

(JUDGMENT SHEET)  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
JUDICIAL DEPARTMENT

**Writ Petition No. 905 of 2021**

Shell Pakistan  
versus  
Learned ADJ, Islamabad (East ), and another

Petitioner by: Mr. Salim Ur Rahman, Advocate.  
Respondent by: Mian Tahir Iqbal, Advocate.  
Date of decision: 21.01.2022

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**SARDAR EJAZ ISHAQ KHAN, J.:-** This writ petition assails the impugned order (details later) whereby the appellate court set aside the order of the trial Court returning the plaint to respondent no.2 for lack of jurisdiction.

**Background**

- 2 The petitioner company (“Shell”) and respondent no.2 (“Retailer”) entered into a retailer franchise agreement in 2017 whereby Shell gave the Retailer the franchise for a petrol station in Islamabad. The petrol station was built on land leased from the Capital Development Authority Islamabad (CDA). The lease was in the name of Shell. For reasons that are not relevant to this petition, Shell terminated the franchise agreement. The Retailer filed a suit at Islamabad for declaration, permanent and mandatory injunction praying, inter alia, for a declaration that he continued to be a lawful licensee for the said business and for his continued possession of the petrol station.
- 3 Shell filed an application under Order 7 Rule 10 of the Code of Civil Procedure, 1908 (CPC) for return of the plaint, relying on clause 21.3 of the franchise agreement whereby the parties had agreed to the exclusive jurisdiction of the civil courts at Karachi. Clause 21.3 of the franchise agreement read as follows:

This Agreement shall be interpreted and  
have effect in all respects in accordance

with the law of Pakistan and any proceedings in connection with this Agreement shall be brought in the courts of Karachi to whose exclusive jurisdiction both parties hereby submit.

- 4 By order dated 28.02.2020, the trial court returned the plaint for presentation to a court at Karachi. The Retailer appealed. Allowing his appeal, the learned Acting District Judge-East, Islamabad, by order dated 30.01.2021 (“impugned order”) set aside the order of the trial court and remanded the suit to the trial court at Islamabad to proceed with the trial. Referring to section 16(d) CPC, the appellate court regarded the suit as concerned with “... *the determination of any other right to or interest in immovable property...*”; the immovable property being the land on which the petrol station is built. He then went on to cite *State Life Insurance Corporation of Pakistan versus Rana Mohammed Saleem, 1987 SCMR 393*, and *Standard Insurance Company versus Pak Garments Limited, 1998 SCMR 1239*, for the principle that the parties’ autonomy to confer exclusive jurisdiction on one of several civil courts that might have jurisdiction over a dispute was limited only to such courts which would otherwise have jurisdiction under law. Following therefrom, the learned appellate court held that:

...as no cause of action accrued within the territorial jurisdiction of Karachi Court and the suit pertains to **rights to and interest in immovable property**, therefore, the parties cannot invest the jurisdiction to the Courts at Karachi. If the courts at Karachi had a jurisdiction along with another Court then the parties could have mutually agreed to file a suit in particular Court.

[sic!]

(emphasis per original text)

### Counsels’ submissions

- 5 Learned counsel for Shell submitted that the appellate court's impugned order is premised on an error of law in that the Retailer had no interest or right in immovable property on which the petrol station was built. The franchise agreement did not result in the

creation or transfer of any right to or interest in Shell’s lease in favour of the Retailer. The lease between Shell and the CDA was exclusive to the two of them. The Retailer was not a privy to the said lease, and had no direct grant of any right or interest in the land by the CDA. He cited several judgments which are discussed later.

- 6 Learned counsel for the Retailer argued in favour of the impugned order. He said that the subject matter of the suit was at Islamabad and the cause of action had also arisen here. He went on to say that Shell had filed a parallel suit for possession against the Retailer in Islamabad, which supported his assertion that the courts at Islamabad had jurisdiction. He relied on the judgments cited in the appellate court’s impugned order.
- 7 Learned counsel for Shell rebutted that Shell’s suit was for possession of the petrol station which the Retailer continued to occupy illegally beyond termination of the franchise agreement, and that the suit for possession did not arise under the franchise agreement but was rooted in the lease agreement between Shell and the CDA.

### **Analysis**

- 8 If the CDA were to cancel the lease held by Shell, would the Retailer have the right to maintain a suit against CDA to compel it to allow the Retailer to occupy the petrol station? I don't think so. The Retailer would be unable to show a right or interest in the leasehold land itself, his right to the said land being limited to access and use thereof under the shadow of the franchise agreement. This is what happened in *Shahi Syed versus Total Parco Marketing Limited and another*, 2018 YLR 2039. Total Parco was a lessee of the land and had licensed Shahi Syed to operate the petrol station. On cancellation of the lease, Total Parco was ordered to be evicted from the petrol station. A Division Bench of the Sindh High Court upheld the order of a Single Bench rejecting the plaint of Shahi Syed qua the

operator/licensee of the petrol station seeking a declaration of being a licensee coupled with interest entitled to possession of the petrol station and an injunction restraining both Total Parco and its lessor from interfering with his possession of the petrol station. The relevant parts of the judgment are reproduced below:

... it has transpired that the appellant is merely a licensee to carry on the business of filling station and had executed agreement of service station and dealership ... appellant has no privity of contract, whatsoever, with the owner of the subject property i.e. Mst. Sultana Ahmed, respondent no.2 through a lease agreement ... Total Parco Marketing Ltd acquired possession of the suit property from its owner... however, appellant has no privity of contract or an agreement whatsoever with regard to possession of suit property with its owner...

The Division Bench went on to hold that:

...the appellant was allowed a temporary use of the service/filling station and sell the company's petroleum products, therefore, the appellant could possibly be treated as a licensee of respondent no.1 for a limited purpose and cannot claim any right over subject suit property owned by respondent no.2 with whom the appellant has no relationship whatsoever.

The Court then referred to sections 52 and 62(g) of the Easements Act 1882 and found that a licensee of an immovable property could not acquire an independent right of its own to the immovable property but would remain coupled with the terms of the grant which, in that case (and this one too) owes its existence to the subsistence of the license/franchise agreement; it lives and dies with the license/franchise agreement.

9 In *Abdul Rashid Khan versus President, Services Institute PAF base, Lahore, 1999 MLD 1870*, it was held as follows:

...it may be stated that a licensee merely has a right to use the property and such a right does not amount to an easement or an interest in the property but is only a privilege given to the licensee by the

licensor. After termination of license, the licensor is legally entitled and has a right to deal with his property in the manner he feels like. This right, he gets as owner in possession of the property against possession of the licensee, would be deemed to be possession of the lawful order. He needs not to bring a decree of the court to obtain and enforce his right but is entitled to resist in defence of his proprietary right the attempts of licensee to come upon his property by exerting necessary and reasonable minimum force to expel the trespasser.

- 10 The learned counsel for Shell also cited *2018 MLD 802*, *2017 YLR 2006* and *2009 CLC 406*, all of which uphold the principle that, in the absence of a direct grant by the owner of land creating privity of contract, a mere licensee of a lessee of the owner does not have a right to or interest in the leased land where the license is granted by the lessee for the purposes of and incidental to a business to be undertaken on the said land.
- 11 The reasoning of the learned appellate court has uncalled for ramifications. Would a shop owner allowing a painter to display his paintings in a corner of his shop be held to have given the painter a right to or interest in his shop? Would a court allow a suit for possession of the shop corner to be filed? Would a parking lot giving, say, a month long parking ticket to a car owner be said to have given the car owner a right to or interest in the land owned or leased by the parking lot owner? The answer is obviously no. This would be destructive of ‘derivative transactions’ (if I may borrow the term from the world of finance) employing the right of access to and use of the immovable property only as an incident of the business to be conducted thereat and where, if asked, the grantor would shake his head vigorously to reply that he never gave any right to the grantee to lay a claim to the immovable property by agreeing for the grantee to run a business there. If this were the law, and thankfully it is not, owners would cease to enter into such business contracts.

- 12 The learned counsel for the Retailer has not referred to any tenancy or similar agreement between the Retailer and CDA conferring a right or interest in the subject land independent of the franchise agreement. Nor has he pointed out any land access or similar agreement with Shell conferring a right to the petrol station land which could be said to be binding on Shell independent of the franchise agreement. If such an agreement existed, it would have been pointed out. If such an agreement existed, it would have been a material document to evaluate the claim of the Retailer to a right or interest in the subject land. The outcome is that the only agreement conferring access to the petrol station on the Retailer was the franchise agreement, and when the franchise agreement went, so did the license thereunder.

### **Findings**

- 13 I find that the Retailer's right of access to and use of the petrol station was in the nature of a contractual license derived under and owing its existence to the franchise agreement; it did not exist in its own right. It was granted for the limited purpose of the performance of the franchise agreement in order to make lawful the access to the land on which the petrol station was constructed which, in the absence of such a licence, would constitute trespass.
- 14 Not finding that the Retailer had an interest to or right in immovable property on which the petrol station is built, the basis for the appellate court's order invoking section 16(d) CPC falls away. It also falls away in view of the proviso to section 16 CPC which, in material part, reads as follows:

Provided that a suit to obtain relief respecting...immovable property held by...the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted...in the Court within the local limits of whose jurisdiction the defendant...carries on business...

The relief prayed for in the Retailer's suit could be entirely obtained through the obedience of Shell. Shell has offices in both

Karachi and Islamabad. By virtue of the said proviso, even if it were to be assumed for the sake of argument that the subject matter of the suit is immovable property, the courts at both Karachi and Islamabad would have jurisdiction. Therefore, by the ratio of *Standard Insurance* and *State Life* cases relied on by the learned appellate court, both the courts have jurisdiction (limiting ourselves to the context of the Retailer’s instant suit) and therefore it remained open to the parties to confer exclusive jurisdiction on either of them, which they did, and to which they are bound.

- 15 I find that the impugned order dated 30.01.2021 is premised on an error of law and therefore set it aside. Resultantly, the order of the learned trial Court dated 28.02.2020 returning the plaint stands revived.

#### **Costs**

- 16 I find that the pleas of the Retailer raised a triable issue. Therefore, the parties are to bear their own costs.

**(SARDAR EJAZ ISHAQ KHAN)**  
**JUDGE**

*Rana.M.Ift*

**Approved for reporting.**