

FORM NO.HCJD/C
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD
JUDICIAL DEPARTMENT

C.S. No. 63 of 2014

**Telecom Services
& Consultants Pvt.
Ltd.**

Versus

OOREDOO Q.S.C. etc.

Date of hearing:

04.06.2015.

Applicants / Defendants by:

***Mr Faisal Naqvi, and Mr Nasir
Mehmood, advocates.***

Respondent / Plaintiff by:-

***Mr Iftikhar Ahmed Bashir,
advocate.***

Athar Minallah, J:-

Through this order,

I intend to decide the application filed under Order VII Rule 10 read with Section 151 of the Civil Procedure Code 1908 (hereinafter referred to as the "CPC"), on behalf of the applicants / defendants No.1, 2 and 3.

2. The facts, in brief, are that the cause of action, as disclosed in the plaint, is the alleged acts of defendants No.1, 2 and 4 with respect to the process of sale of 100% of the issued share capital of defendant No.3. The respondent / plaintiff has claimed certain amounts as expenditure incurred

due to its participation in the bidding process, and in addition has also claimed damages for breach. The respondent / plaintiff had approached defendant No.4 and the latter issued a 'teaser' in October 2013. The teaser was followed by two 'process letters' dated 29-11-2013 and 10-01-2014 respectively. The plaintiff submitted its bid on 14-03-2014. However, the deadline was extended by the defendants. Reference has been made in the plaint to correspondence via email. However, the bidding process was terminated, as intimated vide letter dated 19-04-2014. The respondent / plaintiff has alleged that the purpose of the bidding process was to get the indicative price of shares, while the defendants had never intended to sell the shares. The two process letters, dated 29-11-2013 and 10-01-2014 respectively, contained a 'forum selection clause' and the same is reproduced as follows:

"This letter, the relationship between the parties referred to in it in respect of the Process and the conduct of the Process shall be governed by, and construed in accordance with English Law. The English Courts shall have exclusive jurisdiction over any disputes arising under or in connection with the foregoing".

3. The question raised through the instant application is, whether this Court should proceed in the matter or give effect to the above mentioned 'forum selection clause'?

4. Mr. Faisal Naqvi, ASC, the learned counsel for the applicants/defendants has contended that; it is settled law that 'forum selection clauses' are to be enforced on the same analogy as in the case of foreign arbitration clauses and, therefore, the proceedings ought to be stayed; reliance has been placed on the cases of "*M.A. Chowdhury versus O.S.K. Lines Ltd*" [PLD 1970 S.C. 373], "*Raziq International versus Panalpina Management*" [PLD 2014 Sindh 175], "*Light Industries versus ZSK Stickmaschinen GmbH*" [2009 CLD 1340], "*Masood Asif versus UBL*" [PLJ 2001 Kar. 90], "*CGM versus Hussain Akbar*" [2002 CLD 1528]; the language of the 'forum selection clause' is extremely wide; the clause applies to "any disputes arising under or in connection with the foregoing"; phrases such as 'arising under and in connection with' are to be construed widely; reliance has been placed on the cases "Premium Nafta Products Ltd versus Fili Shipping Co. Ltd." [2007 UKHL 40], "Renusagar Power Co. Ltd versus General Electric Company" [AIR 1985 S.C. 1156], "Empresa Exportadora De Azucar versus Industria Azucarera Nacional S.A." [1983] 2 Lloyd's Rep. 171], "Abdullah M. Fahim & Co. versus Mareb Yemen Insurance Co. & Tomen (UK) Ltd." [1997] 2 Lloyd's Rep.

738]; it is settled law that giving effect to a 'forum selection clause' is not a violation of Section 28 of the Contract Act 1872; reliance has been placed on the cases of "Kadir Motors (Regd), Rawalpindi versus National Motors Ltd. Karachi" [1992 SCMR 1174] and "State Life Insurance versus Rana Muhammad Saleem" [1987 SCMR 393]; consent is sufficient basis for UK Courts to assume jurisdiction. It has been prayed that the instant proceedings may be stayed and the respondent / plaintiff be directed to approach the competent forum.

5. Mr Iftikhar Ahmed Bashir, ASC, on the other hand, has submitted that; the suit is for recovery of damages and compensation arising out of the defendants' tortuous conduct and breach of collateral contract attended to the process letters; the cause of action has arisen on account of the acts amounting to deception, malafide, misrepresentation, discrimination, misleading etc; if the acts or omissions already constitute elements of tort, then legal proceedings would be competent before this Court; reliance has been placed on the case "M/S Thakurdas Bhudarsao versus Industrial Stores Company and others" [1971 MPLJ 1052]; the termination of the collateral agreement could not mean the performance of the same, including the 'forum selection clause'; reliance has been placed on the cases "Surgeon Munawar Ali versus Health Vision and others" [2008 CLC 1476], "Damodar Valley Corporation versus K.K.

Kar” [AIR 1974 S.C. 158]; the process letters were not registered and stamped in Pakistan and, therefore, cannot be considered or relied upon for the purposes of instant application; reliance has been placed on the case “Malik Muhammad Akram versus Khuda Bakhsh” [2000 CLC 759]; the jurisdiction of this Court cannot be ousted on account of the ‘forum selection clause’; reliance has been placed on the cases “M/S Eckhardt and Co. Marine GmbH versus Muhammad Hanif” [PLD 1993 S.C. 42] and “M/S Uzin Export and Import Enterprises for Foreign Trade versus M/S M. Iftikhar and Co. Ltd.” [1993 SCMR 866]; there is no agreement between the parties to resolve the matter by way of arbitration. It has been strenuously urged that the instant application be dismissed and the defendants be directed to submit written statements.

6. The learned counsels have been heard and the record perused with their able assistance.

7. The two process letters, dated 29-11-2013 and 10-01-2014 respectively, are not in dispute. It is also not in dispute that both the letters contain a ‘forum selection clause’ as has been reproduced above. The plain reading of the clause makes it obvious that its’ scope is expansive and extends to the relationship between the parties in respect of the process and the conduct of the process, particularly over disputes arising under or in connection therewith. The

parties had unambiguously agreed that the process and the conduct of the process shall be governed and construed in accordance with English Law. It was further unambiguously agreed that the English Courts will have 'exclusive' jurisdiction over any disputes arising under or in connection with the foregoing. The governing law and the Courts having 'exclusive' jurisdiction were precisely and clearly agreed and accepted by the respondent / plaintiff. Should then this Court give effect to what was bargained by the parties by unequivocally selecting the forum of choice for resolving disputes?

8. There was a time when the courts would jealously guard their jurisdiction by being reluctant to stay proceedings in giving effect to clauses contained in contracts consenting to take the disputes elsewhere. However, much has changed and 'forum selection clauses', or having the option to make a choice of jurisdiction, have not only become common but favorably acknowledged by courts in almost every jurisdiction. It is noted that 'forum selection clauses' may fall in different categories, depending on the intention of the parties, as expressed in the language of the clause. Broadly, it is of two types i.e. 'exclusive' or 'non exclusive'. The former requires that disputes arising under the contract, or in connection therewith, shall be taken exclusively to the Court specified in the clause, while that is not the case with the latter. Clauses drafted in language

which clearly and unambiguously shows that the parties had intended to give exclusive jurisdiction to a particular Court, are also termed as mandatory clauses. However, if the language is not clear and it cannot be unambiguously determined that the intent was to give exclusivity, then such a non exclusive clause is also termed as 'permissive'.

9. It would be beneficial to briefly survey the approach of courts in various jurisdictions in the context of forum selection clauses. The traditional approach of English Courts in the realm of the laws of conflict was based on the doctrine of 'forum non conveniens', meaning a forum which is not convenient. The principles were enunciated in the celebrated judgment in "Spiliada Maritime Corp versus Cansulex Ltd" [1986] 3 All ER 843]. The House of Lords in Donohue versus Armco Inc [2002] 1 Lloyd's Rep 425 reiterated the principles set out by Lord Brandon in the earlier decisions in the Eleftheria [1969] 2 All ER 641 and in the case of The El Amiria [1981] 2 Lloyd's Rep 119. The principles formulated by Lord Brandon are as follows;

(1) When plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising the discretion the Court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded.

(a) In what country the evidence on the issue of fact is situated or more readily available and the effect of that on the relative convenience and expense of trial as between the English Courts and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

The above principles were quoted by the august Supreme Court in the case "*M.A. Chowdhury versus O.S.K. Lines Ltd*" [PLD 1970 S.C. 373] and it was observed as follows:-

"It would thus appear that so far as England is concerned the Courts there had never proceeded on the basis that such a clause absolutely ousted the jurisdiction of the English Courts. At most, they have treated such a clause as being in the nature of a submission to arbitration, which does not oust the jurisdiction of the Court but gives the Court a discretion to decide whether it will allow the suit to proceed or enforce the agreement between the parties and compel them to go to arbitration as agreed upon whether before another tribunal in the same country or in a foreign country or before a lay arbitrator".

10. In *British Aerospace versus Dee Howard* [1993] 1 Lloyd's Rep 368, the Court, in the context of the contract providing for an exclusive jurisdiction clause, laid down the test as to whether the circumstances relied upon for suggesting trial at the place other than bargained for was foreseeable at the time of executing the contract? If the circumstances were foreseeable then the Court would not disturb the contractual arrangement bargained for by the parties, and the exclusive forum clause will be given effect.

11. In *Donohue versus Armco Inc. and others* (2001 UKHL 64), the agreements contained an express stipulation providing for the exclusive jurisdiction of the English Court. It also provided that the contract was to be governed by English Law. The following principles were formulated by Lord Bingham;

"If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by

restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case".

It was further held;

"Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause".

12. A major shift came in the United States with the judgment of Bremen (and Underwieser G.M.B.H) versus Zapata Off Shore Company 407 US 1 (1972). The United States Supreme Court gave effect to a jurisdiction clause, and recognized the clause giving jurisdiction to a Court outside the United States. It was held that 'In such circumstances it should be incumbent on the party seeking to escape his contract to show that the trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court'. It was observed that while giving effect to such a contractual clause, fraud, undue influence or overbearing bargaining power could be factors, which may be taken into consideration.

13. The Supreme Court of Pakistan has consistently stressed upon upholding and jealously guarding

the sanctity of contractual commitments made between the parties. It would be pertinent to reproduce the relevant portion from the judgment in *M.A. Chowdhury versus Messrs Mitsui O.S.K. Lines Ltd, and others* [PLD 1970 S.C. 373] as follows;

"Having said this, however, I am of the opinion that in order to preserve the sanctity of contracts I ought also to hold, as was done in the earlier cases in Great Britain that such foreign jurisdiction clauses, even when they purport to give jurisdiction to a Court in a foreign country, are really in the nature of arbitration clauses which come within the exceptions to section 28 of the Contract Act and, therefore, should be dealt with in the same manner as other arbitration clauses. In the case of an arbitration it has to be remembered that the jurisdiction of the Courts is not altogether ousted, for, the Courts merely stay their hands to allow the parties to resort to the form of adjudication to which they have previously agreed. By only staying the action before them the Courts still retain to themselves the jurisdiction to resume the case if the arbitration, for any reason, fails or the parties find it impossible to comply with the form of

adjudication to which they had agreed. This was also the view taken in the case of Malik Ali Akbar, which I approve”.

Reference may also be made to the observations made in the case of “Hitachi Limited versus Rupali Polyester” [1998 SCMR 1618]. Though these observations were in the context of a foreign arbitration clause, nevertheless they are equally relevant for the purposes of exclusive forum selection clauses. The same are reproduced below:-

“I may observe that while dealing with an application under Section 34 of the Arbitration Act in relation to a foreign arbitration clause like the one in issue, the Court’s approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honoured as generally the other party to such an arbitration clause is a foreign party. With the development and growth of International Trade and Commerce and due to modernization of Communication/Transport system in the World, the contracts containing such an arbitration clause are very common nowadays. The bargain, that follows from the sanctity which the Court attaches to contracts, must be applied with more vigour to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will transit the image of Pakistan in the comity of nations. A

ground which could be a contemplation of party at the time of entering into the contract as a prudent man of business cannot furnish basis for refusal to stay the suit under section 34 of the Act. So the ground like, that it would be difficult to carry the voluminous evidence or numerous witnesses to a foreign country for arbitration proceedings or that it would be too expensive or that the subject-matter of the contract is in Pakistan or that the breach of the contract has taken place in Pakistan in my view cannot be a sound ground for refusal to stay a suit filed in Pakistan in breach of a foreign arbitration clause contained in contract of the nature referred to hereinabove. In order to deprive a foreign party to have arbitration in foreign country in the manner provided for in the contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or would amount to forcing the Plaintiff to honour a different contract, which was not in contemplation of the parties and which could not have been in their contemplation as a prudent man of business."

14. It is, therefore, obvious that upholding the sanctity of a contractual bargain is pivotal. Courts will give effect to 'exclusive' jurisdiction clauses unless the plaintiff is able to discharge the heavy burden of satisfying the Court that circumstances exist, not foreseen at the time of

execution of the contract containing such a clause, that the proceedings be allowed in a non contractual forum.

15. Next is the effect of Section 28 of the Contract Act 1872. It is by now settled law that the said provisions do not create a bar in enforcing forum selection clauses mutually agreed between the parties. The learned counsel for the applicants / defendants has rightly relied on the law laid down by the august Supreme Court in the cases "M/S Kadir Motors (Regd) Rawalpindi versus M/S National Motors Ltd. Karachi and 03 others" [1992 SCMR 1174], "M.A. Chowdhury versus M/S Mitsui O.S.K. Lines Ltd. and 03 others" [PLD 1970 S.C. 373] and "State Life Insurance Corporation of Pakistan versus Rana Muhammad Saleem" [1987 SCMR 393]. It is noted that such mutually agreed forum selection clauses could neither be considered contrary to public policy nor contravened the provisions of Section 28 of the Contract Act, 1872.

16. In the instant case, the plain language of the 'forum selection clause' is precise, unambiguous and clear, and there is no doubt that the parties had intended the jurisdiction of the English Courts to be 'exclusive'. The clause covers the adjudication of grievances or cause of action disclosed and asserted in the plaint. The refusal of the instant application would indeed tantamount to enable the plaintiff to circumvent the binding obligation, which it had undertaken at the time of accepting the two process letters,

including the forum selection clause contained therein. Moreover, the parties had also chosen English Law as the governing law. The plaintiff has not raised any ground so as to justify refusal in giving effect to the exclusive jurisdiction clause. The plaintiff had accepted the exclusive forum selection clause voluntarily and out of free will. In the circumstances it would be just and proper to give effect to the exclusive clause contained in the respective process letters.

17. For the foregoing reasons the application under Order VII Rule 10 CPC is ***allowed*** and it is open for the respondent / plaintiff to institute proceedings for its claim before the competent English Courts.

(Athar Minallah)
Judge

Announced in the Open Court on 01-07-2015.

Judge

Approved for reporting.

*Asad K/**