JUDGMENT SHEET.

Islamabad High Court, Islamabad.

C.R. No.244 of 2007

M/S Sezai Turkes Feyzi Akkaya Construction Company
Versus
M/S Ekon Yapi Onarim TicaretVe Sanayi Ltd. etc.

Mr. Muhammad Bilal, Mr. Babar Bilal and Ms Shaziya Bilal Advocates for the petitioner.
Mr. Umar Farooq Adam Advocate for respondent No.1.
Syed Nayyab Hassan Gardezi Advocate for respondent No.3.

Date of hearing 09-5-2008.

Syed Qalb-i-Hassan, J. Brief facts of the instant revision are that respondent No.2 Port Qasim Authority entered into an agreement with the petitioner and respondent No.3 (hereinafter call as STFA-Hakkas JV as contractor) for certain work of civil engineering namely Rehabilitation and Refurbishment of iron ore coal berth at Port Qasim Karachi, Pakistan, on 11-12-2004. That the petitioner and respondent No.3 further entered into an agreement for the said work with respondent No.1 on 17-1-2005. That some dispute had arisen between petitioner and his co-partner with respondent No.1, therefore, respondent No.1 filed a suit against the petitioner and respondents No.2 & 3 in the Civil Court, Islamabad for recovery of Rs.1,22,21,333/- alongwith interest at the rate of 18% per annum commencing from 28-3-2006 till the date of payment. That the petitioner filed an application U/O VII Rule 11 of CPC for rejection of plaint on the ground that according to clause 25 of the agreement dated 17-1-2005 in case of any dispute between the parties the Court at Istanbul will have jurisdiction over the matter, therefore, the Court at Islamabad has no jurisdiction to entertain and try the suit. The application was dismissed vide order dated 24-4-2007. The petitioner has assailed the validity of said order through the instant revision petition.

2. Learned counsel for the petitioner contended that agreement between the plaintiff and defendant No.1 was executed in Turkey. The agreement provides that the dispute between the parties shall be resolved

by the Court at Istanbul and both the parties to the agreement maintained their head offices at Istanbul, therefore, this Court at Islamabad has no jurisdiction to decide the lis. The learned lower Court has dismissed the application against the provision of admitted agreement between the parties as well as law laid down on the subject by the superior Courts of Pakistan. The learned counsel relied upon Kadir Motors Vs. National Motors (1992 SCMR 1174), Muhammad Asghar Versus Standard Insurance (2007 CLC 209) and State Life Insurance Versus Rana M. Saleem (1987 SCMR 393) to support his contention.

3. Learned counsel for the respondent No.1 vehemently resisted the said contention raised by the petitioner and contended that the petitioner and respondent No.3 as join venture entered into an agreement with respondent No.1 whereas both of them have their offices in Islamabad, therefore, Court at Islamabad has rightly entertained the suit in question. The learned counsel for the respondents further adds that the learned counsel for the petitioner has referred judgments which reveal that they were all cases of competition between two courts in Pakistan, therefore, the said principle is not applicable in the instant case. Learned counsel has relied upon M.A. Chowdhury Versus Messrs MITSUI O.S.K. Lines Ltd. and three others (PLD 1970 SC 373) and prayed for dismissal of the instant revision petition.

4. I have heard the learned counsel for the parties and perused the record.

5. Contention of the learned counsel for respondent No.1 is that the principle that the plaintiff who is Dominus litis can always choose his forum is necessarily limited to a competent forum situated within a country both having jurisdiction in the case but in the instant case even by the consent of the parties the jurisdiction of local courts cannot be ousted. In a similar dispute the Hon'ble Supreme Court in M.A. Chowdhury Versus Messrs MITSUI O.S.K. LINES Ltd. and three others (PLD 1970 SC 373) observed as under:-

"My examination of the treatment given to such foreign jurisdiction clauses by Courts in different countries leads me to the irresistible conclusion that nowhere have the Courts gone to the same extent as the Courts in East Pakistan. In no country has any Court accepted that such a foreign jurisdiction clause in a contract can legally oust the jurisdiction of the municipal Courts of the country, but the tendency actually seems to be that such a foreign jurisdiction clause, which is derogatory to the sovereignty of an independent country should not be recognized. Even in Great Britain the British Maritime Law Association Agreement of Ist August 1950, has now, inter alia, provided that "in the event of any claim being contested by legal process, the ship owner will not rely on any provision in the contract of carriage stipulating that claims must be referred to tribunals outside the United Kingdom". This is a significant change.

Some countries have actually declared by law that such clauses shall be null and void, others have struck them down as being opposed to their own public policy, while a few have given them to the status of an arbitration clause providings for an arbitration by a foreign arbitrator in a foreign place and in order to preserve the sanctity of private contracts by binding the parties to their bargain merely stayed proceedings in their own courts, if the clause is otherwise found to be reasonable and does not decrease the rights which would be available to a party to the contract in the ordinary tribunals of the country of does not relieve the other party altogether or lessen his liability in any way. In some cases, the Courts have even held that such a foreign jurisdiction clauses do not bind the party, who is not a signatory to the contract. But there is no case in which a such clause has been held to be valid in the face of an express law prohibiting the making of such a contract or invalidating the same. Indeed, the very fact that most Courts treat such clauses to be void as being against public policy seems to indicate that

where there is an express provision in a local law forbidding the making of such a contract too then it would be void on the same principle, for, whatever a law prohibits is also opposed to the public policy.

In this view of the matter, in spite of the consistent decisions of the High Court of East Pakistan, I have, with utmost respect, to hold that these decisions have diverted the law of the country into a wrong channel and must, therefore, be overruled."

In view of above said observation by the Appex Court of Pakistan I am clear in my mind that any contract entered into with a foreign national giving jurisdiction to a foreign Court and ousting the jurisdiction of courts in Pakistan would be invalid. The judgments referred by the learned counsel for the petitioner and respondent No.3 are admittedly based on the principle that a plaintiff who is dominus litis can always choose his forum having jurisdiction in the matter, therefore, with utmost respect to the judgments passed by Apex Court of Pakistan, same are not applicable to the facts of the instant case.

6 Now the bare reading of Section 20 of CPC makes it amply clear that all suits shall have to be instituted in Court wherein the local limits of whose jurisdiction the defendant or any of the defendants actually and voluntarily resides or carries on business or personally works for gain at the commencement of the suit. Admittedly the petitioner and his partner respondent No.3 have their offices at Islamabad, therefore, the suit was rightly filed in court of Islamabad.

7 In view of what has been discussed above, this civil revision is dismissed with no order as to costs.

(Syed Qalb-i-Hassan)
Judge

Muhammad Afzaal.

05.05.2008: Muhammad Bilal, Babar Bilal and Shaziya Bilal, advocates for the petitioner.
Umar Farooq Adam, adv for the respondent No.1.

On request of learned counsel for the respondent No.1, case is adjourned to 09.05.2008.

(Syed Qalb-i-Hassan)
Judge.