

Stereo. H C J D A-38.
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

FAO No.75308 of 2019

Faysal Bank Ltd.

Versus

M/s Usman Enterprises & another

J U D G M E N T

Date of hearing: 11.09.2023.
Appellant by: Mr. Ashar Elahi, Advocate.
Respondents by: Mr. Muhammad Imran Malik, Advocate.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant appeal, appellant has called into question vires of order dated 12.11.2019, passed by learned Judge Banking Court-I, Lahore, whereby plaint of appellant's suit for recovery of Rs.24,376,956.48 along with cost of funds and mark-up etc., was returned by invoking the provisions of Order VII Rule 10 CPC for its presentation before the proper forum.

2. Learned counsel for the appellant-bank submits that learned Banking Court relied upon Clause 24 of the finance agreement, whereby the parties agreed that the territorial jurisdiction would be at Gujranwala, however, it failed to appreciate that mere agreement between the parties could not confer the jurisdiction upon the Court. He adds that impugned order, being absolutely illegal and unlawful, is unsustainable in the eye of law. In this regard, he referred to Tahir Tariq Textile Mills (Pvt.) Ltd. through Chief Executive and 2 others v. N.D.F.C. through Chairman (2001 YLR 846) and High Noon Textile Ltd. through Authorized Attorney and 2 others v. Saudi Pak Industrial and Agricultural Investment Co. (Pvt.) Ltd. through Authorized Attorney and 4 others (2010 CLD 567).

3. Contrarily, learned counsel for respondents defends the impugned order by contending that appellants have failed to pinpoint any illegality or legal infirmity in the impugned order, thus, no interference is warranted.

4. Arguments heard. Available record perused.

5. Record reflects that appellant-bank instituted suit under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance (“FIO”), 2001 for recovery of Rs.24,376,956.48 along with cost of funds and mark-up, liquidated damages, costs and expenses etc. till the final realization of the suit amount, plaint whereof was returned by learned Banking Court while invoking the provisions of Order VII Rule 10 CPC for its presentation before the proper forum, on the basis of Clause-24 of the finance agreement.

For facility of reference, impugned order, which also contains Clause-24 *ibid*, is reproduced hereunder:-

“No one has turned up on behalf of plaintiff today. Learned counsel for the defendant has submitted that this Court has no jurisdiction to entertain this suit as per terms and conditions of the finance agreement.

The finance agreement is available at page 25 of the file. Its **Clause-24** may read as under:-

“This agreement shall be governed and construed in accordance with laws of Pakistan and Courts / Tribunals at Gujranwala shall have non-exclusive jurisdiction.”

The suit has been instituted by the bank, relying upon the said document. The parties are bound by its terms and conditions and once the jurisdiction of a particular court has been determined no other Court can exercise the jurisdiction of the said matter. The jurisdiction of this Court was ousted by the parties in the finance agreement. This being so the plaint is hereby returned as provided under Order VII Rule 10 CPC for its presentation before the proper forum. The office shall retained the photocopies of the proceedings which shall be consigned to the record after due compilation.”

6. The matter of jurisdiction of Courts regarding determination and enforcement of contractual rights and obligations is usually incorporated under *forum selection clauses*

of a contract. 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.

8. Needless to say that the parties by their agreement or consent cannot invest Court with a jurisdiction where it does not exist in law nor can the parties divest a Court of its jurisdiction by such methodology. Where more than one Court has jurisdiction in the matter, the parties can make choice by their agreement or consent for conferment of jurisdiction upon one Court to the exclusion of other and agreement in such behalf in normal circumstances is binding upon parties thereto. And such choice of forum by agreement is not contrary to the mandate of Section 28 of the Contract Act, 1872. However, the condition precedent to make a choice by the parties through an agreement is thus that the Court or the Tribunal so chosen has the jurisdiction under the law. When question arises as to the nature of jurisdiction agreed to between the parties, the Court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case. Reference is made to Multan Electric Power Company Ltd. through Chief Executive and another v. Muhammad Ashiq and others (PLD 2006 Supreme Court 328), Muhammad Saddiq v. Askri Leasing Ltd. through Chairman and 2 others (2009 YLR 900), COMSET Services Limited v. Holger Hahn and another [2009 PLC (C.S.) 446], Pakistan KUWAIT Investment Company (Pvt.) Limited through Authorized Representative v. Messrs Active Apparels International and 6 others (2012 CLD 1036), Messrs Raziq International (Pvt) Ltd. through Vice President v. Panalpina Management Ltd. (PLD 2014 Sindh 175), Bepin Behary Law v. Mohit Kumar Pal and others [A.I.R. (29) 1942 Calcutta 496] and Radha Kishen v. Bombay Company Ltd. [A.I.R. (30) 1943 Lahore 295].

9. In view of the above discussion, since learned Banking Court not only misconceived / ignored the distinction between these two broad categories of the *forum selection clauses* but also

straight away ordered the return of plaint without deliberating upon same and without making any effort to ascertain the real intent of the parties under the said *non-exclusive jurisdiction clause*, therefore, the impugned order being devoid of any valid lawful reasons is not sustainable in the eye of law.

10. Resultantly, this appeal is allowed and impugned order dated 12.11.2019, passed by learned Judge Banking Court-I, Lahore, is set aside. Consequently, appellant's suit shall be deemed to be pending before learned Judge Banking Court, who is directed to decide the suit on merits in accordance with law, within a period of sixty days from the date being fixed by this Court, through a well-reasoned judgment, under intimation to this Court through Deputy Registrar (Judicial). Parties are directed to appear before learned Judge Banking Court on 26.09.2023. Office shall transmit copy of this judgment to the concerned Court immediately.

(Asim Hafeez)
Judge

(Muhammad Sajid Mehmood Sethi)
Judge

Approved for Reporting

Judge

A.H.S.