ ተይዞ እያለ ተጠሪ የግልግል ዳኞች ከችሎት እንዲነሱለት አመልክቶ በዚህ ማመልከቻ ላይ ዕልባት ለመስጠት ሲባል ችሎት እንደማይኖር ተነግሮን እያለ በሌለንበት የመሰማት መብታችን ታልፎ ኢ ፍትሐዊ የሆነ ጊዚያዊ ትዕዛዝ ተሠጥቷል በሌለንበት የተሠጠው ትዕዛዝ ተነስቶ ክርክራችን ይሰማ በሚል ያቀረብነው አቤቶታም ለተጠሪ ደርሶት ክርክር ሳይደረግ ውድቅ ተደርጓል :: ጊዚያዊ የመጠበቂያ እርምጃ ትዕዛዝ ሲሰጥ የሌላኛው ወገን ሳይሰማ መሆን የለበትም ይሁንጅ የግልግል ጉባኤው አመልካች መልሰስ ሳይሰጥበት ለቃል ክርክርም ቀርቦ እንዳያስረዳ ሆን ተብሎ ዳኞች የሱም በሚል ችሎት የለም በማለት በተቃራኒው ደግሞ ተጠሪ ለብቻው እንዲስተናገድ እና ክርክር እንዲያቀርብ በማድረግ እኔን የሚጎዳ ውሳኔ መሰጠቱ ፤ጉባኤው ጊዚያዊ የመጠበቂያ እርምጃ ጥያቄ መነሻነት ውሳኔ የመሥጠት ስልጣን የሌለው መሆኑን ፤በጊዚያዊ ስም የተሰጠው ውሳኔ ዋነውን ጉዳይ አስቀድሞ የሚወስን መሆኑን ፤ጉባኤው ተፈጻሚነት የሌለውን ህግ መሠረት በማድረግ ውሳኔ የሰጠ መሆኑን እና ተጠሪ ሊመለሥለት የሚገባ ገንዘብ የሌለው መሆኑን በቅሬታ ነጥብ በማነሳት የአዲስ

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በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ከፍተኛ ፍርድ ቤት
The Federal Democratic Republic of Ethiopia
Federal High Court

ቁጥር
No
ከ /መ/ቁ /288797
ቀን ዓ/ም
Date
አዲስ አበባ / Addis Ababa

ቀን 17/10/2014

አበባ ግልግል ጉባኤ በአመልካችና ተጠሪ ባለው ክርክር ሚያዝያ 06/2014 ዓ/ም በዋለው ችሎት ለውሉ አፈጻጸም በተሠጠው ዋስትና መሠረት ገቢ የተደረገ ገንዘብ ተመላሽ እንዲሆን ጊዜጣዊ ትዕዛዝ በሚል የሰጠው ውሳኔ ሙሉ በሙሉ እንዲሻር በማለት አቤቶታውን ከማሥረጃ ዝርዝር ጋር አቅርቧል ::

የአመልካች አቤቶታ እና ማሥረጃ ለተጠሪ ደርሶት መክላከያ መልሱን ይዞ እንዲቀርብ ታዝዞ በቀን 12/09/2014 ዓ/ም በተጻፈ መልስ የመጀመሪያ ደረጃ የክስ መቃወሚያ እና ዝርዝር የፍሬ ነገር መልስ አቅርቧል በመቃወሚያውም አመልካች አቤቱታውን ያቀረበው በፍ/ብ/ሥ/ሥ/ህ/ቁ 355 እና በግልግል ዳኝነት እና እርቅ አሰራር ስርዓት አዋጅ 1237/2013 አንቀፅ 50(1) መሰረት ነው::በመሰረቱ በፍ/ብ/ሥ/ሥ/ህ/ቁ 355 በአዋጅ ቁጥር1237/2013 አንቀፅ 78(2) መሰረት ተሸሯል:: የአዋጁ አንቀፅ 50(1) ደግሞ የተሰጠ ፍርድ ወይም ውሳኔ እንዲሻር ወደ ፍርድ ቤት ለመሄድ በዚሁ አንቀፅ ንዑስ ቁጥር 2 ከ‹‹ሀ እስከ ረ››ያሉትን ጥብቅ መስፈርቶች አሟልቶ መሆን እንዳለበት ነው፤ የተሰጠ ፍርድ ወይም ውሳኔ (Arbitral Award) መሆኑ ተደንግጎአል:: በአዋጁ አንቀፅ 2(2) *የግልግል ዳኝነት ውሳኔ ማለት አለመግባባትን ለመፍታት በቋሚነት በተደራጀ የግልግል ተቋም ወይም በተዋዋይ ወገኖች ስምምነት በጊዜአዊነት በሚቋቋም የግልግል አካል የሚሰጥ ውሳኔ ነው* ይላል:: በመሰረቱ የአሁን አመልካች ያቀረቡት አቤቱታ አለመግባባቱን ለመፍታትና በተሰጠው ውሳኔ ላይ አይደለም:: አቤቱታ የቀረበው በጊዜያዊ የመጠባበቂያ ትዕዛዝ ላይ ነው:: የጊዜያዊ የመጠባበቂያ ትዕዛዝ ላይ ደግሞ በአዋጁ አንቀፅ 26 ትዕዛዙ የቀረበበት ፍርድ ቤት የጊዜያዊ መጠባበቂያ እርምጃ ትዕዛዞችን መክለስና ማሻሻል እና መሻር እንደማይችል ተደንግጎአል:: በመሰረታዊነት የአዋጁ አንቀፅ 5 የፍርድ ቤት ጣልቃ ገብነት ስለ መክልከሉ በሚለው ርዕስ ፍርድ ቤቶች በአዋጅ ተለይቶ በተሰጣቸው ስልጣን በስተቀር በግልግል ዳኝነት በሚታዩ ጉዳዮች ላይ ጣልቃ አይገቡም በማለት ይደነግጋል::ከዚህ ሁላ እንደምንረዳው አቤቱታው የቀረበበት አግባብ የህግ መሰረት የሌለው ነው:: ይኼውም በተሰጠው ጊዜያዊ የመጠባበቂያ እርምጃ ላይ ፍርድ ቤት ጣልቃ መግባት ካልቻለ እንዲሁም አመልካች የጠቀሱት የፍ/ብ/ሥ/ሥ/ህ/ የተሻረ በመሆኑና በተጨማሪም የአዋጁ አንቀፅ 79 ካወጁ ጋር የሚቃረኑ የፍ/ብ/ሥ/ሥ/ህ/ ድንጋጌዎች ተፈፃሚነት የሌላቸው ናቸው:: ስለሆነም ከህግ አግባብ ውጭ የቀረበብን አቤቱታ ፍርድ ቤቱ ጉዳዩን ለማየት ስልጣን የሌለው በመሆኑ በፍ/ብ/ሥ/ሥ/ህ/ቁ 244(2(ሀ))መሰረት ከኪሳራ ጋር ውድቅ እንዲያደርግልን እንዲሁም በተሰጠብን እግድ ምክንያት ሊደርስብን የሚችለውን ኪሳራ ታሳቢ በማድረግ በአፅንኦት አቤቱታ የቀረበበትን የህግ መሰረት መርምሮ በአጭር ቀጠሮ ውድቅ እንዲያደርግልን በማለት አቅርቧል ::

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የጽሁፍ ክርክራቸው ይህን የሚመሥል ሲሆን ፍ/ቤቱ ግራቀኙን በችሎት በመቃወሚያው ላይ ሲያከራክርም አመልካች ከአዋጅ ቁጥር 1237/2012 በፊት በነበሩ ጉዳዮች የሥነ ሥርዓት ህጉ ተፈጻሚነት ያለው ስለሆነ እና የግልግል ጉባኤው ጊዚያዊ የማገጃ ትዕዛዙን ደግሞ በአዋጁ መሠረት የሰጠው ስለሆነ በዐዋጁ እና በሥነ ሥርዓት ህጉ መሠረት ማቅረባችን ትክክል ነው ፍ/ቤቱ ጊዚያዊ ትዕዛዝ እስካልሆነ ድረስ ጉባኤው በሰጠው ውሳኔ ላይ መሻር ይችላል ስለዚህ በዚህ ረገድ የቀረበው መቃወሚያ ተገቢ አይደለም በማለት ተከራክረ ሲሆን ተጠሪ በበኩሉ በጽሁፍ ክርክር እንዳቀረበው ሁሉ በዚህ ጉዳይ ላይ ፍ/ቤት ተመልክቶ ማሻሻል እና የማጽናት ውሳኔ አይችልም በማለት ተከራክረዋል ::

የክርክሩ አመጣጥ እና ይዘት ይህን የሚመሥል ሲሆን አከራካሪው ነጥብም የግልግል ጉባኤው በሰጠው የጊዚያዊ እርምጃዎች ላይ የመሻር ውሳኔ ለመስጠት የሚያስችል ስልጣን አለው ወይ ? ሚለውን በጭብጥነት ይዘን አግባብነት ካለው ህግ ጋር በማገናዘብ መርምረናል :: የአዋጅ 1237/2012 አንቀጽ 20/1/ ተዋዋይ ወገኖች በሌላ ሁኔታ ካልተስማሙ በስተቀር ተዋዋይ ወገን በሚያቀርበው ጥያቄ መሠረት በግልግል ዳኝነት የቀረበውን ጉዳይ የሚመለከቱ ጊዜያዊ የመጠበቂያ እርምጃዎች መውሰድ ተገቢ ሆኖ ሲያገኘው ጉባዔው ጊዜያዊ የመጠበቂያ እርምጃዎች ትዕዛዝ ሊሰጥ ይችላል በማለት ደንግጓል ሚሰጠው ጊዜያዊ የመጠበቂያ እርምጃዎች ውስጥም ለግልግል ምክንያት የሆነው አለመግባባት እስኪወሰን ድረስ የነበረው ሁኔታ እንዲቀጥል ወይም ወደ ነበረበት እንዲመለስ የማድረግ መሆኑን የአዋጁ አንቀጽ 20/2/መ/ ያመላክታል :: በዚህ ጊዜያዊ የመጠበቂያ እርምጃ ላይ ቅር የተሰኜ ወገን እንዴት እና የት ነው ሊያሳርም ሚችለው የሚለውን ስናይ የአዋጁ አንቀጽ 23 ድንጋጌ ጉባዔው በተዋዋይ ወገኖች ጥያቄ ወይም በልዩ ሁኔታ ተገቢ ሆኖ ሲያገኘው ለተዋዋይ ወገኖች በማሳወቅ በራሱ ተነሳሽነት የሰጠውን ትዕዛዝ ለጊዜው ሊያሻሽል፣ ሊያግድ፣ ወይም ሊሰርዘው ይችላል በማለት ደንግጓል ከዚህ ድንጋጌ መረዳት እንደሚቻለው የግልግል ጉባኤው አስቀድሞም ሚሰጠው ጊዜያዊ የመጠበቂያ እርምጃዎች የመጨረሻ ውሳኔ እንዳለመሆኑ መጠን እንደየሁኔታዎቹ እያየ በራሱ ተነሳሽነት ወይም በተዋዋይ ወገኖች ጠያቂነት የሰጠውን ትዕዛዝ ለጊዜው ሊያሻሽል፣ ሊያግድ፣ ወይም ሊሰርዘው የሚችል መሆኑን እና በነጻነት ያለፍ/ቤቱ ጣልቃነት ሊወስን የሚችል መሆኑን የሚያስገነዝብ ነው :: ስለሆነም አመልካች በቅሬታቸውና በክርክራቸው የመጨረሻ ውሳኔ የተሰጠባቸው መሆኑን በማመን እንዲሻር ለዚህ ፍ/ቤት ማቅረቡ ሲታይ በተለይም በአዋጁ እንደተመለከተው ለግልግል ጉባኤው እንዲሰርዝላቸው አቅርበው የታለፈባቸው ወይም ውድቅ ስለመደረጉ በክርክራቸው ያቀረቡት ነገር የለም ስለሆነም ለግልግል ጉባኤው ለዚህ ፍ/ቤት ያቀረቡትን ቅሬታ አቅርበው ሳያሳርሙ ወይም የሚሠጠውን ውሳኔ ሳያውቁ መምጣታቸውን ተመረድተናል ስለሆነም

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ቀን 17/10/2014

መደበኛ ፍ/ቤቶች በአዋጁ ተለይቶ ከተሰጣቸው ስልጣን ውጭ በግልግል ጉባኤ ውሳኔ ላይ ጣልቃ እንደማይገቡ እና ይህ ጊዜያዊ የመጠበቂያ አርምጃ ደግሞ የተወሰነውም በግልግል ጉባኤ ነው ሊሻሻል ፣ ሊታገድ ወይም ሊሰረዝ የሚችለው ደግሞ በራሱ በግልግል ጉባኤው በመሆኑ አመልካች የመጨረሻ ውሳኔ እንደተሰጠበት ጉዳይ ይሻርልኝ በማለት ያቀረቡት አቤቶታ የአዋጁን 1237/2012 አንቀጽ 5 እና አንቀጽ 23 እንዲሁም የፍ/ሥ/ሥ/ህ/ቁ/ 320/2/ ላይ የተመለከተውን ያላገናዘበ ነው በሚል በፍ/ሥ/ሥ/ህ/ቁ/ 244/2/ሀ/ መሠረት ይህ ፍ/ቤት ጉዳዩን ተቀብሎ የማየት ስልጣን የለውም በማለት ተወስኗል ::

ትዕዛዝ

የተሰጠው ዕግድ ተነስቷል ዕግዱ ለተላለፈለት ተቋም ይጻፍ

ይግባኝ መብት ነው

መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለሥ ::

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የፅዳታ ምድብ 2ኛ ኮንስትራክሽን ይግባኝ ችሎት

ዳኞች፡- ንዋይ ነጌሶ

ደርበው ተዋበ

ጌታሁን ገ/መስቀል

ይግባኝ ባይ ፡- የኢትዮጵያ መንገዶች ባለስልጣን- አልቀረቡም

መልስ ሰጭ ፡- አኪር ኮንስትራክሽን - በሌለበት

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጠ

ፍርድ

ለዚህ ፍርድ መነሻ የሆነው ጉዳይ ይ/ባይ በሥር ፍ/ቤት የተሰጠ ብይን ይሻርልኝ ሲል ያቀረበው የይግባኝ አቤቱታ ነው። ይግባኝ ባይ በ22/09/2014 ዓ.ም በተጻፈ የይግባኝ አቤቱታ በሥር የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ከመ/ሰጭ ጋር በገባው የግንባታ ውል መሰረት መ/ሰጭ ከሳውላ-ማጂ ሎት 3 ሳላይሽ-አሞ ያለውን የመንገድ ሥራ ለመስራት ተዋውሎ የነበረ መሆኑን፤ መ/ሰጭ እንደውሉ ባለመፈጸሙ ምክንያት ይ/ባይ ውሉን ያቋረጠ መሆኑን፤ የውሉን መቋረጥ ተከትሎም በውላቸው መሰረት የግልግል ጉባኤ ተቋቁሞ ጉዳዩ እስከሚታይ ድረስ መ/ሰጭ ያለውን ንብረት ሊያሸሽ ስለሚችል በአዋጅ ቁ. 1237/2013 አንቀጽ 9 እና 27 መሰረት የመ/ሰጭ ንብረቶች እንዲታገዱለት አቤቱታ አቅርቦ የነበረ ቢሆንም የሥር ፍ/ቤት በአብላጫ ድምጽ በሰጠው ብይን ግን የተጠየቀው እግድ እስከ ብር 150,529,154.74 (አንድ መቶ ሃምሳ አራት ሚሊዮን አምስት መቶ ሃያ ዘጠኝ ሺህ አንድ መቶ ሃምሳ አራት ብር ከሰባ አራት ሳንቲም) የሚደርስ ጥያቄ ያለው መሆኑን የሚያመለክት በመሆኑ ጉዳዩ ሊዳኝ የሚችለው በፌዴራል ከፍተኛ ፍ/ቤት ነው፤ ጉዳዩን ለማየት የሚያስችል የሥረ ነገር ስልጣን የለኝም በሚል የሰጠው ብይን ይሻርልኝ የሚል የይግባኝ አቤቱታ አቅርቧል።

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የፀደታ ምድብ 2ኛ ኮንስትሬክሽን ዳግማኛ ችሎት

የሥር ፍ/ቤት በአብላጫ ድምጽ የሰጠው ብይን ስህተት ያለበት ነው የሚልበትን ምክንያትም ሲዘረዝር የጠየቅነው ዳኝነት እግድ ይሰጥልን የሚል ሲሆን እንዲህ አይነት ጥያቄዎች ደግሞ በፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 አንቀጽ 14 (3) እና የፍ/ሥ/ሥ/ሕ/ቁ 18 መሰረት ግምታቸው የማይታወቁ ክርክሮችን ተቀብሎ የመዳኘት ስልጣን ያለው የፌ/መጀመሪያ ደረጃ ፍ/ቤት ሆኖ እያለ ስልጣኑ የፌ/ከፍተኛ ፍ/ቤት ነው መባሉ ስህተት መሆኑን፤ የአዋጅ ቁ. 1237/2013 አንቀጽ 23 93) እና 25 (3) ላይ የተጠቀሰውን ድንጋጌ በማንሳትም የደረሰበት ድምዳሜ ስህተት መሆኑን፤ ይህ ድንጋጌ ውሳኔ ለማስፈጸም ሚቀርብ ጉዳይን የሚመለከት እንጂ የግልግል ጉባኤ ከመቋቋሙ በፊት የሚጠየቅ የጥንቃቄ እርምጃዎችን የሚመለከት አለመሆኑን በመግለጽ ቅሬታውን አቅርቧል። በማስማሚያ ኃሳብ የተገለጸው ኃሳብን በተመለከተም በግልግል ዳኝነትና በእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ 1237. አንቀጽ 8 መሠረት ለጊዜው የሚሰጥ የመጠባበቂያ እርምጃ ከሠላሳ ቀናት ሊበልጥ አይችልም የሚለው በግልግል ጉባዔው በኩል የሚሰጡ የጊዜያዊ መጠባበቂያ እርምጃዎችን እንጂ በፍ/ቤት ለሚሰጡ የጥንቃቄ እርምጃዎች ተፈጻሚ የሚሆን አይደለም። ነው። ፍ/ቤት የሚሰጠው እግድና የግልግል ጉባዔው የሚሰጠው እግድ ሁለት የተለያዩ ነገሮች ናቸው። ፍ/ቤት በግልግል አዋጁ አንቀጽ 9 መሠረት የሚሰጠው እግድ በጊዜ ያልተገደበ ይልቁንም የተፈለገው ነገር እስከሚፈጸም (በእኛ ጉዳይ ጉባዔው እስከሚቋቋም) ሊቆይ የሚችል በመሆኑ በማስማሚያ ኃሳቡ ላይ የተገለጸውም 30 ቀን ስላለፈው እግዱ ይነሳ በሚል የተሰጠው ድምዳ ተገቢ አይደለም በሚል ቅሬታውን አቅርቧል።

ፍ/ቤቱም የእግድ ትዕዛዝ ይሰጥልኝ በሚል የቀረበ አቤቱታን ሥልጣን የለኝም በሚል በአብላጫ ድምጽ የሥር ፍ/ቤት የወሰነውን ውሳኔ አግባብነት ለማጣራት መ/ሰጭን ያስቀርባል የሚል ትዕዛዝ ሰጥቶ የነበረ ቢሆንም መ/ሰጭ መጥሪያ ደርሶት ሊቀርብ ያልቻለ በመሆኑ በሌለበት ጉዳዩ እንዲታይ ተደርጓል።

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ፍ/ቤቱም መ/ሰጭን ያስቀርባል ከተባለበት ነጥብ አንጻር መዝገቡን እንደሚከተለው መርምሮታል።

ለጉዳዩ መነሻ የሆነው ጉዳይ የሥረ-ነገር የዳኝነት ሥልጣንን የሚመለከት ጉዳይ ነው። በግልግል ዳኝነትና በእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ. 12372013 አንቀጽ 9 መሰረት የግልግል ውል ያደረገ ማንኛውም ወገን ዋነውን ጉዳይ ለመዳኘት የሚችል ገላጋይ ዳኛ እስከሚሾም ድረስ ጊዜያዊ የመጠባበቂያ እርምጃዎች እንዲሰጥለት ለፍ/ቤት ሊያመለክት ይችላል በሚል ደንግጎ ይገኛል። ይህ ድንጋጌ ጉዳዩ የሚቀርበው በየትኛው ደረጃ ላለ ፍ/ቤት እንደሆነ በግልጽ የሚያመለክት ባይሆንም ከሥረ-ነገር ሥልጣን አላማና ጽንሰ-ኃሳብ አንጻር፣ እንዲሁም የፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 እና የፍ/ብሔር ሥነ-ሥርዓት ሕጉ ግምት የሌላቸው ጉዳዮችን የመዳኘት ስልጣን አስመልክቶ ካስቀመጣቸው ድንጋጌዎች አንጻር ትርጉም ሊሰጥበት የሚገባው ጉዳይ ሆኖ ተገኝቷል።

የፍ/ቤቶችን የሥረ- ነገር ስልጣን ሕግ በሚወሰንበት ጊዜ ታሳቢ የሚያደርገው የፍ/ቤቶችን አቅም ወይም ብቃት (Competency) እና የጉዳዮችን ውስብስብነት (complexity of cases) እንደሆነ ከሥረ-ነገር ስልጣን ጽንሰ ኃሳብ የምንረዳው ጉዳይ ነው። በፌዴራል ፍ/ቤቶች አዋጅ ቁ 1234/2013 ላይ እስከ ብር 10,000,0000 (አስር ሚሊየን ብር) ድረስ ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት፣ ከብር 10,000,000 (አስር ሚሊየን ብር) በላይ ደግሞ ለፌዴራል ከፍተኛ ፍ/ቤት፣ እንዲሁም የተወሰኑ ግምት የሌላቸውን ጉዳዮች ለፌዴራል ከፍተኛ ፍ/ቤት ሰጥቶ ከተዘረዘሩት ውጭ ያሉትን ደግሞ በፌ/መጀመሪያ ደረጃ ፍ/ቤት እንዲታዩ ሥልጣን ደልድሎ እናገኘዋለን። ሕጉ ይህን ያደረገበትን ምክንያም ስንመለከት የገንዘብ መጠናቸው ከፍተኛ የሆኑና በባህሪያቸው ውስብስበ ናቸው ተብለው የሚታሰቡ ጉዳዮችን ለመዳኘት የተሻለ የዳኝነት ሥራ ልምድና እና እውቀት ያላቸው ዳኞች ይገኙበታል ተብሎ የሚታሰበው የፌ/ከፍተኛ ፍ/ቤት ቢመለከተው ይሻላል ከሚል መነሻ እንደሆነ መገንዘብ ይቻላል።

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የፀደቃ ምድብ 2ኛ ኮንስትሬክሽን ደግሟኝ ችሁት

ከዚህ ጽንሰ ኃሳብ አንጻር የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የቀረበለትን የአግድ ይሰጥልኝ አቤቱታ ተቀብሎ ለመዳኘት የሚያስችል አቅም ወይም ብቃት የለውም ለማለት ይቻላል ወይ የሚለውን መመልከት ያስፈልጋል። የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት በአዋጅ ቁ 1234/2013 በተሰጠው ስልጣን መሰረት ግምት የሌላቸውን ውስበስብ የሆኑ የኩባንያ ይፍረስልኝ እና መሰል ክርክሮችን ተቀብሎ የመዳኘት ስልጣን ያለው ሲሆን ይህም ስልጣን የተሰጠው ፍ/ቤቱ በዚህ ልክ ብቃት ያላቸውን ዳኞች ይሟል ተብሎ ስለሚታመን ነው። እንዲህ አይነት ጉዳዮችን የመዳኘት ብቃት አለው ተብሎ የሚታመን ፍ/ቤት የትዕዛዝ ጉዳዮችን፤ በተለይም የአግድ ትዕዛዝ ይሰጥልኝ ጉዳዮችን ተቀብሎ ለማስተናገድ ብቃት ያንሰዋል ወይም ውስብስብ ይሆንበታል ተብሎ አይታሰብም።

ከዚህም በላይ አሁን በተያዘው ጉዳይ ለዳኝነት የቀረበውን ነጥብ ስንመለከት አግድ ይሰጥልኝ የሚል ነው። ይህም ትዕዛዝ ለማሰጠት በሚቀርብ የትዕዛዝ ፋይል መዝገብ የሚስተናገድ ጉዳይ ሲሆን ለዳኝነት የሚከፈለው ገንዘብም ከብር 25 እንደማይበልጥ ከዳኝነት ገንዘብ አከፋፈል የሕግ ክፍል ማስታወቂያ ቁ. 177/1945 መመሪያ የምንገነዘበው ጉዳይ ነው። ምንም እንኳን ይ/ባይ የመንግስት የአስተዳደር ተቋም በመሆኑ የዳኝነት ገንዘብ ያልከፈለ ቢሆን ዳኝነት የመክፈል ግዴታ ያለበት ተከራካሪ ወገን ግን ለተመሳሳይ ጉዳይ ከብር 25 በላይ ሊከፍልበት የማይችል ጉዳይ ነው። ይህም ጉዳዩ ግምታቸው ከማይታወቁ የዳኝነት አይነቶች የሚመደብ ሆኖ እናገኘዋለን። ግምታቸው የማይታወቁ ጉዳዮች ሆነው በፌዴራል ከፍ/ፍ/ቤት የዳኝነት ስልጣን ሥር የሚወድቁ ጉዳዮችን በተመለከተ በአዋጅ ቁ. 1234/2013 አንቀጽ 11 (2) መሰረት ከአንቀጽ 5 (1) (ሀ) እስከ (ሠ) ባሉት ድንጋጌዎች ላይ ተጠቅሶ የሚገኝ ሲሆን በዚህ ዝርዝር ውስጥ የፌ/ከፍ/ፍ/ቤት የአግድ ይሰጥልኝ አቤቱታን ተቀብሎ ለማስተናገድ ስልጣን ያለው ስለመሆኑ አልተገለጸም። ይህ ከሆነ ደግሞ በአዋጅ ቁ. 1234 አንቀጽ 11 (2) መሰረት በግልጽ ለፌ/ከፍ/ፍ/ቤት ከተሰጡ ግምታቸው ከማይታወቅ ጉዳዮች ውጭ ያሉ ሌሎች ጉዳዮች በሙሉ ለፌ/መጀመሪያ ደረጃ ፍ/ቤት የተሰጡ መሆናቸውን ከአዋጁ አንቀጽ 14 መገንዘብ ይቻላል።

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ከዚህ በተጨማሪም ከአዋጁ ጋር በማይቃረን ሁኔታ የፍ/ሥ/ሥ/ሕጉ ተፈጻሚነት ያለው በመሆኑ በፍ/ሥ/ሥ/ሕ/ቁ 18 መሰረት ግምታቸው የማይታወቁ ጉዳዮች በቀድሞው ለአውራጃ ግዛት ፍ/ቤት (በአሁኑ ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት) እንደሚቀርብ የሚያስገነዝብ ነው።

የሥር ፍ/ቤት የሥረ-ነገር ስልጣን የለኝም ለማለት መነሻ ያደረገው ለግልግል ዳኝነት ይቀርባል ተብሎ የሚታሰበው ጉዳይ ከብር 150,000,000 (አንድ መቶ ሃምሳ ሚሊየን ብር) በላይ ነው በሚል ነው። ይሁን እንጂ ይህ የአንድ መቶ ሃምሳ ሚሊየን ብር ጉዳይ ገና ወደፊት በሚቋቋመው የግልግል ጉባኤ የሚታይ እንጂ በፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የሚታይ ጉዳይ አይደለም። ይ/ባይ ይህን ብር 150,000,000 (አንድ መቶ ሃምሳ ሚሊየን ብር) በአቤቱታው ላይ የጠቀሰው እንዲታገድለት የሚፈልገውን የገንዘብ ወይም የንብረት መጠን ለማሳየት እንጂ በተጠቀሰው ገንዘብ ልክ ዳኝነት እየጠየቀ አይደለም። ይ/ባይ በዚህ ልክ ዳኝነት ካልጠየቀ ደግሞ የገንዘቡ መጠን ከብር 10,000,000 (አስር ሚሊየን ብር) በላይ ስለሆነ ሥልጣን የለኝም ወደሚል ድምዳሜ የሚያደርስ አይሆንም። የሥር ፍ/ቤት ወደዚህ ድምዳሜ ለመድረስ የጠቀሰው ድንጋጌ የፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 አንቀጽ 14 ሲሆን ይህ ድንጋጌ ከአዋጁ አንቀጽ 11 (1) ጋር ተጣምሮ ሲነበብ የፌ/መጀመሪያ ደረጃ ፍ/ቤት እስከ ብር 10,000,000 ድረስ የሚገመቱ ጉዳዮችን ለመዳኘት ስልጣን ያለው መሆኑን የሚገልጽ ድንጋጌ ነው። የድንጋጌው ኃሳብ በገንዘብ የሚገመቱ ጉዳዮችን የሚመለከት ሆኖ እያለ የሥር ፍ/ቤት ድንጋጌውን ያለቦታው በመጥቀስ ለቀረበለት ግምት ለሌለውና ትዕዛዝ ይሰጥልኝ ለሚል አቤቱታ ተጠቅሞ ሥልጣን የለኝም ሲል የደረሰበት ድምዳሜ ሊታረም የሚገባው ሆኖ ተገኝቷል።

ሌላው የሥር ፍ/ቤት ሥልጣን የለኝም ወደሚል ድምዳሜ ለመድረስ ያበቃው ምክንያት በግልግል ዳኝነትና የእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ. 1137/2013 አንቀጽ 25 (3) ሥር የተጠቀሰው ድንጋጌ ነው። ይህ ድንጋጌ ጊዜያዊ የመጠባበቂያ ትዕዛዞችን በፍ/ቤት እውቅና ለማሰጠት ወይም ለማስፈጸም በሚቀርብበት ጊዜ ጉዳዩ ለግልግል ጉባኤ ባይቀርብ ኖሮ ጉዳዩን

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የፀደታ ምድብ 2ኛ ኮንስትራክሽን ጀግዛኝ ችሎት

ተቀብሎ ለማየት ስልጣን ላለው ፍ/ቤት እንደሚቀርብ የሚገልጽ ነው። ይህ ድንጋጌ የትዕዛዝ አፈጻጸምን የሚመለከት በመሆኑ ከቀረበው የትዕዛዝ ይሰጥልኝ አቤቱታ ጋር ቀጥተኛ ግንኙነት የለውም። ከዚህም በላይ አንድን ድንጋጌ በማመሳሰል (By analogy) ተፈጻሚ ለማድረግ ለጉዳዩ አግባብነት ያለው ድንጋጌ ሳይኖር ሲቀር እንደሆነ ከሕግ አተረጓጎም መርህ የምንገነዘበው ጉዳይ ነው። ለጉዳዩ አግባብነት ያለው ድንጋጌ እያለ ሕግን በማመሳሰል (By analogy) ተፈጻሚ ማድረግ የሚቻልበት የሕግ አተረጓጎም መርህ የለም። አሁን በተያዘው ጉዳይ የቀረበው የትዕዛዝ ይሰጥልኝ አቤቱታ ጉዳዩ ግምት የሌለው ክስ ከመሆኑ አንጻር የዳኝነት ስልጣንን በተመለከተ ተፈጻሚ ሊደረጉ የሚገባቸው አግባብነት ያላቸው ድንጋጌዎች የፍ/ሥ/ሥ/ሕ/ቁ 18 እና የፌዴራል ፍ/ቤቶች አዋጅ ቁ. 1234/2013 አንቀጽ 14 (1) ድንጋጌዎች ናቸው። እነዚህ ቀጥተኛና አግባብነት ያላቸው ድንጋጌዎች እያሉ የሥር ፍ/ቤት ለጉዳዩ አልባት ለመስጠት ሲል አግባብነት የሌለውን ድንጋጌ በማመሳሰል (By analogy) የተረጎመበት መንገድ ተገቢነት ያለው ሆኖ አልተገኘም።

ሌላው በሥር ፍ/ቤት ከአብላጫው ድምጽ ተለይተው የማስማሚያ ኃሳብ ያቀረቡትን ዳኛ ኃሳብ በተመለከተም ፍ/ቤቱ የአግድ ትዕዛዙን ለመስጠት የሚያስችል ስልጣን ያለው ቢሆንም በግልግል ዳኝነት እና በእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ. 1237/2013 አንቀጽ 22 (4) መሰረት እግዱ 30 ቀን ያለፈው በመሆኑ ሊነሳ ይገባል በሚል የደረሱበት ድምዳሜ የተሳሳተ ነው የሚል ቅሬታ በይ/ባይ ቀርቧል። በእርግጥም የማስማሚያ ኃሳቡን ስንመለከት በፍ/ቤቶች የሚሰጡ ጊዜያዊ የመጠባበቂያ እርምጃዎች መቆየት ያለባቸው ለ30 ቀናት ብቻ ነውን? የሚል ጥያቄ እንዲነሳ ያደርጋል። የአዋጁን አንቀጽ 22 (4) ስንመለከት የግልግል ጉባኤ የሚሰጠው የጥንቃቄ እርምጃዎች ትዕዛዝ የሚቆየው ለ30 ቀናት ብቻ እንደሆነ የሚገልጽ ሲሆን ፍ/ቤቶች የሚሰጡትን የጥንቃቄ እርምጃዎችን የሚመለከት አይደለም። ከአዋጁ አንቀጽ 20 ጀምሮ እስከ አንቀጽ 24 ድረስ ያሉት ድንጋጌዎች በተዋዋይ ወገኖች ውሰታ መሰረት በሚቋቋም የግልግል ጉባኤ የሚሰጡ የጥንቃቄ እርምጃዎችን የሚመለከት ሲሆን እነዚህ ድንጋጌዎች በፍ/ቤት

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የፀደቃ ምድብ 2ኛ ኮንስትራክሽን ዳግማኛ ችሎት

ለሚሰጡ የጥንቃቄ እርምጃዎች ተፈጻሚነት ያላቸው ስለመሆኑ ድንጋጌዎቹ አያመለክቱም። ይህ ከሆነ ደግሞ የማስማሚያ ኃሳብ የጻፉት ዳኛ ለጉዳዩ አግባብነት የሌለውን ድንጋጌ በመጥቀስ የደረሱበትም ድምዳሜ ሊታረም የሚገባው ሆኖ ተገኝቷል። ፍ/ቤቶች የሚሰጧቸው የጥንቃቄ እርምጃዎች በአዋጁ አንቀጽ 9 እና 27 መሰረት ሲሆን በፍ/ቤቶች የሚሰጡ የጥንቃቄ እርምጃዎች ለምን ያህል ጊዜ እንደሚቆዩ ድንጋጌዎቹ አይገልጹም። ይህ ከሆነ ደግሞ ፍ/ቤቶች ለሚሰጧቸው የጥንቃቄ እርምጃዎች የተቀመጠ የጊዜ ገደብ ባለመኖሩ ተገቢ ነው የሚሉትን ጊዜ የሚሰጡ ካልሆነ በስተቀር 30 ቀን ብቻ ነው በሚል የእግዱን ጊዜ በቀናት ለመወሰን የሚቻልበት የሕግ አግባብ አይኖርም።

በጥቅሉ ከላይ በተጠቀሱት ዝርዝር ምክንያቶች የሥር ፍ/ቤት አብላጫው ድምጽ ሥልጣን የለኝም ሲል የደረሰበት ድምዳሜ እንዲሁም በልዩነት የተጻፈው የማስማሚያ ኃሳብ ሊታረም የሚገባው ሆኖ ተገኝቷል። በመሆኑም በይግባኝ ባይ አቤቱታ መሰረት ዋናውን የክርክር ጭብጥ ለመዳኘት የሚችል የግልግል ጉባኤ እስከሚቋቋም ድረስ በግልግል ዳኝነትና በእርቅ አሰራር ሥነ-ሥርዓት አዋጅ ቁ 1237/2013 አንቀጽ 9 መሰረት እግድ ይሰጥልኝ በሚል የቀረበውን አቤቱታ ተቀብሎ ለማስተናገድ የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የሥራ-ነገር ሥልጣን አለው ተብሏል።

ውሣኔ

1. የሥር ፍ/ቤት በአብላጫ ድምጽ በመ.ቁ 301454 ሚያዚያ 11 ቀን 2014 ዓ.ም የሰጠው ብይን እና በልዩነት የተሰጠው የማስማሚያ ኃሳብ በፍ/ሥ/ሥ/ሕ/ቁ 348 (1) መሰረት ተሽሯል።
2. ይ/ባይ ያቀረበውን የእግድ ይሰጥልኝ አቤቱታ ተቀብሎ ለማየት የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የሥራ-ነገር ስልጣን ያለው በመሆኑ መዝገቡን በማንቀሳቀስ ተገቢውን ትዕዛዝ

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ወይም ውሳኔ እንዲሰጥ በፍ/ሥ/ሕ/ቁ 341 መሰረት ታሟል። የውሳኔው ግልባጭ ለፈ/መጀመሪያ ደረጃ ፍ/ቤት ይላክለት።

3. በዚህ መዝገብ ነሐሴ 20 ቀን 2014 ዓ.ም ተሰጥቶ የነበረው አግድ ተነስቷል። የአግድ ትዕዛዙ ለተላለፈለት አካል የዚህ ትዕዛዝ ግልባጭ ይድረሰው።

<u>ትዕዛዝ</u>

- ወጪና ኪሣራን በተመለከተ ግራ ቀኙ የየራሳቸውን ይቻሉ።
- ይግባኝ መብት ነው፤ መዝገቡ ተዘግቷል ለመ/ቤት ይመለስ።

የማይነበብ የሦስት ዳኞች ፊርማ አለበት

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የከ/መ/ቁጥር 01999

መስከረም 25 ቀን 2015 ዓ/ም

ፌዴራል መጀመሪያ ደረጃ ፍርድ ቤት

ንግድ እና ኢንቨስትመንት ምድብ 1ኛ ኮንስትራክሽን ችሎት

ዳኞች፡- መካ ነስሩ

ደረሰ ተክሉ

ከሳሽ፡- ቻይና ሬልዌይ 14 ቢሮ ግሩፕ ኩባንያ ሊሚትድ ኢትዮጵያ

ቅርንጫፍ - ጠበቃ ብስራት ተክሉ ቀረቡ

ተከሳሽ፡- የኢትዮጵያ መንገዶች አስተዳደር - አልቀረቡም

መዝገቡ ተመርምሮ ተከታዩ ብይን ተሰጥቷል።

ብ ይ ን

መዝገቡ ለተረኛ ችሎት ለመቅረብ ምክንያት የሆነው ጉዳይ በመስከረም 24 ቀን 2015 ዓ/ም በተሃፈ ቃለ-መሐላ አቤቱታ ላይ በአጠቃላይ የውል ሁኔታዎች አንቀጽ 4.2 እና 13.2 ላይ በአስገዳጅነት የሰፈሩ ቅድመ ሁኔታዎች ባላተሟሉበት ተከሳሽ በከሳሽ የቀረቡለት የመልካም ሥራ አፈፃፀም ዋስትና እና የቅድመ ክፍያ ዋስትና አላግባብ እና ከቅን ልቦና ውጪ በሆነ አካሄድ ቢመረስ በከሳሽ ላይ በገንዘብ ሊካስ የማይችል ዘላቂ ጉዳት ሊያደርስ እንደሚችል በመገንዘብ ከሳሽ ለተከሳሽ በየካቲት 11 ቀን 2012 ዓ/ም በቁጥር MD20010 ተመዝግቦ ከኢትዮጵያ ንግድ ባንክ በሰጠሁት የመልካም ስራ አፈፃፀም ዋስትና፣ በሐምሌ 01 ቀን 2012 ዓ/ም በቁጥር DB/AG/026/20 ተመዝግቦ ከዳሸን ባንክ የሰጠሁትን የመጀመሪያ ዙር ቅድመ ክፍያ ዋስትና እንዲሁም በነሐሴ 19 ቀን 2013 ዓ/ም በቁጥር DB/AG/069/21 ተመዝግቦ ከዳሸን ባንክ የሰጠሁትን ሁለተኛ ዙር ቅድመ ክፍያ ዋስትና ለተከሳሽ ገቢ እንዳያደርጉ የቀረበው ጥያቄ ከቅን ልቦና በራቀና በውሉ አጠቃላይ ሁኔታዎች አንቀጽ 2.4፣ 13 እና 15.2 ላይ እንደሰፈረው በከሳሽ የውል ጥሰት ባልተፈፀመበት በመሆኑ ዋስትናዎቹ ባንኩ ለተከሳሽ እንዳይከፍሉ በፍትሐ ብሔር

ሥነ-ሥርዓት ሕግ ቁጥር 154 መሰረት ታግዶ እንዲቆይ የዕግድ ትዕዛዝ ለባንኩ ይሰጥልን በማለት አቤቱታ በማቅረባቸው ነው።

በዚህ መዝገብ ከሳሽ ባቀረቡት የክስ አቤቱታ ከተከሳሽ ጋር ባላቸዉ የመንገድ ፕሮጀክት ንድፍ እና የግንባታ ሥራ ዉል መነሻነት በግራ ቀኞችን መካከል የተፈጠረው አለመግባባት በግልግል ዳኛ ጉባዔ ታይቶ እልባት ያገኝ ዘንድ በአጠቃላይ የውል ሁኔታ እና የውል ልዩ ሁኔታ አንቀጽ 20.6 መሰረት የግልግል ዳኛ ጉባዔ ይቋቋም ዘንድ ተከሳሽ ገላጋይ ዳኛ መርጦ ለከሳሽ እንዲያሳውቅና የግልግል ጉባኤተቋቁሞ ጉዳዩን እንዲመለከት እንዲደረግ፣ በፍርድ ቤት በተሰጠው ጊዜ ውስጥ ገላጋይ ዳኛውን መርጦ ለከሳሽ ሳያሳውቅ ከቀረ ፍርድ ቤቱ በውሉ መሰረት ዓለም አቀፍ የንግድ ምክር ቤት በተከሳሽ እግር ተተክቶ በተከሳሽ በኩል የሚሰየመውን የግልግል ዳኛ መርጦ እንዲሾም ትዕዛዝ እንዲሰጥ፣ የግልግል ጉባኤው ተቋቁሞ ትዕዛዝ እስከሚሰጥ ድረስ አስፈላጊውን የአጠባበቅ እርምጃ እንዲሰጥልን በማለት ዳኝነት ጠይቀዋል።

ፍርድ ቤቱም ከሳሽ በተረኛ ችሎት ዕግድ እንዲሰጥበት የጠየቀው ጉዳይ ተመልክቶ ውሳኔ የመስጠት የሥረ-ነገር ሥልጣን ያለው መሆን አለመሆኑን ከህግ አንፃር በማገናዘብ እንደሚከተለው መርምሯል።

ፍርድ ቤቱ የዕግድ ትዕዛዝ እንዲሰጥባቸው የተጠየቁት የመልካም ሥራ አፈፃፀም እና የቅድመ ክፍያ ዋስትናዎች ላይ የተጠቀሰው የገንዘብ መጠን በዳሽን ባንክ ብቻ 12,910,629.76 የአሜሪካን ዶላር መሆኑን ከሳሽ በማስረጃ ዝርዝር መግለጫ ተራ ቁጥር 19 ካቀረበው ደብዳቤ መረዳት የሚቻል ነው። የመልካም ስራ አፈፃፀም ዋስትና የገንዘብ መጠን ከኢትዮጵያ ንግድ ባንክ ማስረጃው አልደረሰንም በማለት ጠበቃው በቃል 6,453,810.44 ዶላር እንደሆነ ለፍርድ ቤቱ አስረድተዋል።

ጊዜያዊ የመጠባበቂያ የእግድ ትዕዛዝ የሚደነግገዉ የግልግል ዳኝነት እና እርቅ አሰራር ሰርዓት አዋጅ ቁጥር 1237/2013 አንቀጽ 9 ድንጋጌ ተዋዋይ ወገኖች የግልግል ዳኝነት ሂደቱ ከመጀመሩ በፊት ወይም ሂደቱ ከተጀመረ በኋላ የግልግል ዳኝነት ስምምነቱ መሰረት በማድረግ ጊዜያዊ የመጠባበቂያ እርምጃ ትዕዛዝ እንዲሰጥ ለፍርድ ቤቱ ማመልከት እንደሚችል ከመደንገጉ ጨጪ አቤቱታዉ የሚቀርብዉ ለየትኛዉ ፍርድ ቤት እንደሆነ በግልፅ አልተመላከተም። በሌላ በኩልም የዚሁ አዋጅ አንቀጽ 23(3) ስር በግልግል ጉባዔዉ የተሰጠ ጊዜያዊ የመጠባበቂያ ትዕዛዝ የሚፈጸመዉ ጉዳዩን ለግልግል ዳኝነት ጉባዔ በይቀርብ ኖሮ ጉዳዩን ለማየት የስር ነገር ስልጣን

ባለዉ ፍርድ ቤት ስለመሆኑ ተመልክቷል። የተሰጠ ትዕዛዝ ወይም ዉሳኔ እንዲፈጸም ከሚደረግበት አግባብ አንፃር ከታየም አፈፃፀም የሚከተለዉ የሥረ-ነገር ስልጣንን ስለመሆኑ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁ 75788 አስገዳጅ የሕግ ትርጉም ሰጥቶበታል። በአዋጅ ቁጥር 1237/2013 አንቀጽ 25(3) ጊዜያዊ የመጠባበቂያ ትዕዛዝ በገላጋይ ዳኛ በተሰጠ ጊዜ ይህንን ትዕዛዝ የሚያስፈጽመዉ ጉዳዩ ለገላጋይ ዳኛ ባይቀርብ ኖሮ ጉዳዩን ለማየት የስረ-ነገር ስልጣን ያለዉ ፍርድ ቤት እንደሆነ ማስቀመጡ የትዕዛዙ አፈፃፀም የስረ-ነገር ስልጣንን የሚከተል መሆኑን የሚያሳይ ነዉ።

ፍርድ ቤት የሚሰጠው ጊዚያዊ የመጠባበቂያ አርምጃ ትዕዛዝ በተለያዩ ምክንያቶች ሳይፈፀም ቢቀር ትዕዛዙ እንዲፈፀም ጥያቄው የሚቀርበው ጉዳዩን የማየት ስልጣን ላላው ፍርድ ቤት ስለመሆኑ ከድንጋጌው ይዘትና መንፈስ መረዳት የሚቻል ነው። በግልግል ዳንነት እና የእርቅ አሰራር ሥርዓት አዋጅ ቁጥር 1237/2013 ድንጋጌዎች ይዘት አንፃር በፍርድ ቤት የሚቀርብ ጊዜያዊ የመጠባበቂያ ትዕዛዝ ይሰጥልኝ ዳኝነት መቅረብ ያለበት ለየትኛው ፍርድ ቤት እንደሆነ በግልፅ ባይደነግግም በግልግል ጉባኤ የተሰጠ የጊዜያዊ የመጠባበቂያ ትዕዛዝ አፈፃፀም አንፃር የሚቀርብ ዳኝነት የሥረ-ነገር ሥልጣን ያለው ፍርድ ቤት የትኛው እንደሆነ ተለይቶ መቅረብ እንዳለበት በአዋጁ አንቀጽ 25(3) መደንገጉ ሲታይ ግልግል ጉባኤ በፍርድ ቤት ከመቋቋም በፊት ሆነ ከተቋቋመ በኃላ ጊዜያዊ የመጠባበቂያ ትዕዛዝ ይሰጥልኝ ዳኝነት ለፍርድ ቤት ሲቀርብ በግልግል እንዲታይ የተጠየቀው ዳኝነት የሥረ-ነገር ሥልጣን የየትኛው ደረጃ ፍርድ ቤት ሥልጣን እንደሆነ ተለይቶ ሊቀርብ የሚገባው ጉዳይ መሆኑን መረዳት የሚቻል ነው።

ከሳሽ እየጠየቁት ያሉት እግድ ለመልካም ሥራ አፈፃፀም እና ለቅድመ ክፍያ የተያዘ የቃስትና ገንዘብ ለተከሳሽ ገቢ እንዳይደረግ የሚል ሲሆን ይህ የገንዘቡ መጠን የቅድመ ክፍያ ዋስትናዎች ላይ የተጠቀሰው የገንዘብ መጠን በዳሽን ባንክ ብቻ 12,910,629.76 የአሜሪካን ዶላር ሲሆን በኢትዮጵያ ንግድ ባንክ የመልካም ሥራ አፈፃፀም ዋስትና ደግሞ 6,453,810.44 የአሜሪካ ዶላር ነው። ይህ የገንዘብ መጠን አሁን ባለው የውጭ ምንዛሬ አንፃር ተሰልቶ ለግልግል ዳኝነት ባይቀርብ ኖሮ በፌዴራል ፍርድ ቤት ማቋቋሚያ አዋጅ ቁጥር 1234/2013 አንቀጽ 11(1) እና በአዋጅ ቁጥር 1237/2013 አንቀጽ 25(3) መሰረት ሊዳኝ የሚችለዉ በፌደራል ከፍተኛ ፍርድ ቤት ነዉ። ስለሆነም ይህ ፍርድ ቤት በአዋጅ ቁጥር 1234/2013 አንቀጽ 14 መሰረት ለመመልከት ስልጣን ያለዉ እስከ ብር አስር ሚሊዮን የሚመለከቱ ጉዳዮችን ስለሆነ አመልካች ጊዜያዊ መጠባበቂያ እንዲሰጥላቸዉ የጠየቁበት ጉዳይ ደግሞ ከአስር ሚሊዮን ብር በላይ በመሆኑ ይህ ፍርድ ቤት

የቀረበዉን አቤቱታ ተቀብሎ የመጠባበቂያ ትዕዛዝ የመስጠት ስልጣን የሌለው በመሆኑ ዕግድ እንዲሰጥላቸው ያቀረቡት አቡቱታ ፍርድ ቤቱ አልተቀበለውም።በመሆኑም ተከታዩ ትዕዛዝ ተሰጥቷል።

ት ዕ ዛ ዝ

1. ከሳሽ ዕግድ እንዲሰጥላቸው የጠየቁበት ጉዳይ ከአዋጅ ቁጥር 1237/2013 አንቀጽ 23(3) መሰረት ሥልጣን ስለሌለው ሥልጣን ባለው ፍርድ ቤት አቤቱታውን ሊያቀርቡ ይገባል በማለት ውድቅ ተደርጓል።
2. በተሰጠው ብይን ላይ ቅሬታ ካለ የመዝገቡ ግልባች ለይግባኝ ሰሚው ፍርድ ቤት እንዲላክ ታዟል።
3. ከሳሽ በዋናው ጉዳይ ያቀረቡት ዳኝነት መደበኛ ሥራ ሲጀመር ለመደበኛ ችሎቱ ቀርቦ እንዲስተናገድ ለችሎቱ ይቅረብ። ለችሎት ፀሐፊ መዝገቡ ተመላሽይደረግ።

የማይነበብ የሁለት ዳኞች ፊርማ አለበት።

ዳኛ - ደረሰ ተክሉ

አመልካቾች - 1. አቶ መሐመድ አህመድ ሰኢድ - ጠበቃ ናሆም አብዱ - ቀረቡ

2. አቶ ከድር ሙሳ አስማን - አልቀረቡም

3. ወዲዝ ኢንጂነሪንግ ኃላ.የተ.የግ.ማ - ጠበቃ አስማየሁ ቢርቢርሳ - ቀረቡ

ተጠሪ - አቶ ሳላህ አህመድ አብዱራህማን - አልቀረቡም

ይህ መዝገብ ተከፍቶ ለችሎት ሲቀርብ የቻለዉ ክሳሽ በ26/03/2017 ዓ/ም ጽፈዉ ባቀረቡት አቤቱታ መነሻነት ሲሆን ለስ ዳኝነት አክፋፈሉ በሞዴል 30 በደረሰኝ ቁጥር 884138 ብር ዘጠና /90/ ተከፍሉበት ቀርቧል። አመላካቾች በአቤቱታቸዉ የጊዜያዊ የመጠባበቂያ ትዕዛዝ እንዲሰጥላቸዉ የጠየቁ ሲሆን አቤቱታቸዉም አመልካቾች እና በተጠሪ መካከል ብርቱ የሆነ አስመገባባት ከመፈጠሩ አልፎ በእስካሁን የዕዳት ምርመራ ተጠሪ በሲሱች አባላት እና 3ኛ አመልካች ላይ ያደረሰው የገንዘብ ጉዳት ብር 650,000,000.00/ስድስት መቶ ሃምሳ ሚሊዮን ብር/ ጉዳት/ኪሳራ አድርሷል። በመሆኑም በዚህ በተፈጠረዉ ችገር በአመልካቾች ላይ የተፈጠረዉ የገንዘብ ጉዳት በአባላት መካከል አስመገባባትና ብርቱ ጭቅጭቅ በግራ ቀኝችን በምንመርጣቸዉ ገላጋይ ዳኞች አልባት የሚሰጠዉ መሆኑ እንደተጠበቀ ሆኖ በአመልካቾች ላይ እየደረሰ ያለው ጉዳት ክፍተኛ ከመሆኑ አንጻር አንዲሁም ተጠሪ አዘንም በአመልካቾች ላይ የሚደርሰዉን ጉዳት ከመቀነሰ ይልቅ እያባባሰ የሚገኝ በመሆኑ፡ በተለይም ገንባታው ተጠናቆ ለደንበኞች ለማስረክብ ዝገጁ የሆነን በአዲስ አበባ ክተማ ዮካ ክ/ክተማ ወረዳ 13 የቢ/ቁ አዲስ የሚገኝ ሕንፃ በንልበት በመያዝ ኃላፊነታችንን እያከበደ ይገኛል። ስለሆነም ይህ ጉዳት በግልግል ዳኝነት ጉባኤ ማየት አስኪጀመር ድረስ የጊዜያዊ የመጠባበቂያ ትዕዛዝ እንዲሰጥልን የሚል ነዉ። ሲሰጣቸዉ የሚገባዉን የጊዜያዊ የመጠባበቂያ ትዕዛዝ ዘርዝረዉ አቅርበዋል። በመሆኑም ፍርድ ቤቱም መዝገቡን መርምሮ ተክታየን ትዕዛዝ ሰጥቷል።

<u>ትእዛዝ</u>

1. ወዲዝ ኢንጂነሪንግ ኃላ/የተ/የግ ማህበር ላያ ያለው በተከሳሽ ስም ተመዘግቦ የሚገኝ ማንኛዉም አክሲዮንም ሆነ ክፍያ ታግዶ እንዲቆይ ታዟል። ለሚመለከተዉ ሁሉ ይፃፍ።

2. እርነስት ማኑፋክቸሪንግ ኃላ/የተ/የግ ማህበር ላያ ያለው በተከሳሽ ስም ተመዘግቦ የሚገኝ ማንኛዉም አክሲዮንም

ሆነ ከፍያ ታግዶ እንዲቆይ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

3. በሲኤምሲ የሚገኘው ንብረትነቱ የወጂዝ ኢንጂነሪንግ ኃ/የተ/የግ ማህበር የሆነው በተከሳሽ ስም በአደራ ተመዝግቦ የሚገኘው ህንፃ እና ቤቶች እንዳይሸጡ ወይም ለ3ኛ ወገን እንዳይዘዋወሩ ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

4. ራይዝ ኢንጂነሪንግ ኃ/የተ/የግ ማህበር ላይ ያለው ማንኛውም በተከሳሽ ስም ተመዝግቦ የሚገኝ ሆነ በእህቱ (ወ/ሮ ፈትሂያ አህመድ አብዱረህማን) ስም የሚገኙ አክሲዮንም ሆነ ከፍያዎች ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

5. ሰነድ ኃ/የተ/የግ ማህበር ላይ ያለው ማንኛውም በተከሳሽ ስም ተመዝግቦ የሚገኝ ሆነ በእህቱ(ወ/ሮ ፈትሂያ አህመድ አብዱረህማን)ስም የሚገኙ አክሲዮንም ሆነ ከፍያዎች ታግደው እንዲቆዩ ታዟል።ስሚመለከተዉ ሁሉ ይፃፍ።

6. በአልአፈያ አ.ማ ላይ ያለው ማንኛውም በተከሳሽ ስም ተመዝግቦ የሚገኝ፣ በእህቱ (ፅ/ሮ ፈትሂያ አህመድ አብዱረህማን) ፣በባለቤቱ (ወ/ሮ አይሻ ሀሰን ነጋ)፣ በልጆቹ የሚገኙ አክሲዮንም ሆነ ከፍያ ታግዶ እንዲቆይ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

7. በራይደርስ ትሬዲንግ እና ማኑፋክቸሪንግ አ.ማህበር ላይ ያለው ማንኛውም በተከሳሽ ስም ተመዝግቦ የሚገኝ ሆነ በእህቱ (ወ/ሮ ፈትሂያ አህመድ አብዱረህማን) ስም የሚገኙ አክሲዮንም ሆነ ከፍያዎች ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

8. በራይዝ ኢንጂነሪንግ ኃ/የተ/የግ/ማህበር ስም የተከፈቱ የባንክ ሂሳቦች ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

9. በራይዝ ኢንጂነሪንግ ኃ/የተ/የግ ማህበር እና በሰነድ ኃ/የተ/የግ ስም ተመዝግበው የሚገኙ ይዞታዎች እና በግንባታ ላይ ያሉ ቤቶች ሰሌዳ 3ኛ ወገን መሸጥ እንዳይችሉ ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

10. በሰነድ ኃላ/የተ/የግ ማህበር እና በሪይዝ ኢንጂነሪንግ ኃላ/የተ/የግ ማህበር ወይም በተከሳሽ ስም አዲስ የባንክ ብድሮች እንዳይፈቀዱ ፣የተፈቀዱም ካሉ ብድሩ ሳይሰቀቅ ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

11. በሰነድ ኃላ/የተ/የግ የተከፈቱ የባንክ ሂሳቦች ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

12. በተከሳሽ ስም ፡ በእህቱ (ወ/ሮ ፈትሂያ አህመድ አብዱረህማን) ፡በባለቤቱ (ወ/ሮ አይሻ ሀሰን ነጋ) እና በልጆቹ ተከፍተው የሚገኙ የባንክ ሂሳቦች ታግደው እንዲቆዩ

13. በተከሳሽ ስም ፡ በእህቱ(ወ/ሮ ፈትሂያ አህመድ አብዱረህማን) ፡በባለቤቱ (ወ/ሮ አይሻ ሀሰን ነጋ) እና በልጆቹ ስም ተመዝግበው የሚገኙ ተሸከርካሪዎች ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

14. በተከሳሽ ስም ፡ በእህቱ(ወ/ሮ ፈትሂያ አህመድ አብዱረህማን)፡ በባለቤቱ(ወ/ሮ አይሻ ሀሰን ነጋ) እና በልጆቹ ስም ተመዝግበው የሚገኙ የማየንቀሳቀሱ ንብረቶች ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

15. በተከሳሽ ስም፡ ሆነ በእህቱ(ወ/ሮ ፈትሂያ አህመድ አብዱረህማን) ተከፍተው የሚገኙ ድርጅቶች አክሲዮኖች እና የባንክ ሂሳቦች ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

16. በተከሳሽ ስም፡ ሆነ እህቱ(ወ/ሮ ፈትሂያ አህመድ አብዱረህማን) ጉዳዩ እስኪጠናቀቅ ድረስ ከአገር እንዳይወጡ ታግደው እንዲቆዩ ታዟል። ስሚመለከተዉ ሁሉ ይፃፍ።

17. መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ

የማይነበብ የዳኛ ፊርማ አሰበት