

JUDGMENT SHEET
LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Civil Original Suit No.06 of 2023

Sadiq Poultry Farms (Private) V/S First Habib Modaraba
Limited etc.

J U D G M E N T

Date of hearings	23.04.2024 and 30.09.2024
Plaintiff(s) by	M/s Muhammad Imran Malik, ASC, Aakif Majeed and Asim Tufail Farooqi, Advocates.
Defendant(s) by	Ms. Samia Faiz Durrani, ASC, Faiz Durani, ASC with Salman Khan Baryalay and Arshad Mehmood, Advocate.

JAWAD HASSAN, J. This suit was filed under Section 9 of the Financial Institution (Recovery of Finances) Ordinance, 2001 (the “*Ordinance*”) claiming multiple reliefs including recovery of Rs.285 million with up-to-date profit against the Defendant due to non-fulfillment of obligations and breach of sanctioned finance facilities.

2. In response to the suit, the Defendant filed PLA under Section 10 of the “*Ordinance*” and primarily objected to maintainability of the suit on the ground that the suit is not maintainable on the score of territorial jurisdiction in view of Clause 12 of the Musharakah Agreement dated 27.05.2022 (the “*Agreement*”).

3. Arguments have been heard in detail on the question of jurisdiction.

I. Question of Jurisdiction

4. Learned counsel for the Defendant Ms. Samia Faiz Durrani, ASC on 11.12.2023 objected to maintainability of the suit on the question of law and argued the case on 26.02.2024 and 26.03.2024 regarding the jurisdiction of Courts at Karachi in term of the “*Agreement*”. As the question of territorial jurisdiction has been

raised by learned counsel for the Defendant therefore, without advert to other merits of the case, this objection is being decided. It is a well-entrenched and settled principle of law that before delving into matter in issue, a Court/Tribunal has to make sure that it has jurisdiction to ponder upon such issue. The Supreme Court of Pakistan in its judgment reported as “GOVERNMENT OF SINDH THROUGH SECRETARY EDUCATION AND LITERACY DEPARTMENT and others Versus NIZAKAT ALI and others” (2011 SCMR 592) has held that “every Court prior to taking cognizance and adjudicating upon an issue should first resort to the question of assumption of jurisdiction of the Court and if it comes to the conclusion that jurisdiction can be assumed only then it can adjudicate upon the issue”. The question regarding assumption of jurisdiction and its exercise has very comprehensively been dealt with and decided by the Supreme Court of Pakistan in the case titled “FAUJI FOUNDATION and another Versus SHAMIMUR REHMAN” (PLD 1983 SC 457). Moreover, it is an oft repeated principle of law that jurisdiction cannot be vested to the court with the consent of the parties or at their whims unless it is so equipped under the law as held by the Supreme Court of Pakistan in “IZHAR ALAM RAROOQI, ADVOCATE versus Sheikh ABDUL SATTAR LASI and others” (2008 SCMR 240).

II. Agreements relating to Exclusive Jurisdiction Clauses

5. The nub of the matter is to examine the agreements having exclusive clauses related to jurisdiction of the Court settled between the parties. Learned counsel for the parties, while arguing the case, have referred to various documents/agreements executed between the parties, filed and relied by them under the provisions of the “Ordinance”. Pertinently, signing of the “Agreement” at Karachi and inclusion of Clause 12 in it at the time of its execution is not denied. Ms. Samia Faiz Durrani, ASC counsel for the Defendant stated that as per Clause 12, the parties had agreed that the courts at Karachi would have exclusive territorial jurisdiction to adjudicate any dispute or claim arising out of the agreement while the Plaintiffs have filed this suit before this Court which is liable to be returned under Order VII

Rule 10 of the Code of Civil Procedure, 1908 (the “CPC”). On the other hand, Mr. Muhammad Imran Malik, ASC counsel for the Plaintiffs have relied on sanction letters of different dates executed at Rawalpindi. Before proceeding further, it would be advantageous to mention some agreements alongwith their date and place of execution:

Sr.#	Particular	Date	Place
1	Diminishing Musharakah Agreement	27.05.2022 07.06.2022 09.06.2022 25.07.2022 04.08.2022 10.08.2022 11.08.2022	Karachi
<u>Jurisdiction Clause 12</u> The Courts at Karachi or as deem fit by FHM shall have the exclusive jurisdiction to adjudicate upon any dispute or claim arising out or in accordance with this Agreement.			
2	Monthly Payment Agreement	27.05.2022	Karachi
<u>Jurisdiction Clause 10</u> The MONTHLY Payment Agreement is governed by and shall be construed in accordance with Pakistan law. All competent courts at Karachi or as deem fit by FHM shall have the exclusive jurisdiction to hear and determine any action, claim or proceedings arising out of or in connection with this MONTHLY Payment Agreement. The amounts payable by the Customer to Modaraba under this Monthly Payment Agreement may be recovered through the Banking Courts, under the Financial Institutions (Recovery of Finances) Ordinance, 2001 or any replacement or statutory modification thereof.			
3	Musharakah Agreement (Purchase of Asset(s))	26.05.2022 06.06.2022 08.06.2022 26.07.2022	Karachi
<u>Jurisdiction Clause 16</u> The MONTHLY Payment Agreement is governed by and shall be construed in accordance with Pakistan law. All competent courts at Karachi or as deem fit by FHM shall have the exclusive jurisdiction to hear and determine any action, claim or proceedings arising out of or in connection with this Agreement. The amounts payable by the Customer to the Modaraba under any Agreement may be recovered through the Banking Courts, under the Financial Institutions (Recovery of Finances) Ordinance, 2001 or any replacement or statutory modification thereof.			
4	Moveable/Immoveable Property Finance Agreement	27.05.2022	Karachi
<u>Jurisdiction Clause 12</u> The Courts at Karachi or as deem fit by FHM shall have the exclusive jurisdiction to adjudicate upon any dispute or claim arising out or in accordance with this Agreement.			
5	Monthly Payment Agreement	07.06.2022 09.06.2022 26.07.2022 04.08.2022 11.08.2022	Karachi
<u>Jurisdiction Clause 10</u> The MONTHLY Payment Agreement is governed by and shall be construed in accordance with Pakistan law. All competent courts at Karachi or as deem fit by FHM shall have the exclusive jurisdiction to hear and determine any action, claim or proceedings arising out of or in connection with this MONTHLY Payment Agreement. The amounts payable by the Customer to Modaraba under this Monthly Payment Agreement may be recovered through the Banking Courts, under the Financial Institutions (Recovery of Finances) Ordinance, 2001 or any replacement or statutory modification thereof.			
5	Moveable/Immoveable Property Finance Agreement	27.05.2022 26.07.2022 11.08.2022	Karachi

7	Personal Guarantee	27.05.2022 26.07.2022 28.07.2022 11.08.2022	Karachi
<p style="text-align: center;">Jurisdiction Clause 19</p> <p>This Agreement shall be deemed to have been executed at Karachi and both the parties hereto specifically agree that the courts at Karachi or at the sole option of First Habib Modaraba, any other court, shall have the exclusive jurisdiction to adjudicate upon any issue, dispute and/or matter whatsoever directly or indirectly raised to any of the provision of this agreement and hear and determine any action, claim or proceedings arising out of or in connection with this agreement.</p>			

6. The admitted documents/agreements tabulated above clearly depict that the parties had mutually agreed to resolve their issues at Courts of Karachi having exclusive jurisdiction for the determination of their disputes. The issue of exclusive jurisdiction for determination and enforcement of contractual rights and obligation has been discussed by learned Division Bench in “FAYSAL BANK LIMITED versus Messrs USMAN ENTERPRISES and another” (2023 CLD 1563), relevant portion thereof reads as”

“There are two broad categories under forum selection clauses and this categorization is depending on the intention of the parties to a contract as expressed in the language of the forum selection clause. A contract may contain an exclusive jurisdiction clause or a non-exclusive jurisdiction clause. Traditionally, a clear cut distinction could be traced out in common law jurisdictions between an exclusive jurisdiction clause and a non-exclusive jurisdiction clause. Under a traditional exclusive jurisdiction clause the parties to a contract agree that disputes arising out of the contract will be decided exclusively by the court chosen by the parties while under a traditional non-exclusive jurisdiction clause parties to a contract agree that a particular court or courts will be having the jurisdiction to decide a matter pertaining to the contract however such a clause meant a preferable jurisdiction meaning thereby that jurisdiction of other courts was not ousted altogether.

7. In the modern contracts this clear cut traditional distinction between an exclusive jurisdiction clause and a non-exclusive jurisdiction clause has faded away with the passage of time due to multiple factors including increasing use and growing litigation in relation to such clauses, more sophistication in drafting contracts and a variation in interpretation of these clauses specially a non-exclusive jurisdiction clauses by court of different jurisdictions. This scenario has led to situations

where sometimes a non-exclusive jurisdiction clause gives rise to same effects as that of an exclusive jurisdiction clause. In such a scenario the traditional distinction between these clauses seems to be an illusory one. Nevertheless, a distinction can be drawn and ascertained on the basis of the content and scope of the contractual bargain of the parties to a contract. This brings the matter of a non-exclusive jurisdiction clause in the domain of inference from other clauses of such an agreement as well as construction of a specific agreement on case to case basis by ascertaining the real intent of the parties regarding choice of forum”

III. Judicial Anthology of Exclusive Jurisdiction Clauses

7. Above said jurisdiction clauses in the Diminishing Musharakah Financing Agreement, Monthly Payment Agreement, Musharakah Agreements (Purchase of Asset(s), Moveable/Immoveable Property Finance Agreements and Personal Guarantees are clear and unambiguously show that the parties had given exclusive jurisdiction to the Courts at Karachi, thus, they are bound by their terms and condition for resolution of their disputes as is evident from para eight (08) of the suit. The Supreme Court of Pakistan in “EDEN BUILDERS (PVT.) LIMITED, LAHORE Versus MUHAMMAD ASLAM and others” (2022 SCMR 2044) (the “Eden Builders case”) has held that the “*parties cannot be restrained to enforce their right in an ordinary court of law but if by mutual agreement between the parties a particular court having territorial and pecuniary jurisdiction is selected for the determination of their dispute, there appears to be nothing wrong or illegal in it or opposed to public policy*”. Furthermore, Five (05) Members Bench of Supreme Court of Pakistan in “STATE LIFE INSURANCE CORPORATION OF PAKISTAN Versus Rana MUHAMMAD SALEEM” (1987 SCMR 393) (the “State Life Insurance case”) has held that “*there is nothing contrary to public policy in an agreement between the parties that the disputes between them should be tried at one place rather than the other as it would neither contravene provisions laid down in Section 28 of the Contract Act, 1972 nor violate in any manner provisions of Section.9 or Section 20 of C.P.C*”. This view was further endorsed by

the Supreme Court of Pakistan in “Messrs KADIR MOTORS (REGD). RAWALPINDI Versus Messrs NATIONAL MOTORS LTD., KARACHI and 3 others” (1992 SCMR 1174) the (“Messrs Kadir Motors case”) wherein it has held that *“it obviously implies that a party cannot be restrained to enforce his right in ordinary Court of law but if by mutual agreement between the parties a particular Court having territorial and pecuniary jurisdiction is selected for the determination of their dispute, there appears to be nothing wrong or illegal in it or opposed to public policy”*. The above said judgments were referred to in “AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC. and others versus MUHAMMAD NASRULLAH BEG, ADVOCATE” (2000 MLD 1155) whereby the Court has held that *“when parties were at controversy regarding point of jurisdiction of Court, it was incumbent upon the Court either to decide question of jurisdiction after giving an opportunity of hearing to parties and then to proceed with the other issues regarding merits of case”*.

8. In view of the admitted exclusive jurisdiction clauses agreed between the Parties and in the light of jurisprudence developed by the Supreme Court of Pakistan in the *“State Life Insurance case”* and in the *“Messrs Kadir Motors case”*, it is now a settled and recognized law in Pakistan, that all commercial and banking contracts/agreements contain a number of **“boilerplate clauses”**¹, which are often seen as standard add-ons to the main terms and conditions of the contract. One such **“boilerplate clause”** relates to jurisdiction and choice of law, and although these can be relatively straightforward when both parties are based in the same jurisdiction, they deserve proper consideration, particularly when the parties to the contract are based in different jurisdictions. In drafting dispute resolution clauses in commercial contracts and banking agreements, parties contemplate, *inter alia*, the most convenient and affordable forums to resolve their disputes through the **“boilerplate clauses”**. However, a

¹ A boilerplate clause is a legal English term that is used in conjunction with contract law. When forming contracts, parties to the contract often use templates or forms with boilerplate clauses (boilerplate language, used as standard language). Such clauses refers to the standardized clauses in contracts, and they are to be found towards the end of the agreement. Including boilerplate clauses is the process by which parties to the contract may better define their relationship and the will to provide certainty if terms in the contract are ever disputed. Boilerplate clauses are standard contractual terms that are routinely included in many contracts.

question they are faced with is the extent of autonomy they can exercise in choosing an appropriate forum in “**boilerplate** clauses”. Henceforth, to avoid the hassle of litigating in a forum, which is inconvenient or time-consuming, parties often mutually agree to litigate their disputes before a specific Court. Such clauses are drafted taking into account the common economic and geographic convenience of the parties. As stated earlier, exclusive jurisdiction clauses enunciate a choice by parties to limit the place of institution of the suit to one forum. Jurisdiction clauses, therefore, relate as to which Courts would hear a dispute. Nevertheless, an exclusive jurisdiction specifies that only the Courts of a particular jurisdiction, such as those of Karachi, in this case, should deal with any disputes arising out of a contract between the Parties.

IV. Opinion of the Court

9. Keeping in view of the law laid down in the “*State Life Insurance case*”, the “*Messrs Kadir Motors case*” and the “*Eden Builders case*” which are binding under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, it is unequivocal that based on the agreements, mentioned above, between the parties, which have been acknowledged by learned counsel for the parties and the documents filed and relied by learned counsel for the Plaintiffs under Section 9 of the “*Ordinance*” alongwith list of documents under Order XIII Rule 1 of the “*CPC*” and under Section 10 of the “*Ordinance*” by learned counsel for the Defendant, this Court lacks jurisdiction to entertain the matter due to specific and exclusive jurisdiction clauses in all the agreements. The view enunciated by the Supreme Court of Pakistan in the “*State Life Insurance case*”, the “*Messrs Kadir Motors case*” and the “*Eden Builders Case*” was later on followed and discussed in “SALEEM MEHTAB versus Messrs REFHAN BEST FOOD LTD, COMPNAY through Chief Executive and 9 others” (2010 MLD 1015), “Chaudhry MEHTAB AHMAD and another versus Mir. SHAKEEL-UR-REHMAN and 4 others” (2004 MLD 662), “TAHIR TARIQ TEXTILE MILLS (PVT.) LTD. through Chief Executive and 2 others versus N.D.F.C. through Chairman”

(2001 YLR 846), “TRADESMEN INTERNATIONAL (PVT.) LTD. versus FEDERATION OF PAKISTAN through Secretary, Ministry of Food, Agriculture and Livestock and another” (2008 CLD 1217), “BANKERS EQUITY LTD. versus IQAS WEAVING MILLS (PVT.) LTD.” (2001 CLD 169). This Court also in alike matter reported in “MCB Bank Limited Versus ADEEL SHAHBAZ STEEL MILLS and others” (2023 CLD 655) has returned the plaint of the Bank for its presentation before the Court of competent jurisdiction.

10. In the present case, all the agreements, mentioned in paragraphs No.3 and 8 were executed on different dates at the registered office of the Defendant at Karachi and not disputed by the parties. Hence, in the light of case law of the Supreme Court of Pakistan in “State Life Insurance case”, “Messrs Kadir Motors case” and the “Eden Builders Case”, this Court lacks territorial jurisdiction to pass any judgment and decree against the Defendant. As a sequel, the plaint is hereby returned under order VII Rule 10 of the “CPC” for presenting it before a Court of Competent Jurisdiction.

(JAWAD HASSAN)
JUDGE

Approved for Reporting

JUDGE