

[Peshawar]

Before Mazhar Alam Khan Miankhel and Yahya Afridi, JJ

NATIONAL HIGHWAY AUTHORITY---Appellant

Versus

**Messrs PUT SARAJEVO GENERAL ENGINEERING COMPANY and another---
Respondents**

First Appeals against Order Nos.52 of 2010 and 1 of 2011, decided on 5th July, 2011.

Contract Act (IX of 1872)---

---Ss. 23 & 28---Civil Procedure Code (V of 1908), S.20(c)---Arbitration Act (X of 1940), Ss.2(c), 14(2), 17, 31 & 39---Making award rule of court---Territorial jurisdiction of court---Award having been announced by the sole arbitrator, contractor company moved the court for making the award rule of the court---Court at place "P" allowed the petition by partially making the award rule of court---Appellant had raised objection with regard to jurisdiction of the court, contending that as the contract/agreement was executed at place "I" and Head Office of the appellant as well as respondent-company being located at places "I" and "L", the court at "P" had no territorial jurisdiction over the matter---Plea of respondent-company was that relevant clause of the agreement had merely fixed the venue at place "I" for the purpose of arbitration only, which had nothing to do with conferring of an exclusive jurisdiction in the courts at place "I"---Agreement between the parties was executed at place "I" for a work to be done within Districts "P" and "N"---Agreement provided a clause for referring the dispute to adjudicator and then to the sole arbitrator---Agreement further provided that arbitration between the parties would be made at "I"---Where there were many courts having the jurisdiction to entertain the dispute between the parties under the agreement, and the parties with their mutual consent agree to refer their dispute to any such court or courts, such consent agreement between the parties was also not against the provisions of S.23 or 28 of the Contract Act, 1872---In the present case no such clause of agreement conferring jurisdiction in any one court except the one that the arbitration would be held in "I" in given circumstances, dispute between the parties could be referred to the courts having the jurisdiction under the general law---Head Office of respondent-company being at place "L", a suit regarding any dispute against respondent could be filed at place "L"---Work being done was within the territorial jurisdiction of the court at "P" and dispute between them also cropped up there---Sub-offices of both the parties were also situated at place "P"---Such a dispute between the parties regarding the subject-matter situated within the territorial jurisdiction of courts at "P" could well be referred and agitated before the court at "P" as cause of action wholly or partly, within the meaning of S.20(c), C.P.C. arose there---No bar existed in the agreement that the courts at "P" would have no jurisdiction---Court at place "P" could well entertain the dispute---Finding of the courts below were set aside directing the office to send both the cases to the court of Senior Civil Judge at place "P", who would decide the matter

between the parties at its earliest.

Messrs Kadir Motors (Regd.) Rawalpindi v. Messrs National Motors Ltd., Karachi and 3 others 1992 SCMR 1174; Messrs Trade Masters (Pvt.) Ltd. through Chief Executive v. Messrs Shell Pakistan Ltd. through Chief Executive 2010 CLD 670; Messrs Unitrade Impex and others v. Federation of Pakistan and others 2010 CLC 1267; Special Communication Organization through Director-General, Rawalpindi v. Messrs IBELL (Pvt.) Ltd., Lahore 2007 CLC 248; Food Corporation of India and another v. Great Eastern Shipping Co. Ltd. AIR 1988 Supreme Court 1198; Messrs Nanak Chand Shadurain v The Tinnelvelv-Tuticorin Electric Supply Co. Ltd., Calcutta AIR 1975 Mad. 103; Messrs Salem Chemical Industries v. Messrs Bird and Co. (P) Ltd., Calcutta AIR 1979 Mad. 16; Messrs Road Transport Corporation and others v. Messrs Kirloskar Brothers Ltd. and others AIR 1981 Bom. 299; Messrs Angils Insulations v. Messrs Ashmore India Ltd. and another AIR 1995 SC 1766; Rajasthan High Court Advocates Association v. Union of India and others AIR 2001 SC 416; Ravi Glass Mills Limited v. I.C.I. Pakistan Powergen Limited 2004 YLR 2503 and Special Communication Organization v. Messrs IBELL (Pvt.) Ltd., Lahore 2007 CLC 248 ref.

Zahid Idrees Mufti for Appellant.

Omar Faruk Adam for Respondents.

Date of hearing: 5th July, 2011.

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.--- The National Highway Authority, the appellant herein/a respondent before the Court below, being an employer entered into an agreement with Messrs Put Sarajevo General Engineering Company, a contractor company, respondent herein/petitioner before the initial Court, came across with certain disputes regarding NHIP Contract No.14 for resurfacing and strengthening of National Highway N-5 from km 1660 to 1694 between Peshawar and Nowshera. This led the aggrieved party to approach the adjudicator under the agreement to get the disputes resolved. His decision too, was referred to the sole arbitrator under clause 25 of the agreement (relevant clauses available on the appeal file) and accordingly award dated 4-3-2010 was announced. The contractor moved the Court under section 14(2) read with sections 17 and 31 of the Arbitration Act, 1940 for making the same as rule of Court. Since the matter was under consideration before Civil Judge-XIV, Peshawar, who vide his judgments/order dated 12-6-2010 held that his Court being a Court of competent jurisdiction can decide the lis between the parties and accordingly allowed the petition by partially making the award Rule of Court vide his judgment dated 30.6.2010. The employer being an aggrieved party (hereinafter called the appellant) has filed instant appeal (F.A.O. No.52 of 2010).

Yet another dispute between the same parties regarding the same subject-matter, in execution of the same contract arose. After the decision of adjudicator, this too, was referred to the same sole arbitrator, who vide his award dated 15-8-2010 resolved the dispute. The contractor, once again, approached the Court to get the certification of the Court regarding the award vide Application No,22/6 of 2010 but this time his application was sent to the Court of Civil Judge-XXIV, Peshawar, who vide his judgment/order dated 2-12-2010 returned the petition declaring that the

same has been filed in a Court, who lacks jurisdiction to entertain and decide the matter between the parties. This decision of the Court is challenged by the contractor company through its appeal (F.A.O. No.1 of 2011), hereinafter call the respondent.

Since the common question of law is involved in both the appeals having the same subject-matter between the same parties so, both the appeals are being disposed of through this single judgment.

The learned counsel for the appellant argued that the judgment/order of the learned Court is against the law and in excess of jurisdiction as the contract agreement was executed at Islamabad, and the Head Offices of appellant as well as the respondent being located at Islamabad and Lahore respectively, the Court at Peshawar had no territorial jurisdiction over the matter. Further argued that clause-25.3 of the Contract Agreement dated 3-8-2004 specifically provides that the place of arbitration shall be Islamabad. Hence, the respondent was bound by the stipulation of exclusive jurisdiction clause in the agreement was not obliged to invoke the jurisdiction of Civil Court at Peshawar, as except the Courts at Islamabad, no other Court could assume jurisdiction in the matter. The learned counsel in support of his contentions relied upon the judgments from Pakistan as well as Indian jurisdiction delivered in the cases of Messrs Kadir Motors (Regd.) Rawalpindi v. Messrs National Motors Ltd., Karachi and 3 others (1992 SCMR 1174), Messrs Trade Masters (Pvt.) Ltd. through Chief Executive v. Messrs Shell Pakistan Ltd. through Chief Executive (2010 CLD 670), Messrs Unitrade Impex and others v. Federation of Pakistan and others (2010 CLC 1267), Special Communication Organization through Director-General, Rawalpindi v. Messrs IBELL (Pvt.) Ltd., Lahore (2007 CLC 248), and Food Corporation of India and another v. Great Eastern Shipping Co. Ltd. (AIR 1988 Supreme Court 1198).

As against that the learned counsel for the respondent, while referring to sections 2(c), 31 and 31(4) of the Act of 1940 as well as section 20(c) of the Code of Civil Procedure, argued that the relevant clause of the agreement has merely fixed the venue of Islamabad for the purpose of arbitration only, which has nothing to do with conferring of an exclusive jurisdiction in the Courts at Islamabad, when admittedly the cause of action has arisen at Peshawar. The site office of the respondent is in Peshawar and the works carried out were also within the territorial jurisdiction of the civil Court at Peshawar. Even otherwise, the appellant itself has waived clause 25.3 of the agreement, when except the nomination of the Arbitrator being made at Islamabad all other arbitration proceedings including the announcement of award were made at Lahore. The learned counsel placed reliance on certain judgments from the Indian jurisdiction rendered in the cases of Messrs Nanak Chand Shadurain v. The Tinnelvelv-Tuticorin Electric Supply Co. Ltd., Calcutta (AIR 1975 Madras 103), Messrs Salem Chemical Industries v. Messrs Bird and Co. (P) Ltd., Calcutta (AIR 1979 Madras 16), Messrs Road Transport Corporation and others v. Messrs Kirloskar Brothers Ltd. and others (AIR 1981 Bombay 299), Messrs Angils Insulations v. Messrs Ashmore India Ltd. and another (AIR 1995 Supreme Court 1766), and Rajasthan High Court Advocates Association v. Union of India and others (AIR 2001 Supreme Court 416). Besides, the judgments delivered by the Lahore High Court in the cases of Ravi Glass Mills Limited v. I.C.I. Pakistan Powergen Limited (2004 YLR 2503) and Special Communication Organization v. Messrs IBELL Pvt.) Ltd., Lahore (2007 CLC 248) were also referred to in support of the above arguments.

We have heard the learned counsel for the parties and have also perused the record.

Perusal of the record would establish certain facts, which would make it easier to decide the controversy between the parties. The appellant, being an employer based at Islamabad entered into an agreement with the respondent-company, the contractor based at Lahore to execute

certain works of resurfacing and strengthening of National Highway situated between Peshawar and Nowshera. The agreement between the parties was executed at Islamabad for a work to be done within the Districts of Peshawar and Nowshera. Their agreement provided a clause for referring the dispute to adjudicator and then to the sole arbitrator. The agreement further provided the arbitration between the parties would be made in Islamabad.

Accordingly, their dispute regarding the abovesaid agreement was referred to a sole arbitrator appointed under the contract agreement but both the parties to the dispute acquiesced to the fact that arbitration between the parties was made at Lahore, which is the initial violation of their agreement.

The material available on the record would further reveal that the agreement is silent with regard to filing of award in the Court for making the same as rule of Court. It is settled law that the disputes between the parties to the contract agreements are referred to the Courts in whose territorial jurisdiction the agreements are signed. It is also settled proposition of law that where there are many Courts having the jurisdiction to entertain the disputes between the parties under the agreement, then the parties with their mutual consent agree to refer their dispute to any such Court or Courts and such consent agreement between the parties is also not against the provisions of section 23 or section 28 of the Contract Act (IX of 1872). But here in this case there is no such clause of the agreement conferring jurisdiction in any one Court except the one that the arbitration would be held in Islamabad, which too, has been violated by both the parties. So, in the given circumstances, the dispute between the parties could be referred to the Courts having the jurisdiction under general law. No doubt, the Courts at Islamabad have the jurisdiction to entertain any dispute between the parties as agreement between them was executed at Islamabad. Since head-office of respondent is there in Lahore so, a suit regarding any dispute against respondent can be filed at Lahore. The work being done was within the territorial jurisdiction of the Courts at Peshawar and dispute between them also cropped up there. Sub-offices of both the parties are also situated in Peshawar. So, such a dispute between the parties regarding the subject-matter situated within the territorial jurisdiction of Courts at Peshawar can well be referred and agitated before the Courts at Peshawar as cause of action wholly or partly, within the meaning of section 20(c) of C.P.C, arose here. Similarly, there is no bar in the agreement that the Courts at Peshawar will have no jurisdiction. Said provision of law makes it abundantly clear, which reads as under:---

"20. Other suits to be instituted where defendants reside or cause of action arises--- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction--

(a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) Any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation I.--- Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.--- A corporation shall be deemed to carry on business at its sole or principal office in Pakistan or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

The judgments rendered in the cases of Special Communication Organization and Ravi Ghee Mills (supra) can also be referred in this regard. So, in the given circumstances, the Courts at Peshawar can well entertain their such dispute.

Since, two different disputes between the same parties regarding the same subject-matter were referred to two different Courts and both the Courts have divergent views regarding the question of jurisdiction, so it would be in the fitness of things that both the matters be referred to one and the same Court so as to avoid any other conflict.

We, in the circumstances, have no option but to allow both the appeals and set aside the findings of both the Courts by directing the office to send both the cases to the Court of Senior Civil Judge, Peshawar, who should decide the matter between the parties on merits at its earliest. Both the appeals are disposed of in above terms with no order as to costs.

H.B.T.349/P

Order accordingly.