

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

C.R. No.227/2013

Al-Noor Development Services

versus

Malik Muhammad Sarwar and Company, etc.

Petitioner by: Mr. Muhammad Ishtiaq Ahmad Raja,
Advocate.

Respondent No.2 by: Mr. Asim Shahbaz Malik, Advocate.

Date of Decision: 24.05.2019.

MOHSIN AKHTAR KAYANI, J: Through this civil revision, the petitioner has called in question judgment dated 26.04.2013 passed by learned Additional District Judge (West), Islamabad as well as order dated 21.09.2011 passed by learned Civil Judge 1st Class, Islamabad, and prayed for remand of suit filed by the respondents.

2. The facts in brief as referred in the instant petition are that petitioner being a business concern entered into an agreement regarding sale of bitumen with respondents on 06.05.1995, which was revised through subsequent agreement dated 27.06.1995. However, the petitioner filed a suit for recovery of Rs.5,007,396/- against the respondents as they violated the terms of the agreement, which was decreed ex-parte, though the same was set-aside on the application made by the respondents and ultimately, the learned trial Court accepted the application of respondents and returned the plaint vide impugned order dated 21.09.2011. Feeling aggrieved thereby the petitioner filed an appeal, which was dismissed vide impugned judgment dated 26.04.2013. Hence, the instant civil revision petition.

3. Learned counsel for petitioner contends that impugned orders are based on mis-reading and non-reading of the evidence; that the respondents are using delaying tactics by filing frivolous applications in the Court and then avoid appearance in the same; that the impugned orders of both the Courts below are against the law and facts, therefore, the same may be set-aside; that the application filed by the respondents under Order VII Rule 10 of CPC may be dismissed and the case may be remanded to the learned trial Court for decision afresh on merits.

4. Conversely, learned counsel for respondent No.2 opposed the instant civil revision petition and contends that orders impugned herein are free from any illegality and have been passed after due appreciation of evidence available on record; that both the Courts below have rightly appreciated the evidence and passed the orders impugned, therefore, the instant civil revision demands dismissal.

5. Arguments heard, record perused.

6. The perusal of record reveals that petitioner is mainly aggrieved with judgment dated 21.09.2011, whereby plaint of suit filed by petitioner for recovery of Rs.5,007,396/- has been returned in terms of Order VII Rule 10 CPC for its presentation in the Court having jurisdiction. The said judgment has further been upheld by the learned Additional District Judge (West), Islamabad vide judgment dated 26.04.2013.

7. As per pleadings of the parties, the relationship between the parties has been defined in agreement dated 27.06.1995 (Exh.P1), which relates to export of 500 metric ton of asphalt, and when the respondents

failed to comply with the terms of the said agreement, the petitioner filed a suit for recovery. The agreement also discloses that the petitioner has subsisting contract with National Refinery Limited Karachi and the respondents intend to enter into the benefits of the said agreement with the responsibility that respondents will lift 500 metric tons of Asphalt for onward export to Afghanistan and respondents will bear the custom formalities for export of entire consignment in terms of clause 5 of the agreement. However, when the respondents failed to appear in the learned Trial Court, the suit was decreed ex-parte vide judgment dated 24.05.2004 after completion of ex-parte evidence. Resultantly, the respondent filed application for setting aside the said ex-parte judgment, which was set aside vide order dated 17.06.2006 subject to payment of cost of Rs.5,000/-. In the intervening time, the subject matter was transferred to Islamabad High Court on the basis of pecuniary jurisdiction, whereafter the respondents have filed application under Order VII Rule 10 CPC. The matter was numbered as *Civil Suit No. 709/2008*, in which this Court on 20.09.2009 framed preliminary issue regarding territorial jurisdiction of the Court. For ready reference, the same is reproduced as under:

- i. *Whether this court lacks territorial jurisdiction to entertain, proceed and decide the present suit/matter?*
(OPD)
- ii. *Relief.*

8. With respect to above referred preliminary issue, both the parties led their evidence. Muhammad Bashir Cheema being plaintiff appeared as PW-1 and contended that he entered into agreement with respondent at Islamabad through Exh.P1, whereas a new agreement regarding 500

metric tons of Asphalt was executed between both the parties at Karachi as the defendants were short of money for full quantity of asphalt. He further stated that defendants received 500 metric tons asphalt and sold it in local market instead of export to Afghanistan, whereafter the remaining asphalt quantity of 500 metric tons was not given to defendants as they had violated the terms of agreement. During the course of cross-examination, PW-1 acknowledged that agreement with defendant No.2 was subject to terms and conditions of agreement of National Refinery Karachi and as such, Exh.P1 was neither referred in the plaint nor submitted in the list of reliance. He also acknowledged that agreement Exh.D2 and undertaking Exh.D3 were not referred in the agreement Exh.P1.

9. On the other hand, Mudassar Ahmad appeared as DW-1 and acknowledged the relationship with the contention that he had a meeting with plaintiff in Gujrat on 04.05.1995 and they executed an agreement at Islamabad on 06.05.1995, though the said agreement was cancelled soon thereafter. He also acknowledged that later on plaintiff and defendant No.1 Malik Muhammad Sarwar went to Karachi and asked him to reach there in relation to new agreement, whereafter a new agreement (Exh.D2) was executed on 27.06.1995 and he being a marginal witness signed the same. However, during the course of cross-examination, DW-1 Mudassar Ahmad acknowledged that agreement dated 06.05.1995 (Exh.P1) was executed with plaintiff at Islamabad and he has not produced any document purporting to cancellation of the said agreement.

10. The above referred background spells out two different agreements i.e. agreement dated 06.05.1995 (Exh.P1) regarding bitumen (*Tarkol*), executed between Muhammad Bashir Cheema and Mudassar Ahmad at Islamabad and agreement dated 27.06.1995 (Exh.D2), executed between the petitioner and respondents at Karachi relating to contract for export of 500 metric tons of asphalt.

11. In essence, the performance of agreement (Exh.P1), written in Urdu, between Muhammad Bashir Cheema and Mudassar Ahmad is dependent upon the performance of agreement executed at Karachi and the question relating to territorial jurisdiction has to be decided in the light of Sections 16 to 20 of CPC as well as the principles laid down in 2001 CLC 169 Lahore (Bankers Equity Ltd. vs. Iqas Weaving Mills (Pvt.) Ltd.), 2009 YLR 900 Lahore (Muhammad Saddiq vs. Askri Leasing Ltd.), 2000 MLD 1693 SC AJK (AKMIDC vs. Akber Ali Malik), and 2006 CLD 67 Lahore (Zaib Cold Storage and Ice Factory vs. M/s Pakistan Industrial Leasing Corporation).

12. This Court has further observed that petitioner has also relied upon Section 20(c) of the CPC, which relates to the cause of action, where the same wholly or in part, arises. Perusal of agreement dated 27.06.1995 *inter se* between the parties reveals that the same was executed at Karachi and the cause of action accrued at Karachi when the consignment was sold out in local market, instead of exporting the same to Afghanistan. Similarly, the Urdu agreement executed at Islamabad referred certain clauses regarding performance of the agreement for

lifting of 500 metric tons of asphalt, in which it has specifically been written that:

نمبر ۵۔ یہ کہ بیعانہ وصول کرنے کے بعد اور مال اٹھانے تک تمام دفتری کارروائی فریق اول کے ذمہ ہوگی۔ اس سلسلے میں وہ تمام کام مکمل کر کے 10 جون 1995 تک مال کی ڈیوری کو یقینی بنانے کے ذمہ دار ہوں گے۔ اگر فریق اول جون 1995 میں نیشنل آنکس ریفرنڈم سے ڈیوری نہیں دلا سکے یا کسی بھی وجہ سے پرمٹ پر مال نہیں مل سکے یا حکومت کی طرف سے پرمٹ کی منسوخی یا اس کی کسی شرط کی پابندی کی صورت میں ایسے حالت ہوں کہ فریق اول فریق دوم کو وعدے کے مطابق مال کی ڈیوری نہ دلا سکے تو فریق اول بیعانہ کی رقم مبلغ ایک لاکھ روپے فریق دوم کو ادا کریں گے۔

13. The above referred clause of the agreement confers that the entire execution of agreement depends upon the lifting of asphalt at Karachi and as such, the performance of same is arising out of the territorial jurisdiction of Karachi, while Islamabad is merely a place where a document has been executed for the convenience of parties, therefore, while relying upon the referred principles, I am of the view that the judgments passed by both the Courts below are in accordance with law, wherein no illegality has been observed, and the plaintiff has cause of action to initiate the recovery proceedings only at Karachi.

14. In view of above, the instant civil revision is misconceived and the same is hereby **DISMISSED**.

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.